

Supreme Court No. 78355-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

GORDON BERGSTROM,

Petitioner.

---

SUPPLEMENTAL BRIEF OF PETITIONER

---

JASON B. SAUNDERS  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

2007 NOV 29 PM 4:57  
DEPT. OF JUSTICE  
STATE OF WASHINGTON

RECEIVED  
CLERK OF SUPREME COURT  
06 DEC 01 AM 8:09  
BY C. J. HERRITT  
CLERK

**TABLE OF CONTENTS**

A. ISSUE PRESENTED FOR REVIEW..... 1

B. STATEMENT OF THE CASE ..... 2

    1. Procedural Facts ..... 2

C. ARGUMENT ..... 5

    BECAUSE MR. BERGSTROM MADE A SPECIFIC OBJECTION TO THE STATE’S CALCULATION OF HIS OFFENDER SCORE, THE STATE AT RESENTENCING MUST BE HELD TO THE EVIDENCE EXISTING AT THE FIRST SENTENCING..... 5

        1. Ford/McCorkle provides where the State fails to carry its burden of proof after a specific objection, it will not be provided a further opportunity to do so at resentencing ..... 5

        2. Lopez held a specific objection places the sentencing court on notice the State must prove its offender score calculation and the defendant has no obligation to present evidence ..... 9

        3. This Court has ruled a prosecuting attorney is not penalized by a sentencing after defendant’s specific objection, when the State has the opportunity to present evidence of prior offenses ..... 10

        4. Cadwallader noted the difference between acquiescence, requiring no further proof, and a timely objection before the court imposes a sentence, requiring the State prove its allegations..... 16

        5. RCW 9.94A.530(2), Ford, Lopez, and Cadwallader dictate public policy requires remand without another opportunity to prove the sentencing allegations the State was required to prove at the initial sentencing hearing ..... 17

D. CONCLUSION ..... 20

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 123 P.3d 456  
(2005)..... 5, 9, 16, 17

*In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002) .. 13

*State v. Ford*, 137 Wn.2d 472, 973 P.2d 452  
(1999)..... 5, 7, 9, 10, 13, 17-19

*State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002)..... 5, 9-15, 17, 19

*State v. McAlpin*, 108 Wn.2d 458, 740 P.2d 824 (1987) ..... 13

*State v. McCorkle*, 137 Wn.2d 490, 973 P.2d 461 (1999)..... 7, 9, 10

*State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004)..... 13

**Washington Court Of Appeals Decisions**

*State v. Gunther*, 45 Wn. App. 755, 727 P.2d 258 (1986)..... 13

*State v. Harp*, 43 Wn. App. 340, 717 P.2d 282 (1986)..... 13

*State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000 (2000)..... 13

*State v. Wilson*, 117 Wn. App. 1, 75 P.3d 573, *review denied*, 150 Wn.2d  
1016, 79 P.3d 447 (2003)..... 13

**Statutes - Revised Code Of Washington**

RCW 9.94A.530 ..... 14, 16, 17

RCW 9.94A.537 ..... 14

A. ISSUE PRESENTED FOR REVIEW

When the defendant makes a specific objection to the State's allegation of prior convictions at sentencing and the State fails to prove the existence of prior convictions and calculation of the offender score, the State will be held to the existing record on remand and will not be given a second opportunity to present additional evidence at resentencing. Here, Mr. Bergstrom specifically objected to the State's calculation of his offender score, arguing specific prior convictions encompassed the same course of criminal conduct. The State failed to prove the convictions were separate offenses and misguided the court by asserting the burden was on Mr. Bergstrom to prove his offender score calculation. The State had the opportunity to present evidence on the refuted offender score, and the court had an opportunity to resolve the conflict. Should the State now have a second opportunity to prove prior convictions were not the same course of criminal conduct, when the State had specific notice of the objection, had opportunity to prove the prior convictions, but rather erroneously misinformed the sentencing court the defendant had the burden of proof?

B. STATEMENT OF THE CASE.

1. Procedural Facts.<sup>1</sup> Following a jury trial, Mr. Bergstrom was found guilty of unlawful possession of a firearm for possessing a flaregun. 4/15/04RP at 7. At sentencing, Mr. Bergstrom objected to the State's calculation of his offender score, arguing his offender score was "7" because some of his prior convictions encompassed the same course of criminal conduct. 11/7/04RP at 5-6. The deputy prosecutor admitted he did not have the judgment and sentences for the prior convictions and could not prove the offenses were not the same criminal conduct. 11/7/04RP at 7. The deputy prosecutor argued Mr. Bergstrom had the burden of proving the offenses listed in the prior convictions were the same course of criminal conduct. 11/7/04RP at 7, 9. The deputy prosecutor also argued Mr. Bergstrom's objection was untimely. 11/7/04RP at 7.

