NO. 1009771

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID V. KANKAM,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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WASHINGTON CASES

COURT RULES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals decision in State v. Kankam, No. 82702-2-I, slip op. at 2-4 (Wash. Ct. App. May 2, 2022).

III. ARGUMENT

A. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH A DECISION OF THE SUPREME COURT; RAP 13.4(B)(1) DOES NOT APPLY.

The defendant asserted for the first time on appeal that certain prior offenses should have been considered same criminal conduct in determining his offender score. At sentencing, the defendant not only failed to challenge his offender score calculation, but explicitly referenced it in his presentence report. 1 CP 43. The defendant had the burden of demonstrating his prior offenses constituted same criminal conduct prior to being sentenced. State v.

Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). The defendant did not meet or *attempt to meet* his burden, and the trial court appropriately relied on his representations in determining his offender score at trial.

In petitioning this Court for review under RAP 13.4(b)(1), the defendant contends that the opinion of the Court of Appeals is in direct conflict with Supreme Court precedent because it declined to apply in his favor two cases concerning waiver of comparability determinations for out-of-state convictions. These cases are: State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010), and State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). Both Lucero and Mendoza involved comparability determinations for out-of-state convictions for which the State has the burden of proof.

Instead of applying cases involving comparability determinations where the State has the burden of proof, the Court of Appeals correctly applied State v. Nitsch, 100

Wn. App. 512, 997 P.2d 1000 (2000), which concerns a more factually analogous circumstance involving waiver of a same criminal conduct determination for which *the defendant has the burden of proof*. The defendant in Nitsch, like the defendant in this case, argued for the first time on appeal that certain crimes should have been considered the same criminal conduct. Id. at 518-19. Importantly, the defendant in Nitsch "affirmatively alleged" his sentencing range, implicitly asserting that his crimes did not constitute the same criminal conduct. Id. at 522.

The defendant in this case went a step further than Nitsch by affirmatively alleging his sentencing range *and his offender score* in his sentencing memorandum:

> For a Robbery in the First Degree conviction, Mr. Kankam's standard range sentence is 129-171 months at an offender score of 11.

1 CP 43. This constitutes an even clearer "implicit assertion that his crimes did not constitute the same criminal conduct." Nitsch, 100 Wn. App. at 522. As such,

the Court of Appeals correctly concluded that the defendant waived his right to challenge his offender score on appeal "because the trial court appropriately relied on his representations to infer that he was not challenging the calculation of his offender score." Slip op. at 7.

The Supreme Court has cited to Nitsch with approval, observing that, "waiver may be found in a case like State v. Nitsch." In re Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). In Goodwin, this Court observed that because Nitsch "agreed in his own presentence memorandum that his offender score had been properly calculated," "fail[ed] to identify a factual dispute for the court's resolution," and "fail[ed] to request an exercise of the court's discretion," he waived the challenge to his offender score on appeal. Id. The Court of Appeals notes Goodwin's discussion of Nitsch in its opinion. Slip op. at 6 ("In Goodwin, the Supreme Court specifically approved of the Court of Appeals opinion in State v. Nitsch.").

The Court of Appeals correctly determined this Court's decisions in Mendoza and Lucero to be distinguishable from this case because they pertained to sentencing determinations for which the State generally bears the burden of proof. Slip op. at 7-8. In Mendoza, this Court held that a defendant's failure to object to the State's assertion of out-of-state criminal history "did not relieve the State of its evidentiary obligations." Mendoza, 165 Wn.2d at 926 (citation and internal quotations omitted). In Lucero, this Court held that, absent an affirmative acknowledgement from a defendant, "the State must meet its burden of proving the defendant's criminal history." Lucero, 168 Wn.2d at 789.

Conversely, the State has no burden to be relieved of with respect to same criminal conduct determinations. That burden rests with the defendant. Graciano, 176 Wn.2d at 539. As such, Mendoza and Lucero do not apply. Because they do not apply, they also do not

conflict with the decision of the Court of Appeals for this case under RAP 13.4(b)(1).

IV. CONCLUSION

The petition for review should be denied.

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This Answer contains **797** words (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature blocks).

Respectfully submitted on June 30, 2022.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, DAVID V. KANKAM, Petitioner.	No. 100977-1 DECLARATION OF DOCUMENT FILING AND E-SERVICE

DECLARATION OF DOCUMENT FILING AND SERVICE

I, DIANE K. KREMENICH, STATE THAT ON THE 30th DAY OF JUNE, 2022, I CAUSED THE ORIGINAL: ANSWER TO PETITION FOR REVIEW TO BE FILED IN THE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

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winklerj@nwattorney.net;

[X] E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 30th DAY OF JUNE, 2022.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

June 30, 2022 - 1:23 PM

Transmittal Information

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