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**FILED**  
JUL 2 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

No. 80553-9

SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

**David Henderson,**

Respondent.

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STATE OF WASHINGTON  
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CLERK

Grays Harbor Superior Court

Cause No. 05-1-00404-8

The Honorable Judge David Foscue

**Respondent's Supplemental Brief**

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## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

After David Henderson was convicted of Trafficking in Stolen Property in the First Degree, the prosecuting attorney for Grays Harbor County filed a document captioned "Statement of Prosecuting Attorney," outlining the state's position on Mr. Henderson's criminal history. CP 20-22. The prosecutor alleged that Mr. Henderson had been convicted of two prior felonies, but did not indicate the offense dates or sentence dates. CP 21. The state did not attach copies of any sentencing documents to the Statement of Prosecuting Attorney, and did not submit any sentencing documents as exhibits at the hearing. RP 80-89, CP 20-22. Mr. Henderson did not stipulate to his alleged criminal history and did not sign the prosecutor's statement regarding criminal history. In fact, the parties did not address Mr. Henderson's criminal history on the record at the sentencing hearing at all. RP 80-89.

Despite this, the sentencing court entered findings of fact relating to Mr. Henderson's criminal history. Finding of Fact No. 2.2 of the Judgment and Sentence reads (in relevant part) as follows:

Crime	Date Of Sentence	Sentencing Court (Court and State)	Date Of Crime	Adult or Juvenile	Type Of Crime
VUCSA - Possession of Controlled substance		GHC 04-1-434-1			
PSP 2		GHC 04-1-434-1			

CP 4.

Without explanation, the sentencing court calculated Mr. Henderson's offender score as two, and sentenced Mr. Henderson to 12 months plus one day in the Department of Corrections. CP 3-10; RP (8/7/06) 87. Mr. Henderson appealed, and the Court of Appeals vacated his sentence:

For a trial court to include prior convictions in an offender's criminal history, one of three events must occur: (1) the State proves the prior convictions with competent evidence; (2) the offender admits to the prior convictions; or (3) the offender acknowledges the prior convictions by failing to object to their inclusion in a presentence report. None of these events occurred during Henderson's sentencing. Therefore, the court erred in including the two prior convictions in his offender score. Opinion, pp. 4-5.

This Court granted the state's Petition for Review, and consolidated Mr. Henderson's case with *State v. Mendoza*, No. 80553-9.

## ARGUMENT

**I. IN THE ABSENCE OF A STIPULATION ENTERED ON THE RECORD, THE PROSECUTION IS CONSTITUTIONALLY OBLIGATED TO PRODUCE EVIDENCE OF CRIMINAL HISTORY AT SENTENCING.**

This Court has held that the state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence," and that "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999). This rule is constitutionally based, and thus cannot be altered by statute; as this Court pointed out, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford, supra*, at 482.

The Statement of Prosecuting Attorney filed in this case consists of bare assertions, unsupported by evidence. CP 20-22. Under the rule in *Ford*, the document is constitutionally insufficient to establish criminal history, even in the absence of an objection by Mr. Henderson. *Ford*, at 482. Because of this, the Court of Appeals' decision should be affirmed.

**II. THE "STATEMENT OF PROSECUTING ATTORNEY" SUBMITTED IN THIS CASE IS NOT A PRESENTENCE REPORT.**

Petitioner seeks to circumvent the constitutional rule established in *Ford* by relying on a statutory exception for presentence reports. RCW

9.94A.530. Under the exception, an offender is deemed to have acknowledged information by not objecting to information contained in a presentence report. RCW 9.94A.530. Without citation to authority, Petitioner claims that a statement prepared by a prosecuting attorney is a presentence report. Petition, p. 3; Petitioner's Supplemental Brief, p. 3. This is incorrect.

First, to be constitutional under *Ford*, the statutory exception for presentence reports must apply only to documents with evidentiary value; it cannot relate to "bare assertions" of the type condemned by this Court in *Ford*. An allegation of criminal history submitted by the prosecuting attorney has no evidentiary value, and thus does not qualify as a presentence report under a constitutional reading of the statutory exception. *Ford*.