Mr. Bergstrom's attorney informed the court that she would not take a position contrary to her client's position, admitting Mr. Bergstrom could be correct in his calculation of his offender score. *Id.*

---

<sup>1</sup> The facts are further set forth in the Court of Appeals opinion, pages 1-3, and Appellant's Opening Brief ("AOB"), pages 3-5, and are incorporated by reference herein.

The sentencing court ruled it did not have sufficient evidence to make a finding that the prior offenses constituted the same course of criminal conduct and that Mr. Bergstrom would have to prove the prior facts showed the offenses encompassed the same time, victim and criminal intent. 11/17/04RP at 9. Mr. Bergstrom requested an evidentiary hearing, wherein his counsel could present the prior judgment and sentences to prove the crimes constituted the same course of criminal conduct. *Id.* at 10. The court denied the request, ruling,

You . . . might be able to find some post-sentencing relief of some sort. But if the offender's [sic] score is wrong, you could bring some type of attack on it. But, quite honestly, I'm reticent to continue this. This is, I think, the second continuance. There was one for the medical purpose and the second one was for checking out . . . sentencing alternatives, including EHM, and I just don't have any evidence to justify at this point another continuance.

11/17/04RP at 10. Judge Erlick imposed a standard range sentence based on an offender score of "11," as the State alleged. CP 26.

On appeal, Mr. Bergstrom argued that the sentencing court incorrectly calculated his offender score and impermissibly placed the burden on him to prove his prior convictions did not encompass the same course of criminal conduct. AOB at 5-12. The court improperly placed the burden on Mr. Bergstrom, ruling because Bergstrom failed to show the prior convictions encompassed the same course of criminal conduct he had

no choice but to count the prior convictions separately. AOB 9-11.

Because Mr. Bergstrom made a specific objection at sentencing and the State failed to prove the disputed facts, the proper remedy following appeal was remand for resentencing without another opportunity to prove the prior convictions did not encompass the same course of criminal conduct. AOB 10-14.

The Court of Appeals agreed with Mr. Bergstrom that the sentencing court erroneously placed the burden on him to prove the prior convictions encompassed the same course of criminal conduct. Slip op. at 1, 4. The Court of Appeals also agreed that Mr. Bergstrom properly objected to his offender score and the sentencing court should have held an evidentiary hearing to resolve the factual dispute but instead sentenced Bergstrom using the disputed fact in the calculation of his offender score. Slip op. at 4. But the Court rejected Mr. Bergstrom's argument the State should be precluded from introducing new evidence at resentencing. Slip op. at 4. The Court found that Bergstrom's counsel had at an earlier stage impliedly agreed to the State's calculation of the offender score by noting the same standard range in a presentence memorandum, and the State reasonably relied upon the agreement on the score, such that despite Mr.

Bergstrom's subsequent objection, the State should have another opportunity to supplement the record on remand. Slip op. at 5.

C. ARGUMENT.

BECAUSE MR. BERGSTROM MADE A SPECIFIC OBJECTION TO THE STATE'S CALCULATION OF HIS OFFENDER SCORE, THE STATE AT RESENTENCING MUST BE HELD TO THE EVIDENCE EXISTING AT THE FIRST SENTENCING

1. Ford/McCorkle provides where the State fails to carry its burden of proof after a specific objection, it will not be provided a further opportunity to do so at resentencing. This Court has repeatedly ruled "remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the state's evidence of the existence or classification of a prior conviction;" otherwise if the defendant has objected, the State will be held to the existing record and the case will be remanded for resentencing without allowing the State to produce further evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005), citing *State v. Lopez*, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002), *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

Where a defendant fails to make a specific objection, the State on remand may present additional evidence to prove its allegations. *Ford*, 137 Wn.2d at 485. For example, in *Ford*, the State alleged but failed to

sufficiently prove prior out-of-state convictions were comparable to Washington felonies. 137 Wn.2d at 481. Mr. Ford did not adequately raise the comparability argument at the sentencing hearing. *Id.* at 485. The Court ruled in circumstances where the defendant objects at sentencing, the State will be held to the existing record on remand, but if the defendant fails to object to defects at sentencing, the State on remand will be allowed another evidentiary hearing:

