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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOHN JONES III,

Respondent.

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

The Honorable George N. Bowdon

SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

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A. ISSUES ON REVIEW

1. Is the rule in *State v. Ford*, which bars the State from providing new evidence of the comparability of out-of-state convictions on remand where the defendant specifically objects at sentencing, grounded in due process?

2. Does application of the 2008 amendments to RCW 9.94A.530(2) require this Court to overrule its decision in *Ford* and the subsequent decisions of this Court reaffirming and reinforcing that rule?

B. STATEMENT OF RELEVANT FACTS

Following a jury trial, John Jones III was convicted of one count of second degree assault involving domestic violence. CP 392, 401. The jury also found in a special verdict that Mr. Jones committed the assault within sight or sound of the victim's minor child. CP 391. On September 22, 2008, the trial court imposed an exceptional sentence of 120 months, the statutory maximum for that offense. CP 372, 376. Mr. Jones appealed his conviction and sentence.

The Court of Appeals reversed and remanded for resentencing, finding the trial court erred in failing to properly determine Mr. Jones's offender score and standard range prior to imposing the exceptional

sentence. CP 363. The Court noted that in calculating the offender score, the trial court apparently included prior California convictions without conducting a comparability analysis. CP 363. Mr. Jones had argued that, on remand, the State should be barred from presenting any new evidence at resentencing since it had already had one opportunity to do so. CP 364. The Court, apparently persuaded by the State's assurance that it had all the evidence it needed to prove the California prior convictions, ruled that the issue of evidence of comparability on remand was premature. CP 363-64.

On remand, the State supplemented the record with voluminous material regarding the California prior convictions. CP 209-308. At this resentencing hearing, Mr. Jones again objected to the inclusion of the California convictions in his offender score. CP 309-25. The trial court failed once again to engage in the comparability analysis on the record, and merely included the prior convictions in Mr. Jones's offender score without comment. The court imposed the same 120 month exceptional sentence. CP 174-77, 183-84, 197-98.

The Court of Appeals again reversed Mr. Jones's sentence, once again finding the State had failed to prove the comparability of the California prior convictions. CP 192-93. The Court ruled that it was the

State's burden to prove comparability and the State had failed to carry that burden.

The facts in the probation report have not been proved beyond a reasonable doubt nor admitted by the defendant in his guilty plea. Our record fails to show whether Jones's conduct constituted intentional second degree murder or second degree felony murder under Washington law as the State contends. *It is the State's burden to prove comparability of out-of-state offenses. The State failed to carry that burden.*

CP 193 (emphasis added). The Court remanded the matter for "resentencing consistent with this opinion." CP 194.

In both prior appeals, the State provided the trial court material from the California prior convictions, but failed to provide a certified copy of the transcript from the preliminary hearing, believing that the California abbreviation "px" referred to the probation report as opposed to the transcript of the preliminary hearing, which provided the factual basis for Mr. Jones's subsequent guilty plea.¹ CP 192-93. The probation report did not include any facts proven by the State or admitted to by Mr. Jones. CP 193.

At the third sentencing hearing, Mr. Jones objected to the trial court considering any additional documentation presented by the State,

¹ See generally <http://multimedia.journalism.berkeley.edu/tutorials/criminal-court-records/preliminary-hearing>.

noting that the State already had the opportunity to prove comparability on two occasions and had failed. CP 143-44.

On the day of sentencing, the State attempted to supplement the record with a non-certified copy of a transcript of the California preliminary hearing. RP 2-3. The trial court refused to consider this non-certified copy, and the court refused the State's request to continue the sentencing in light of the State's failure to obtain the transcript before the two prior sentencing hearings.

In reading *Mendoza* as well as *Hunley*, it is my conclusion that the State, in this case, does not get another bite of the apple. And I think that's underscored when the appellate court here decided in March, the remand came back, and today, following yesterday's hearing, we still do not have an authenticated record of the transcript available.

So I decline the offer to set this over a few days so that a certified transcript of that record can be provided in part because I think *Mendoza* is clear that the State is stuck with the record it created at the resentencing hearing the first time. When that record was found to be inadequate to establish criminal history for the California drive-by shootings.

RP 9-10.

Mr. Jones's standard range based upon an offender score of "1" without the California prior convictions was six to 12 months. CP 131.

The trial court imposed an exceptional sentence of 60 months based upon the jury's special verdict. CP 131-32; RP 10-11.

The State appealed the trial court's failure to continue the sentencing hearing and to allow the State to provide additional evidence of the California prior convictions, i.e., the transcript of the California preliminary hearing. CP 368-69. The State cited the 2008 amendments to RCW 9.94A.530(2) as the basis of its request to supplement the record with additional evidence of Mr. Jones's California prior convictions. In affirming the trial court's decision refusing to grant the State yet another opportunity to supplement the record, the Court of Appeals rejected the State's argument:

This court is not in a position to declare that the "no second chance" rule set forth in *Ford* is no longer in effect. Once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487-88, 681 P.2d 227 (1984). *Ford* is a foundational case on sentencing procedure in Washington. The court was concerned with preserving the integrity and dignity of the sentencing process as a matter of due process generally. *See Ford*, 137 Wn.2d at 484 ("The meaning of appropriate due process at sentencing is not ascertainable in strictly utilitarian terms"), quoting *American Bar Ass'n, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING* std. 18-5.17, at 206 (3d ed.1994). If the State is to have unlimited opportunities to introduce new evidence of criminal history whenever a defendant is resentenced, the State must first convince the Supreme Court that it lacked a

constitutional basis for establishing the contrary rule in *Ford*.