Second, by statute, presentence reports are documents prepared by the Department of Corrections at the court's request. RCW 9.94A.500. A Statement of Prosecuting Attorney such as that submitted here does not qualify as a presentence report under the statute. RCW 9.94A.500(1) provides (in relevant part):

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing.... [T]he court may order the department to complete a risk assessment report. If available before sentencing, the report shall be provided to the court...*In addition, the court shall, at the time of plea or conviction, order*

*the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders... If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.*

RCW 9.94A.500(1); *emphasis added.*

The paragraph that follows this language creates some ambiguity, but that ambiguity is easily resolved. Specifically, the next paragraph begins as follows:

The court shall consider the risk assessment report and presentence reports, if any, *including any victim impact statement and criminal history...*

RCW 9.94A.500(1).

This language could be read to suggest that the offender's criminal history is a kind of presentence report. However, as noted above, criminal history must be established by evidence, not allegation; any presentence report that lists the offender's criminal history must have evidentiary value.<sup>1</sup> And "a prosecutor's assertions are neither fact nor evidence, but merely argument." *Ford*, at 483, n. 3.

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<sup>1</sup> CrR 7.1(b), quoted below, provides support for this interpretation. CrR 7.1(b) requires the Department's presentence report to contain the offender's criminal history as well as information about the victim. The language "presentence reports... including any

The evidentiary character of presentence reports prepared by DOC is reaffirmed by the next sentence in the statute, which requires the court to evaluate the evidence:

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.  
RCW 9.94A.500(1).

Third, CrR 7.1 confirms that presentence reports are those reports prepared at the court's request by the Department of Corrections. CrR 7.1 is captioned "Procedures before sentencing," and reads (in relevant part) as follows:

(a) *Generally* At the time of, or within 3 days after, a plea, finding, or verdict of guilt of a felony, *the court may order that a risk assessment or presentence investigation and report be prepared by the Department of Corrections, when authorized by law.* The court shall also then... [s]et a date at least 10 days before sentencing for delivery of the risk assessment or presentence report, if any, to the court, to the prosecuting attorney, and to the defendant or defense counsel.

(b) *Report* The report of the presentence investigation shall contain the defendant's criminal history, as defined by RCW 9.94A.030, such information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior as may be relevant in imposing sentence or in the correctional treatment of the defendant, information about the victim, and such other information as may be required by the court.

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victim impact statement and criminal history" contained in RCW 9.94A.500(1) may simply be an imprecise reference to the material required by CrR 7.1(b).

(c) *Notice of new evidence* At least 3 days before the sentencing hearing, defense counsel and the prosecuting attorney shall notify opposing counsel and the court of any part of the presentence report that will be controverted by the production of evidence.

(d) *Other reports* Any interested person, as designated in RCW 9.94A.500, may submit a report separate from that furnished by the Department of Corrections.  
CrR 7.1, *emphasis in text added*.

The “other reports” referenced in CrR 7.1(d)—which likely include documents such as the Statement of Prosecuting Attorney at issue here—are not presentence reports. CrR 7.1(d) does not use the phrase “presentence report;” instead, it refers simply to “a report.” This court interprets court rules as though they were drafted by the legislature; accordingly, different language in the same rule should not be read to mean the same thing. *State v. George*, 160 Wn.2d 727 at 735, 158 P.3d 1169 (2007); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210 at 219, 173 P.3d 885 (2007). Because CrR 7.1 uses different language to describe the two documents, a “presentence report” is not the same as “a report.”

For all these reasons, the “Statement of Prosecuting Attorney” should not be treated as a presentence report, and Mr. Henderson’s failure to object should not constitute an acknowledgment. The Court of Appeals Opinion should be affirmed.

**III. DIVISION I'S *STATE V. WEAVER* WAS WRONGLY DECIDED AND SHOULD BE OVERRULED.**

Division I has held that an offender's silence constitutes an acknowledgement to documents other than presentence reports prepared by DOC. *State v. Weaver*, 140 Wn. App. 349, 166 P.3d 761 (2007). The *Weaver* court analyzed the phrase "presentence reports...including any victim impact statement and criminal history." According to Division I,

[t]his language is plain. First, the term "presentence reports" is plural, in contrast to the singular "risk assessment report," and therefore necessarily contemplates more than one source. Second, the term "presentence reports" includes, at the least, any victim impact statement and any statement of criminal history. DOC does not prepare victim impact statements, so it is difficult to see how a DOC report can be the only authorized presentence report. Further, criminal history is defined by statute as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." Nothing in that definition or in the acknowledgment statute suggests that the only source of a criminal history is DOC.