In the normal case, where the disputed issues have been fully 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. *See State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997). Under the present facts, however, while we necessarily hold that a sentence based on insufficient evidence may not stand, we recognize that defense counsel has some obligation to bring the deficiencies of the State's case to the attention of the sentencing court. Accordingly, where, as here, the defendant fails to specifically put the court on notice as to any apparent defects, remand for an evidentiary hearing to allow the State to prove the classification of the disputed convictions is appropriate. *See McCorkle*, 88 Wn.App. at 500. This preserves the purpose of the SRA to impose fair sentences based on provable facts, yet provides the proper disincentive to criminal defendants who might otherwise purposefully fail to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case.

*Ford*, at 485-86. Because Ford's counsel had not specifically put the court on notice of any defects in the State's proof, this Court remanded for

resentencing and allowed the State to produce evidence regarding the disputed convictions. *Ford*, 137 Wn.2d at 485.

But in cases where the defendant makes a specific objection at sentencing, the State on remand will be held to the existing record and will not be given another opportunity to present evidence. *Ford*, 137 Wn.2d at 485. In *State v. McCorkle*, the defense sufficiently objected to the State's failure to provide establish evidentiary proof that McCorkle's prior out-of-state convictions were comparable to Washington felonies. 137 Wn.2d 490, 498, 973 P.2d 461 (1999). The Court held, "where the State fails to carry its burden of proof after a specific objection, it would not be provided a further opportunity to do so." 137 Wn.2d at 496 (citing *Ford*, 137 Wn.2d at 485).<sup>2</sup>

In the instant case, Mr. Bergstrom objected to the calculation of his offender score, specifically declaring prior convictions constituted the same course of criminal conduct. 11/17/04RP at 4. The deputy prosecutor admitted he was not prepared to prove the prior convictions, as he did not have the certified judgment and sentences and could not disprove the prior convictions constituted the same course of criminal conduct. 11/17/04RP

---

<sup>2</sup> In *McCorkle*, because defense counsel failed to cross-appeal the court of appeals' remand order, the case was remanded for an evidentiary hearing. 137 Wn.2d at 496.

at 7. Instead, the deputy prosecutor argued to the court that *Mr. Bergstrom had the burden* of proving his prior convictions constituted the same course of criminal conduct. 11/17/04RP at 7, 9. The deputy prosecutor also argued below that because a prior King County sentencing court did not find the offenses constituted the same course of criminal conduct, the current sentencing court should follow that presumption in the absence of any evidence to the contrary. *Id.*

The Court of Appeals correctly rejected these arguments and remanded Mr. Bergstrom's case for resentencing because the trial court erred in shifting the burden to Bergstrom to prove his offender score. Slip op. at 1. The Court of Appeals also recognized that the initial sentencing court had an obligation to hold an evidentiary hearing to resolve the dispute, ruling

Bergstrom objected to his offender score, and the sentencing court, instead of holding an evidentiary hearing to resolve the dispute, sentenced Bergstrom using the disputed score because Bergstrom did not provide proof to support his objection. Because the court erred in placing the burden of proof on Bergstrom, rather than on the State, we remand for resentencing.

Slip op. at 4. But the Court of Appeals impermissibly gave the prosecutor another opportunity to prove the prior convictions beyond the existing

record, which is contrary to this Court's precedent in *Ford*, *Lopez*, and *Cadwallader*, *supra*.

2. *Lopez* held a specific objection places the sentencing court on notice the State must prove its offender score calculation and the defendant has no obligation to present evidence. Not only did the *Ford-McCorkle* cases fully lay out the proper remedy on remand after a specific objection, this Court has repeated its commitment to the precedent in *Lopez*.<sup>3</sup> In *Lopez*, the State alleged the defendant's prior convictions and defense counsel objected to the adequacy of the State's proof. 147 Wn.2d at 518. Just like the case at bar, the deputy prosecutor in *Lopez* failed to provide evidence of Mr. Lopez's prior convictions. *Id.* Just like the case at bar, the deputy prosecutor argued the challenge "should have been brought up earlier," and argued it could provide judgment and sentences but did not have the documents at sentencing. *Id.* Just like the case at bar, the judge excused the deputy prosecutor's failure to produce sufficient evidence after an objection at sentencing, ruling if it turned out later that the court "omitted a step, we can revisit that and correct it if that is necessary." *Id.*

---

<sup>3</sup> See also *Cadwallader*, 155 Wn.2d at 878.

