

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
A REMAND FOR RESENTENCING IS REQUIRED BECAUSE PINSON OBJECTED TO INCLUDING THE MISSISSIPPI OFFENSE IN HIS OFFENDER SCORE AND BECAUSE HE OBJECTED, THE STATE IS HELD TO THE INITIAL RECORD ON REMAND WITHOUT INCLUDING THE MISSISSIPPI OFFENSE	1
B. <u>CONCLUSION</u>	3

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Bergstrom</u> , 162 Wn.2d 87, 169 P.3d 816 (2007)	1
<u>State v. Cabrera</u> , 73 Wn. App. 165, 868 P.2d 179 (1994)	1
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	3
<u>State v. Labarbera</u> , 128 Wn. App. 343, 115 P.3d 1038 (2005)	2

A. ARGUMENT IN REPLY

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE PINSON OBJECTED TO INCLUDING THE MISSISSIPPI OFFENSE IN HIS OFFENDER SCORE AND BECAUSE HE OBJECTED, THE STATE IS HELD TO THE INITIAL RECORD ON REMAND WITHOUT INCLUDING THE MISSISSIPPI OFFENSE.

The State acknowledges that Pinson objected to including the Mississippi offense in his offender score but without citing any authority, argues that he “should not now be permitted to challenge the validity of prior out-of-state convictions that he had stipulated to in three prior sentencings.” Brief of Respondent at 6. To the contrary, because Pinson objected, the prior judgments and stipulations are insufficient to prove out-of-state convictions. State v. Cabrera, 73 Wn. App 165, 168-70, 868 P.2d 179 (1994)(it would work an injustice on the defendant to preclude him from objecting to the use of out-of-state convictions on the basis that he did not object at prior sentences). The State cites State v. Bergstrom, 162 Wn.2d 87, 94, 169 P.3d 816 (2007), quoting the Washington Supreme Court’s determination that if “the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State’s depiction of the defendant’s criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.” The State’s reliance on Bergstrom is clearly misplaced

because Pinson objected and disagreed with the calculation of his offender score. 6RP 9-11.

The basis for Pinson's objection is not entirely clear because the record does not contain the documents that Pinson presented to the court. Nonetheless, the record reflects that Pinson argued that his offender score should be a four because the Mississippi offense should not be counted and he did not sign the Judgment and Sentence. 6RP 10-11; CP 69. The court therefore erred in failing to conduct an evidentiary hearing and comparability analysis on the record because Pinson challenged his criminal history. State v. Labarbera, 128 Wn. App. 343, 348-49, 115 P.3d 1038 (2005). Consequently, a remand for resentencing is required and the State is held to the existing record on remand. Labarera, 128 Wn. App. at 350. Moreover, because Pinson objected, the prior judgments that used the Mississippi conviction are insufficient to satisfy the State's burden of proving the conviction by a preponderance of evidence. Id. at 349.

The State argues further that Pinson was not denied his right to effective assistance of counsel because "defense counsel correctly calculated and even got the defendant's offender score reduced." Brief of Respondent at 8. Although defense counsel successfully argued that the Ohio convictions should not be counted, his performance was nevertheless deficient for failing to object to including the Mississippi offense in

Pinson's offender score. See Brief of Appellant at 12 - 15. The State argues that defense counsel properly relied on Pinson's prior judgments and stipulations to calculate his offender score as five. The State's argument fails based on the fact that it would be illogical for defense counsel to rely on the judgments and stipulations when he recognized that they erroneously included the Ohio convictions. If defense counsel had depended on the prior judgments and stipulations as the State asserts, he would not have argued against including the Ohio convictions in Pinson's offender score.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should vacate Mr. Pinson's sentence and remand for resentencing without including the Mississippi offense. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

DATED this 18th day of March, 2009.

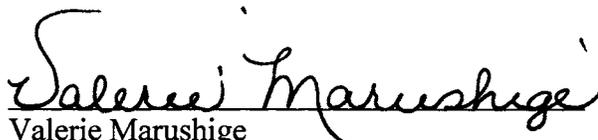

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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas C. Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of March, 2009 in Kent, Washington.


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