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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVSION II

In re the Personal Restraint Petition of DONALD T. MCCARTHY, Petitioner,	Case No.: 32702-3-II PETITIONER'S REPLY TO PARTIAL RESPONSE OF THE STATE

Petitioner, by and through his attorney, Richard Linn, of Law Office of Richard Linn, PLLC, respectfully submits his Reply to Partial Response of the State.

ARGUMENT

A. THE TRIAL COURT DID NOT DETERMINE WHETHER SEXUAL ABUSE IN THE FIRST DEGREE, AN OUT OF STATE OFFENSE, IS COMPARABLE TO A WASHINGTON CONVICTION AND THEREFORE THAT CONVICTION CANNOT BE USED AS A BASIS TO SENTENCE PETITIONER TO AN INDETERMINATE SENTENCE UNDER RCW 9.94A.712.

The State, in its Response, indicates that the Petitioner stipulated to an exceptional sentence of 12 months and one day in order to take advantage of a plea to a lesser charge. (Response at 2). The trial court made a finding that Petitioner was a two time sex offender. Id.;

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therefore it appears that the finding by the trial court that Petitioner's one prior offense, Sexual Abuse in the First Degree, an Oregon offense, was a sex offense was made for the purpose of offender score classification. For offender score purposes, "[o]ut of state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3) Since classification as a sex offense affects offender score (see RCW 9.94A.525(2)), if the trial court did a comparability analysis in Petitioner's case, it would have had to refer to the offenses appearing in RCW 9A.44. A sex offense is defined as, "[a] felony that is a violation of chapter 9A.44 RCW..." RCW 9.94A.030(38)(a)(i) On the other hand, RCW 9.94A.712 provides in relevant part that "[a]n offender who is not a persistent offender shall be sentenced to an indeterminate sentence] if the offender...(b) *[h]as a prior conviction for an offense listed in RCW 9.94A.032(b)*, and is convicted of any sex offense, which was committed after September 1, 2001." (emphasis added) RCW 9A.44, the sex offense statute, is broader than, and contains more offenses, than are listed in RCW 9.94A.030(32)(b).

It is clear that any finding the trial court made concerning the Oregon offense was related to offender score and the exceptional

sentence and not to any RCW 9.94A.712 considerations. See State's Response at 5-6. "Because the defendant had stipulated to an exceptional sentence, there was no reason for the court to go into any detail as to the underlying felony activity that led to the conviction in Oregon." Id at 3.

The State argues that despite the failure of the trial court to determine that the Oregon offense was comparable to one of the enumerated Washington offenses listed in RCW 9.94A.030(32)(b), the fact that the petitioner did not contest or object to the facts concerning the prior Oregon offense as described in the Pre-sentence Investigation (PSI), served to waive any challenge to the comparability of the out of state offense for purposes of an indeterminate sentence under RCW 9.94A.712. State's Response at 4.

The petitioner may not have challenged facts contained in the PSI, but, as the State indicates, comparison for purposes of RCW 9.94A.712 was not at issue. Petitioner stipulated for the purpose of offender score and the exceptional sentence. Response at 3 The State argues that, because Petitioner did not object to the facts contained in the PSI, Petitioner's stipulation constitutes an acknowledgment of the facts, pursuant to State v. Ford 137 Wn.2d 472, 973 P.2d 452 (1999). The court in Ford, stated that "while unchallenged facts and

information are acknowledged by the defendant and may be properly relied upon by the court to support a determination of classification, under the statutory scheme classification of out-of-state convictions is a process unto itself, entirely distinct from the acknowledged existence of any fact which informs the court's conclusions. Accordingly, a defendant does not "acknowledge" the state's position regarding classification absent an *affirmative* agreement beyond merely failing to object." Id at 483 In Ford, the defendant did not object to the existence of prior convictions, but did claim they should not be included on his offender score because they should be counted as civil commitments. The court held that Ford did not affirmatively acknowledge facts supporting classification of the out of state offense. The court remanded for an evidentiary hearing, because the evidence offered by the State was insufficient to support comparable classification of the out of state offenses. Id at 485

In Petitioner's case, he did stipulate to an exceptional sentence, but he did not agree to the any facts supporting comparability for purposes of sentencing under RCW 9.94A.712.

While it is true, as indicated in the Response, that "the state may introduce documents of record or transcripts of prior proceedings to establish the defendant's criminal history," (Response citing State v.

Cabrera, 73 Wn.App. 165, 168, 868 P.2d. 179 (1994)), that case does not specify what those documents include or exclude. A subsequent case held that it was not enough for the State to present certified copies of a grand jury indictment, guilty plea, and judgment and sentence, where the State failed to offer copies of the actual out of state statute and the trial court did not engage in a comparability analysis. State v. Beals, 100 Wn.App. 189, 196, 997 P.2d. 941 (2000). The Court of Appeals, in Beals, also declined to look at the out of state statute and make the comparison itself, stating that "[t]he proper forum for classification of out-of-state convictions is at the sentencing hearing." Id. In Ford, supra, the court alluded to the failure of the State to offer into evidence the California statutes. (Ford, supra , at 475)

In Petitioner's case, the PSI does not provide sufficient evidence of comparability. The PSI does not contain any actual documents from the Oregon court. It does not include the elements of the Oregon offense, only pointing out that. " [t]he components of the [Oregon]crime were similar were similar to the frottage behaviors described in the instant offense." (Response, Attachment A, VII). The PSI based the facts of the Oregon offense on information provided by the Petitioner who, certainly, was not an accurate reporter. Upon

telling the PSI author about an old DUI, the PSI author then described Petitioner as "confused" about his criminal history. Id.

The PSI, itself, does not acknowledge that sentencing under RCW 9.94A.712 was an option (Response, Attachment A, IX) The State points out in the Response that RCW 9.94A.712 was not on the table as far as the plea agreement and stipulations were concerned. No Oregon statute was presented as evidence. No documents from the Oregon courts appear to have been presented.

CONCLUSION

Since the petitioner pled to avoid a greater charge, insufficient facts were presented and no comparability analysis was done by the court, the Sexual Abuse in the First Degree should not have been used as a basis for an indeterminate sentence under RCW 9.94A.712 and the indeterminate sentence should be vacated.

Dated this 11th day of October, 2005

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CERTIFICATE OF SERVICE

On this day, the undersigned sent to the Attorneys of Record for the Indeterminate Sentence Review Board and the State of Washington a copy of this document via Mail, 1st class prepaid. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed	Date	Place
	10/11/05	Seattle, WA

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