This Court followed *Ford* and *McCorkle*, ruling once the defendant specifically objects to a defect at sentencing, the State is held to the existing record on remand, the unlawful portion of the sentence is excised, and no further evidence can be adduced at resentencing. 147 Wn.2d at 520-21, citing *Ford*. This Court was clear that the defendant had no obligation to provide a separate proof of his criminal history. *Id.* at 521, citing *Ammons*, 105 Wn.2d at 183. The *Lopez* Court also ruled a specific objection at sentencing is timely. 147 Wn.2d at 520 n.2. A specific objection for the first time at the sentencing hearing is sufficient to place the court on notice of the State's obligation to prove the prior convictions, such that on remand the State will be held to the existing record. *Id.* at 521.

3. This Court has ruled a prosecuting attorney is not penalized by a sentencing after defendant's specific objection, when the State has the opportunity to present evidence of prior offenses. In *Lopez*, this Court summarily dismissed the State's argument that it should not be penalized for the sentencing court's error in proceeding with sentencing without judgment and sentences which the State declared it *could* produce. 147 Wn.2d at 523. The *Lopez* Court ruled although the State had alleged Mr. Lopez was a persistent offender, "it was nevertheless completely

unprepared to prove his prior offenses.” *Id.* at 523. This Court ruled it would send the wrong message to uphold procedurally defective sentences and would equally send the wrong message to allow the State a second opportunity to prove its allegations at resentencing. *Id.* Accordingly, when the State elects to allege certain convictions, it must be prepared to prove them and if the defendant objects at sentencing, the State should request an evidentiary hearing to prove its allegations before the court imposes a sentence.

The *Lopez* Court ruled following a specific objection, the State must then produce evidence to prove its sentencing allegations or it will not be allowed to do so later at resentencing. 147 Wn.2d at 520. The *Lopez* majority ruled no exception to the rule exists when the trial court overrules the defendant’s objection. 147 Wn.2d at 520 n.2. This Court found the sentencing court did not prevent the State from presenting evidence of prior convictions and had not ruled on the objection until after it had considered the State’s “errant contention that Lopez’s objection was untimely.” 147 Wn.2d at 520 n.2. Accordingly, this Court dismissed the contention that the State should bear the consequences for the sentencing court’s proceeding without sufficient proof, especially where the State was placed on notice of a defect. *Id.*

Rather than following this Court's clear precedent "if the defendant has objected, the State will be held to the existing record and the case will be remanded for resentencing without allowing the State to produce further evidence," the Court of Appeals instead opined, "it would be inequitable to preclude the State from introducing evidence on remand." Slip op. at 5. The Court of Appeals acknowledged that this Court in *Lopez* held when the State fails to meet its burden at the initial sentencing hearing after a specific objection it may not have another opportunity to produce evidence. Slip op. at 4, citing *Lopez*, 147 Wn.2d at 520. But without any authority whatsoever, the Court of Appeals refused to follow *Lopez*, despite finding that the objection was made and the State failed to produce the evidence. Instead the Court of Appeals sought to distinguish *Lopez* because in this case, defense counsel originally came to the same offender score calculation and Mr. Bergstrom did not object until the next sentencing hearing. Slip op at 5. The Court of Appeals ruled, "the State should not be penalized for the court's error." Slip op. at 5. This same reasoning was rejected in *Lopez*; instead, this Court refused to carve out an exception to the rule and placed the burden on the State to prove up the disputed facts before sentence is imposed. *Lopez*, 147 Wn.2d at 523.

Without any authority cited and contrary to this Court's precedent, the Court of Appeals faulted Mr. Bergstrom for failing to specifically object to his prior convictions at an earlier time. Slip op at 5 ("Because Bergstrom agreed to the standard range in a presentence report and failed to object to the score until the second sentencing hearing – and only after his sentencing recommendations were rejected – the State is permitted to supplement the record on remand.") The Court of Appeals has erred by conflating the issue of waiver without a timely objection for appellate review purposes and an objection timely made before a sentencing court imposes a sentence to place the State on notice of defects in the offender score, as announced in *Ford* and further clarified in *Lopez*.