*Weaver*, at 356, footnote omitted.

This interpretation is incorrect for the reasons cited in the previous section. In addition, subsequent legislative history clarifies the legislature's intent and undermines the *Weaver* court's reasoning. See *State v. McKinley*, 84 Wn. App. 677 at 681, 929 P.2d 1145 (1997) ("To help clarify the original intent of a statute, the court may also turn to the statute's subsequent history.").

A change in legislative intent is presumed when a material change is made in a statute. *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422 at 427, 686 P.2d 483 (1984). The legislature has recently amended both RCW 9.94A.500 and RCW 9.94A.530. Laws of 2008, ch. 231, § 3 and 4, effective June 12, 2008. To RCW 9.94A.500, the legislature added the following: “A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500 (Effective June 12, 2008). RCW 9.94A.530(2) now reads “[a]cknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530 (Effective June 12, 2008).

These amendments allow the prosecutor to present a statement of criminal history, and deem an offender’s silence to be an acknowledgment of the prosecutor’s statement.<sup>2</sup> Because the amendments permit a court to rely on a prosecutor’s statement in determining criminal history, they signal a change in legislative intent. Under the 2008 amendments, Mr.

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<sup>2</sup> Whether or not these amendments are constitutional under *Ford* is a question for a subsequent case.

Henderson's failure to object to the Statement of Prosecuting Attorney would be deemed an acknowledgment.

From this change in the statute, it can be inferred that the original legislative intent was *not* to treat a prosecutor's statement of criminal history in the same manner as a presentence report prepared by DOC. *McKinley, supra; Rhoad v. McLean, supra.* The change in legislative intent supports Division II's holding in this case and undermines the *Weaver* court's analysis.

This Court should affirm the Court of Appeals' decision in this case, and overrule Division I's opinion in *Weaver*.

**IV. REQUIRING A PROSECUTOR TO PRESENT EVIDENCE IN THE ABSENCE OF A STIPULATION ON THE RECORD WILL NOT UNDULY BURDEN THE STATE.**

To avoid an evidentiary hearing at sentencing, the state must either seek an order for a presentence report or obtain an explicit stipulation—either in writing, or orally on the record—as to criminal history. If a prosecutor fails to take either of these steps, she or he must provide the sentencing court with evidence constitutionally required by this Court in *Ford*.

As with the elements of an offense to be proved at trial, an offender's failure to object to allegations of criminal history does not amount to an agreement, a stipulation, or a waiver. Insufficient evidence

is insufficient, whether introduced at trial or at sentencing. Mr. Henderson's sentence was imposed in violation of *Ford* and the Sentencing Reform Act. Accordingly, the Court of Appeals decision should be affirmed.

**CONCLUSION**

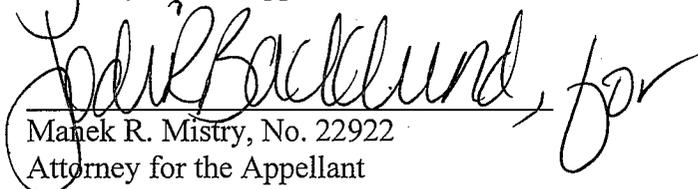
Allegations of criminal history submitted by a prosecuting attorney have no evidentiary value, and cannot constitutionally be used to establish criminal history. *Ford*. Furthermore, a Statement of Prosecuting Attorney does not qualify as a presentence report. RCW 9.94A.500; CrR 7.1. For these reasons, this Court should affirm the Court of Appeals.

Respectfully submitted on July 1, 2008.

**BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Respondent's Supplemental Brief to:

David Henderson  
c/o William Henderson  
3152 116th Avenue SE  
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and to:

Grays Harbor Prosecuting Attorney  
Harold S. Menefee  
102 West Broadway Ave Rm 102  
Montesano, WA 98563.3621

and to:

Nielsen Broman & Koch PLLC  
1908 E Madison St  
Seattle, WA 98122-2842

And that I sent the original and one copy to the Supreme Court for filing;

All postage prepaid, on July 1, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF  
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE  
AND CORRECT.

Signed at Olympia, Washington on July 1, 2008.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

**Appendix: Opinion Filed July 25, 2007**

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID M. HENDERSON,

Appellant.

