

66475-1

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No. 66475-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOHN A. JONES, III.,

Appellant.

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

The Honorable George N. Bowden

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REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON  
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A. ARGUMENT

1. MR. JONES' CALIFORNIA FIRST DEGREE MURDER AND TWO ATTEMPTED FIRST DEGREE MURDER CONVICTIONS WERE NOT COMPARABLE TO WASHINGTON FELONY OFFENSES

John Jones challenged the trial court's determination that his first degree murder and attempted first degree murder were comparable to Washington felony offenses. The State concedes the California offenses were not legally comparable. Brief of Respondent at 3-9. The States argues instead that the facts contained in the probation officer's report proved the offenses were legally comparable. *Id.* at 9-11.

The California convictions were the result of Mr. Jones' guilty pleas. CP 77-88. There is nothing in either Mr. Jones' guilty plea form or the transcript of the change of plea hearing that indicates Mr. Jones' conduct. There are various other documents submitted by the State, primarily documents from the Alameda County Probation Department, which document the acts which constituted these offenses. Yet these documents were neither stipulated to nor admitted by Mr. Jones nor found by the trial court to be proven beyond a reasonable doubt.

The State relies on the California trial court's colloquy where for the factual basis for the guilty plea, Mr. Jones stipulates to the "P.X. transcript." CP 86. The State believes this refers to the Probation Report. Brief of Respondent at 9-11. The State is incorrect. In fact, the reference is to the transcript of the Preliminary Hearing, colloquially referred to as a "P.X. Hearing."

*See generally*

<http://multimedia.journalism.berkeley.edu/tutorials/criminal-court-records/preliminary-hearing.1> Since the preliminary hearing transcript was not included in the packet of materials provided by the State to trial court here, it could not be the basis for the court's comparability analysis.

Since there are no facts to indicate what conduct resulted in the Mr. Jones' convictions, the convictions could very well have been based upon a "provocative act." As a result, the convictions

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<sup>1</sup> There are two ways to initiate felony criminal proceedings against a defendant in California. The district attorney's office can either file a grand jury indictment against an individual alleging one or more felonies and related misdemeanors, or it can file a complaint alleging the same. Cal Const art I, §14.1. Defendants indicted by a grand jury do not receive preliminary hearings. Cal Const art I, §14.1; *Bowens v Superior Court*, 1 Cal.4th 36, 2 Cal.Rptr.2d 376 (1991). But when a defendant is charged through a complaint, he or she is entitled to a preliminary hearing. Penal Code §872; Cal Const art I, §14; *People v Slaughter*, 35 Cal.3d 629, 200 Cal.Rptr. 448 (1984). Once the defendant is held to answer for his or her public offense, after a finding of probable cause, jurisdiction vests in the trial court. *People v Silva* 36 Cal.App.4th 231, 43 Cal.Rptr.2d 8 (1995).

were not legally or factually comparable and the trial court erred in including them in Mr. Jones' offender score. The remedy is to reverse the sentence and remand for resentencing without the California convictions. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

2. THIS COURT CANNOT BE CONFIDENT THE TRIAL COURT WOULD IMPOSE THE SAME SENTENCE BASED SOLELY ON THE AGGRAVATING FACTOR FOUND BY THE JURY

The jury returned a special verdict that the offense involved domestic violence and occurred within the sight or sound of the victim's minor child. CP 184. At the resentencing, in imposing the exceptional sentence, the trial court relied primarily on the fact Mr. Jones boasted about his criminal history of murder and attempted murder to the victim. RP 11-12. In its written findings of fact, the court listed several reasons for the exceptional sentence: the jury's verdict on the aggravating factor and Mr. Jones' boasting of his criminal history as well as the fact Mr. Jones' criminal history included murder, attempted murder, and assault, and the fact Mr. Jones had a prior history of domestic abuse. CP 25. On appeal, Mr. Jones conceded the jury's verdict on the aggravating factor,

but challenged the trial court's use of the additional factors in imposing the exceptional sentence.

The State concedes that use of the additional factors was improper by the court in imposing the exceptional sentence. Brief of Respondent at 12.<sup>2</sup> The State argues there is no need to remand for resentencing since it is clear from the record the trial court would impose the same sentence on remand. Brief of Respondent at 15. Given the trial court's comments at sentencing and its overwhelming reliance on Mr. Jones' history of violence involving murder, this Court cannot be confident the trial court would impose the same sentence if limited solely to the aggravating factor.

When the sentencing court improperly imposes an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

There is nothing in the record to support the court's finding that Mr. Jones had a history of domestic abuse. He was originally

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<sup>2</sup> The State notes use of these factors for imposing the exceptional sentence is error, but use of these factors to choose the length of the sentence is not. It is clear from the sentencing transcript the court was not talking about the length of the sentence but imposition of the sentence. CP 25; RP 11-12.

charged with eight counts of offenses from different degrees of assault to harassment, almost all based on domestic violence. CP 204-06. The jury found Mr. Jones not guilty of all but one count. CP 19. In addition, the State presented nothing at sentencing which established a prior history of domestic violence. The only prior convictions listed in the Judgment and Sentence were the California murder, attempted murder, and possession of controlled substances convictions; there were no prior convictions for domestic violence. The jury's special verdict constituted the only evidence of domestic violence.

In addition, it is clear that the trial court assumed the California murder and attempted murder convictions were comparable and based the exceptional sentence to a great extent on that fact. CP 25 ("The defendant has prior criminal history that includes crimes of violence; specifically murder, attempted murder and assault, which he boasted about to the victim."). But, as argued *supra*, the California convictions were not comparable, thus the court's finding that Mr. Jones' prior criminal history contained these convictions is also not supported by the record and should be stricken.

Mr. Jones requests this Court reverse the exceptional sentence and remand for resentencing without allowing the State to present any further evidence. *Ford*, 137 Wn.2d at 485.

**B. CONCLUSION**

For the reasons stated, Mr. Jones requests this Court reverse his sentence, and remand for resentencing.

DATED this 2nd day of September 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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	)	
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |  |
|--|--|
| <p>[X] MARY KATHLEEN WEBBER, DPA<br/>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br/>3000 ROCKEFELLER<br/>EVERETT, WA 98201</p> | <p>(X) U.S. MAIL<br/>( ) HAND DELIVERY<br/>( ) _____</p> |
| <p>[X] JOHN JHONES III<br/>323372<br/>LARCH CORRECTIONS CENTER<br/>15314 NE DOLE VALLEY RD<br/>YACOLT, WA 98675</p>      | <p>(X) U.S. MAIL<br/>( ) HAND DELIVERY<br/>( ) _____</p> |

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2011.

X \_\_\_\_\_ *GR*