When a criminal defendant fails to timely object to his criminal history or calculation of his offender score, the issue may not be preserved for appellate purposes.<sup>4</sup> But there is no rule that an objection to the State's alleged criminal history must be made "well before sentencing," "at first

---

<sup>4</sup> *State v. Ross*, 152 Wn.2d 220, 230-31, 95 P.3d 1225 (2004); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002); *State v. McAlpin*, 108 Wn.2d 458, 462-463, 740 P.2d 824 (1987); *State v. Wilson*, 117 Wn. App. 1, 21, 75 P.3d 573, review denied, 150 Wn.2d 1016, 79 P.3d 447 (2003) (defendant may waive right to assert that trial court should have made "same course of criminal conduct" determination at sentencing); *State v. Nitsch*, 100 Wn.App. 512, 518-20, 997 P.2d 1000 (2000); *State v. Gunther*, 45 Wn. App. 755, 759, 727 P.2d 258 (1986); *State v. Harp*, 43 Wn. App. 340, 343 n.1, 717 P.2d 282 (1986).

instance,” or “well before a request for an exceptional sentence below the standard range.” Instead, the SRA provides,

In determining any sentence other than a sentence above the standard range, the trial 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, or proven pursuant to RCW 9.94A.537. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

RCW 9.94A.530(2). The statute requires Mr. Bergstrom to object before sentencing or he will be deemed to have acknowledged the State’s calculation in the presentence reports. In the instant case, Mr. Bergstrom objected to the State’s calculation of his offender score before the trial court imposed a sentence – that objection is sufficient to place the sentencing court on notice of its obligation to demand evidence of the prior convictions alleged by the State. *Lopez*, 147 Wn.2d at 521.

The State had the opportunity to present evidence of the disputed fact before sentence was imposed. In fact, Mr. Bergstrom even asked the court if he could bring in evidence to prove his priors constituted the same course of criminal conduct. 11/17/04RP at 10. At that point, because Mr. Bergstrom made a specific objection that required an evidentiary hearing,

the State had the obligation to prove the prior convictions and at the very least should have agreed with Mr. Bergstrom's request and asked for an evidentiary hearing, which is required by RCW 9.94A.530(2). Instead, the State stood by and allowed the court to proceed to sentencing without proving its sentencing allegations, which the *Lopez* Court ruled is prohibited. 147 Wn.2d at 520. The prosecutor's conduct in this case is far more deficient than that in *Lopez*, where the prosecutor at least offered to provide copies of the judgment and sentences it failed to provide at sentencing. 147 Wn.2d at 518. Accordingly, under *Lopez*, the proper remedy is remand without a second opportunity to allow the State to present evidence to prove its sentencing allegations.

Even the dissent in *Lopez* would find the instant case required resentencing without a second opportunity to present additional evidence. The dissent in *Lopez* was troubled by the fact even though the State was not prepared to prove the prior convictions at sentencing, it offered to do so, and the sentencing court's failure to allow further proof should not be blamed on the State. *Id.* at 524-25. Here, the State was the very party that led the Court down the primrose path in arguing Mr. Bergstrom had failed to present sufficient evidence to show his prior offenses constituted the same course of criminal conduct. 11/17/04RP at 7. But here, Mr.

Bergstrom even asked for an evidentiary hearing (as required under RCW 9.94A.530(2)) for him to prove the prior convictions constituted the same course of criminal conduct. 11/17/04RP at 10. Unlike the facts in *Lopez* where the prosecutor seemed willing to provide documents to prove the prior convictions at a subsequent evidentiary hearing, the deputy prosecutor in this case told the court it had no duty to prove the convictions and the court should rule against Mr. Bergstrom unless he could present evidence proving his determination of the offender score. 11/17/04RP at 7. It was the prosecutor's own misguidance and unwillingness to prove the prior convictions that forced the court to sentence Mr. Bergstrom without an evidentiary hearing as required by statute.

4. *Cadwallader* noted the difference between acquiescence, requiring no further proof, and a timely objection before the court imposes a sentence, requiring the State prove its allegations. This Court in *Cadwallader* ruled, a sentencing court can rely on acknowledgment of prior convictions without further proof under RCW 9.94A.530(2), but if there is an objection, as there was in the instant case, the court can no longer sit still without further proof. 155 Wn.2d at 874. As the *Cadwallader* Court correctly instructs, “[a]cknowledgement includes *not*

*objecting* to information included in presentence reports.” *Id.* But if there is any objection or dispute to a sentencing fact, the court has only two possible paths – 1) exclude the disputed fact, or 2) hold an evidentiary hearing to resolve the dispute. *Id.* (citing RCW 9.94A.530(2)).