No. 35316-4-II

UNPUBLISHED OPINION

PENOYAR, J. — A jury convicted David Henderson of first degree trafficking in stolen property. He appeals, arguing that the trial court improperly instructed the jury and erred in including two prior convictions in his criminal history. A commissioner of this court referred his appeal to a panel of judges. Concluding that the instructional error is harmless, but agreeing that the trial court erred in including the prior convictions in his criminal history, we affirm his conviction but remand for resentencing.

FACTS

On July 5, 2005, Rocky Johnson discovered that a side door to his fifth-wheel trailer was open. A set of racing wheels, an aluminum oil pan, fuel pump extensions and a small stereo were missing. He called Butcher's Scrap Metal to alert it that someone had stolen these items. That afternoon, Henderson sold a set of racing wheels to Butcher's Scrap. Ronald Butcher called

Johnson and described the wheels. Johnson came to Butcher's Scrap the next day and identified the wheels as those taken from his trailer.

The police arrested Henderson. After they advised him of his constitutional rights, he told them that he had been given the wheels as collateral for a loan. When the borrowers did not return for the wheels, he sold them to Butcher's Scrap. He said that he did not know they were stolen. After some questioning, he changed his story and said that his girlfriend's son, Ben Martinez, had brought him the wheels. He said Martinez had brought him stolen items in the past to sell for him.

The State charged Henderson with first degree trafficking in stolen property. Johnson, Butcher and the detectives testified as described above. Henderson testified that Martinez told him that the racing wheels were not stolen.

The trial court instructed the jury on both first degree trafficking and second degree trafficking, with the pertinent instructions quoted below:

INSTRUCTION 4.

To convict the defendant, David M. Henderson, of the crime of Trafficking in Stolen Property in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2005, the defendant trafficked in stolen property.
- (2) That the defendant acted knowingly.
- (3) The acts occurred in Grays Harbor County.

.....  
INSTRUCTION 7.

If your are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Trafficking in Stolen Property in the First Degree necessarily includes the lesser crime of Trafficking in Stolen Property in the Second Degree.

*A person commits the crime of Trafficking in Stolen Property in the First Degree when he recklessly traffics in stolen property.*

.....  
INSTRUCTION 8.

To convict the defendant, David M. Henderson, of the crime of Trafficking in Stolen Property in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2005, the defendant trafficked in stolen property.
- (2) That the defendant acted recklessly.
- (3) The acts occurred in Grays Harbor County.

Clerk's Papers (CP) at 16-17 (emphasis added).

The jury convicted Henderson of first degree trafficking in stolen property. At sentencing, the State introduced a statement of prosecuting attorney, which stated that Henderson had two prior convictions. It did not introduce copies of the judgment and sentences. Henderson did not acknowledge or stipulate to the prior convictions. The trial court included both convictions in calculating Henderson's offender score as 2. The court then sentenced Henderson to the bottom of his standard sentence range, which was 12 to 14 months. He appeals.

ANALYSIS

First, Henderson argues that the trial court erred in giving the emphasized sentence in Instruction 7. That sentence should have read: "A person commits the crime of Trafficking in Stolen Property in the Second Degree when he recklessly traffics in stolen property." The State agrees that the sentence was incorrect but contends that it was a harmless typographical error.

An instructional error is harmless only if it "is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)) (interior

quotations and emphases omitted). The error in Instruction 7 is trivial. Instructions 4 and 8, the to-convict instructions for first degree trafficking and for second degree trafficking, were correct. The misstatement of "First Degree" rather than "Second Degree" in the erroneous sentence of Instruction 7 did not prejudice Henderson's substantial rights. Nor did it affect the final outcome of the case. Therefore, the error is harmless.

Second, Henderson argues that the State failed to prove his prior convictions, so the trial court erred in including them in his criminal history. In calculating an offender's criminal history, the court can rely only on information that is "admitted, acknowledged, or proved . . . at the time of sentencing." RCW 9.94A.530(2). "Acknowledgement includes not objecting to information stated in the presentence reports." *Id.* Henderson notes that he did not admit to his prior convictions, that there was no presentence report to which he could have objected, and that the State did not prove his prior convictions. Thus, he contends that the court erred in including them in his criminal history.