Slip op at 6.

This Court granted the State's petition regarding applicability of the 2008 amendments to RCW 9.94A.530(2).

C. ARGUMENT

Through Legislation, the Legislature Cannot Overrule Decisions of This Court Based Upon Constitutional Provisions; Thus, the 2008 Amendments to RCW 9.94A.530 Cannot Apply

1. The State bears the burden of proving the comparability of out-of-state prior convictions.

When a defendant's criminal history includes out-of-state prior convictions, the Sentencing Reform Act (SRA) requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). This burden of proof is placed on the State "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 480,

quoting In Re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). The use of a prior conviction violates the Washington or United States Constitutions where the State fails to prove the existence and comparability of the prior conviction. *Ford*, 137 Wn.2d at 479-80, *citing State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986).

The best evidence to establish a defendant's prior conviction is the production of a certified copy of the prior judgment and sentence. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002), *citing Ford*, 137 Wn.2d at 480. "However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012), *quoting Ford*, 137 Wn.2d at 480. In determining the proper offender score, the 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." RCW 9.94A.530(2).

2. Ford bars the State from attempting to prove the comparability of out-of-state prior convictions on remand with additional evidence not produced at the first sentencing hearing.

When the defendant objects to his offender score and the State does not provide the necessary evidence of the comparability of the out-of-state convictions at the time of sentencing despite having the opportunity, the State is held to the existing record on remand. *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009); *Ford*, 137 Wn.2d at 485.

In *Ford, supra*, this Court determined that a challenge to the classification of an out-of-state prior conviction could be raised for the first time on appeal. 137 Wn.2d at 484-85. After finding error by the trial court, the Court held that on remand “[i]n the normal case, where the disputed issues have been argued to the sentencing court, we would hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing *without allowing further evidence to be adduced.*” *Id.* at 485 (emphasis added). *See also State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997), *aff’d*, 137 Wn.2d 490, 496-97, 973 P.2d 461 (1999).

This Court has consistently upheld this rule. *See Hunley*, 175 Wn.2d at 912 (“Our holdings in *Ford* have been reaffirmed in

subsequent decisions.”). In *Lopez*, the issue in a case involving a persistent offender sentence, was whether, under *Ford*, the State could present additional evidence on remand because the defendant had not made a specific objection to the inclusion of an out-of-state prior conviction. 147 Wn.2d at 520. The State argued the defendant was a persistent offender but failed to provide any proof of the qualifying out-of-state prior convictions. *Id.* at 523. Relying on its decision in *Ford*, the Court held that allowing the State another opportunity to prove the defendant’s criminal history would send the wrong message. *Id.* at 523 (“To uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public.” [citation omitted] Allowing the state a second opportunity to prove its allegations of Lopez’s criminal history would send an equally wrong message.”), quoting *Ford*, 137 Wn.2d at 484.

Finally, in *Mendoza*, the issue before the Court was whether the defendants’ silence at sentencing was an acknowledgement or stipulation of their criminal history. 165 Wn.2d at 925-26. Finding the defendants did not affirmatively acknowledge their criminal history, the Court held their failure to object was not an acknowledgment. *Id.* at 928-29. Again relying on *Ford* and *Lopez*, the Court reiterated that

where the defendant objects to the criminal history at sentencing, and the State fails to provide any evidence, “the State is held to the record as it existed at the sentencing hearing.” *Mendoza*, 165 Wn.2d at 930, *citing Lopez*, 147 Wn.2d at 520-21.

This Court has repeatedly upheld the rule in *Ford* under repeated attacks by the State. The Court should once again uphold the *Ford* decision in Mr. Jones’s matter.

3. The 2008 amendments to RCW 9.94A.530(2) cannot overrule the rule announced in *Ford* and *Lopez*.

In 2008, the Legislature amended RCW 9.94A.530(2) to add the following:

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history not previously presented.

Laws 2008 ch. 231 §4. The Legislature’s plain intent in enacting the amendment to RCW 9.94A.530(2) was to overrule this Court’s holdings in *Ford* and *Lopez*:

Given the decisions in *In re Cadwallader*, 155 Wn.2d 867 (2005); *State v. Lopez*, 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472 (1999); *State v. McCorkle*, 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, 9.94A.530 in order to ensure that sentences accurately reflect the offender’s actual, complete criminal history, whether imposed at sentencing or upon resentencing.

These amendments are consistent with the United States supreme court [sic] holding in *Monge v. California*, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack.

Laws 2008 ch. 231 §1. *See Hunley*, 175 Wn.2d at 914 (“[T]he 2008 amendments attempt to overrule the listed case law, along with *Mendoza* and several Court of Appeals decisions.”).