When Mr. Bergstrom specifically objected and disputed prior convictions, the State, rather than asking the court for a continuance to prove the priors with a charging document or certification for determination of probable cause, shamelessly argued, “I don’t have the certified judgments and sentences, so I can’t argue different victim or whatever, I don’t know.” 11/17/04RP at 7. The prosecutor argued Mr. Bergstrom bore the burden instead of the State, admitting “we [the State] don’t have those judgments and sentences. We don’t have any of the underlying facts.” 11/17/04RP at 7, 9.

5. RCW 9.94A.530(2), *Ford, Lopez, and Cadwallader* dictate public policy requires remand without another opportunity to prove the sentencing allegations the State was required to prove at the initial sentencing hearing. The Court of Appeals ruling is contrary to the public policy and due process concerns represented by RCW 9.94A.530 and fully elaborated in *Ford, Lopez* and *Cadwallader*, which control in this matter. First, the State must be prepared to prove its sentencing allegations, since

it has the burden and without a sufficient record, the sentencing court lacks the necessary evidence to determine the correct offender score. *Ford*, 137 Wn.2d at 479-81. Here, the prior convictions disputed were all alleged to be King County offenses and the sentencing was in King County Superior Court. CP 25, 31. There is no excuse why the State should be unprepared to satisfy its burden of proving its calculation of the offender score.

Secondly, the State was directly responsible for sentencing court's error and should be held accountable for leading the court down this path. The deputy prosecutor at the sentencing hearing was on notice of the need to prove the prior convictions because Mr. Bergstrom properly objected to his offender score. Instead of proving the prior convictions, the deputy prosecutor argued Mr. Bergstrom had the burden of proving his offender score. 11/17/04RP at 7, 9. The *Ford* Court ruled the State's argument that a defendant must point out facts in the record to prove the challenged prior conviction "is erroneous turns the burden of proof on its head." 137 Wn.2d at 482. It is the State's burden and the State cannot satisfy its burden through bare assertions. *Id.* The *Ford* Court found its ruling did not place any additional burden on the State beyond the SRA, requiring the State to substantiate its allegations. *Id.*

The deputy prosecutor also argued below that because a prior King County sentencing court did not find the offenses constituted the same course of criminal conduct, the current sentencing court should follow the presumption in the absence of any evidence to the contrary. *Id.* It was the prosecutor that invited the court's error in misapplying the burden on Mr. Bergstrom. Accordingly, the Court of Appeals decision is contrary to this Court's holdings in *Lopez* and *Ford*. Because Mr. Bergstrom made a specific objection to the State's offender score calculation, the State had an opportunity to prove its allegations before the trial court imposed a sentence and the failure to do so prohibits the State from having a second opportunity on remand to prove what it had the opportunity to prove at the initial sentencing.

In essence, the Court of Appeals sanction of the State's actions at sentencing sends the wrong message: "the State can come to court unprepared, then misguide the sentencing court below, misadvise the court that the defendant has the burden at sentencing, and then if challenged on appeal, the Court of Appeals will remand, allowing the State to produce additional evidence on remand, because the trial court, not the State, made the ruling." When the trial court's ruling follows the State's very misguidance concerning the burden of proof, the State should not be given

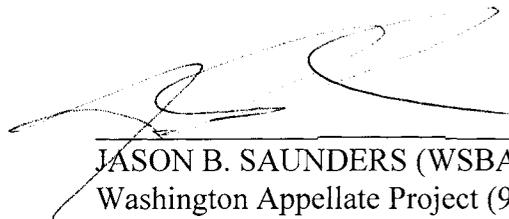
another chance to prove up prior convictions that were specifically objected to by the defendant.

D. CONCLUSION.

Based on the foregoing, Petitioner Gordon Bergstrom respectfully requests this Court remand for resentencing with the evidence first submitted at the initial sentencing hearing.

DATED this 29<sup>th</sup> day of November 2006.

Respectfully submitted,

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

JASON B. SAUNDERS (WSBA 24963)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