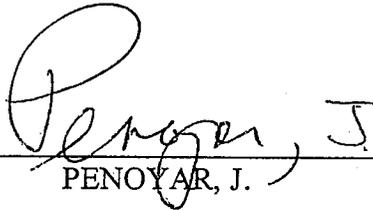
The State responds that Henderson did not challenge his prior convictions at sentencing and so cannot challenge them on appeal. *State v. Garza*, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994); *State v. Handley*, 115 Wn.2d 275, 283-84, 796 P.2d 1266 (1990). Sentencing errors can be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). *Garza* and *Handley* do not support the State's position because they both involve failures to object to presentence reports.

For a trial court to include prior convictions in an offender's criminal history, one of three events must occur: (1) the State proves the prior convictions with competent evidence; (2) the offender admits to the prior convictions; or (3) the offender acknowledges the prior convictions

by failing to object to their inclusion in a presentence report. None of these events occurred during Henderson's sentencing. Therefore, the court erred in including the two prior convictions in his offender score.

We affirm Henderson's conviction but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
PENOYAR, J.

I concur:

  
HOUGHTON, C.J.

QUINN-BRINTNALL, J. (concurring in part and dissenting in part) — I concur with the majority that the typographical error in the instruction did not prejudice David M. Henderson and, thus, we should affirm the jury’s verdict of guilt. But I disagree with the majority’s holding regarding the sentencing issue.

I believe the majority mischaracterizes the prosecuting attorney’s criminal history statement as something other than a presentence report. The criminal history is a presentence report and, as such, Henderson was required to object to it before sentencing to preserve this challenge for review. *State v. Garza*, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994); *State v. Handley*, 115 Wn.2d 275, 283-84, 796 P.2d 1266 (1990).

Here, the State presented a report titled “Statement of Prosecuting Attorney” which read in relevant part:

COMES NOW H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, Washington, by and through his deputy, Gerald R[.] Fuller, and submits the following report for consideration at the sentencing of the defendant in the above-entitled cause.

.....

**PRIOR RECORD**

CRIME	DATE OF SENTENCING	SENTENCING COURT (County and State)	DATE OF CRIME	A (Adult) or J (Juvenile)	TYPE OF CRIME
VUCSA-Poss of Controlled Substance		GHC 04-1-434-1			
PSP 2		GHC 04-1-434-1			

Clerk’s Papers at 20. Henderson did not object to this accounting of his prior record and, in my opinion, he therefore acknowledged this criminal history under RCW 9.94A.530(2).

CrR 7.1(a) grants a trial court authority to order “a risk assessment or presentence investigation and report be prepared by the Department of Corrections [DOC], when authorized

by law.” And CrR 7.1(d) contemplates other reports, allowing “[a]ny interested person, as designated in RCW 9.94A.500 [to] submit a report separate from that furnished by the [DOC].”

Former RCW 9.94A.500 (2000), in turn, grants authority for several reports: (1) a risk assessment report completed by DOC; (2) a chemical dependency screening report prepared by DOC; (3) a “presentence report” for defendants convicted of a felony sexual offense prepared by DOC; (4) a “presentence report” for mentally ill defendants prepared by DOC; and (5) a victim impact statement. The statute goes on to say:

The court shall consider the risk assessment report *and presentence reports, if any, including any victim impact statement and criminal history*, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

Former RCW 9.94A.500(1) (emphasis added).

The language emphasized above means that the term “presentence report” has a wider definition than that used by the majority and may include portions of a victim impact statement, a document that is not prepared by DOC. Crucially, the term clearly includes criminal history. No law requires that a defendant’s criminal history be prepared by the DOC.<sup>1</sup> Indeed, presentence reports of criminal history are typically prepared by the prosecutor or defense attorney and the DOC is only called upon to author such reports, causing much delay, in more serious cases or special circumstances such as the presence of mental illness or a felony sexual offense.

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<sup>1</sup> If, conversely, DOC does prepare a presentence report, it should include criminal history. See CrR 7.1(b).

Without analysis, the majority here holds that an offender acknowledges prior convictions only if he fails to object to a presentencing report that is prepared by the DOC, rather than an attorney. I disagree.

Further, even given the majority's interpretation of presentence reports, I disagree with the remedy. The Grays Harbor County trial court could have taken judicial notice that Grays Harbor County courts had twice convicted Henderson for felonies within the previous two years. ER 201(b). I would affirm on all grounds.

  
QUINN-BRINTNALL, J.