The Legislature may not modify or impair any interpretation of the constitution by the Supreme Court. *See State v. Hunley*, 161 Wn.App. 919, 928-29, 253 P.3d 448 (2011), *affirmed*, 175 Wn.2d 901 (2012) (“[T]he legislature has no power to modify or impair a judicial interpretation of the constitution.”), *citing Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 497, 585 P.2d 71 (1978).

In *Hunley*, this Court found another portion of the 2008 amendments unconstitutional as violative of due process and a vague attempt to overturn the decisions in *Ford, Lopez. Hunley*, 175 Wn.2d at 913-15. *Hunley* involved an amendment to RCW 9.94A.500, which provided;

[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.

Laws of 2008, ch. 231, § 2. A separate provision of RCW 9.94A.530(2) was also amended to add, “Acknowledgment includes . . . not objecting to criminal history presented at the time of sentencing.” Laws of 2008, ch. 231, § 4.

This Court specifically reaffirmed its decision in *Ford*, and held that the Legislature’s attempt at reversing that decision and the other decisions reaffirming it was plainly improper:

Under *Ford* and its progeny, the outcome is clear. But in 2008, when the legislature amended the SRA provisions, it specifically referenced our decisions in *Ford*, *Lopez*, and *Cadwallader* and commented the amendments to RCW 9.94A.500(1) and .530(2) were intended “to ensure that sentences imposed accurately reflect the offender’s actual, complete criminal history, whether imposed at sentencing or upon resentencing.” Laws of 2008, ch. 231, § 1. By asserting that a criminal history summary provides prima facie evidence of criminal history, and that failure to object to this summary constitutes an acknowledgment, the 2008 SRA amendments attempt to overrule the listed case law, along with *Mendoza* and several Court of Appeals decisions.

Id., at 913-14. Thus, this Court held that “the 2008 SRA amendments improperly modify our judicial interpretation of the constitution in *Ford* and its progeny.” *Id.*, at 915 (emphasis in original). Therefore, the amendment was unconstitutional. *Id.* This Court noted the 2008 amendment at issue in *Hunley* relieved the State of its burden of

proving criminal history and shifted the burden to the defendant because the failure to object was deemed an acknowledgement. *Id.*, at 917.

The decisions in *Ford* and *Lopez* are based on principles of due process, thus they rest on interpretations of the Constitution. *See Hunley*, 175 Wn.2d at 912-15 (“The 2008 amendments are impermissible because the *Ford* decision was rooted in principles of due process.”); *Ford*, 137 Wn.2d at 482 (decision rested on “basic principles of due process” in its analysis); *Lopez*, 147 Wn.2d at 522 (rejecting as “inconsistent with the principles underlying our system of justice” State’s argument that it could present additional evidence following remand despite specific objection by defendant), *quoting Ford* 137 Wn.2d at 480. While *Hunley* dealt with a different sentencing provision that was amended by the 2008 amendments, the same analysis holds true here: the Legislature’s intent was to overrule decisions of this Court firmly rooted in due process. In order to reverse the Court of Appeals’ decision here, this Court would have to agree the Legislature had the authority to overrule the decisions in *Ford*, *Lopez*, and *Mendoza*, which this Court was plainly unwilling to do in *Hunley*. 175 Wn.2d at 915.

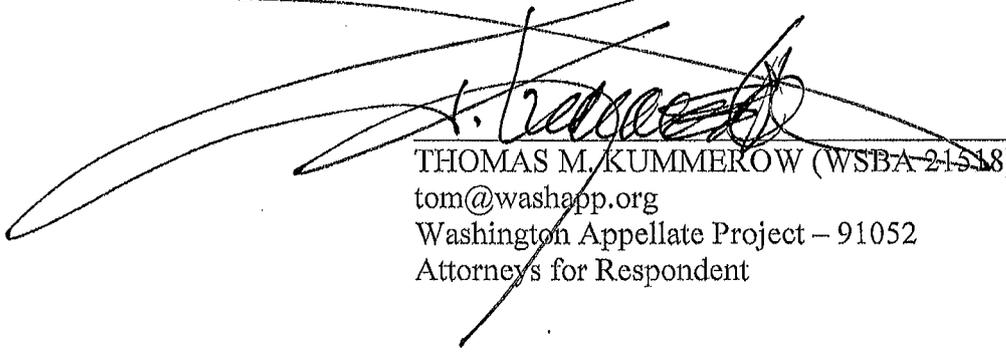
This Court should reaffirm its holdings in *Ford*, *Lopez*, and *Hunley*, and hold that the Legislature's attempt to amend RCW 9.94A.530 was improper. As a consequence, this Court should affirm the Court of Appeals, thus affirming the trial court's decision.

D. CONCLUSION

For the reasons stated, Mr. Jones asks this Court to affirm the Court of Appeals decision, remand for resentencing, and hold that the State is barred from presenting additional evidence of Mr. Jones's prior California convictions on remand.

DATED this 15th day of August 2014.

Respectfully submitted,



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Supplemental Brief of Respondent

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