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1. STATEMENT OF ISSUES

- a. Did Petitioner fail to make any showing necessary to obtain relief under Rule 16.4?
- b. Did Petitioner waive his challenge to his prior conviction where he failed to avail himself of his right to appeal?
- c. Did Petitioner's second successive Personal Restraint Petition, that was properly dismissed pursuant to RCW 10.73.140, operate as an abuse of writ?
- d. Did the State prove the Lincoln County DUI conviction by a preponderance of the evidence when it presented without objection, accurate and reliable certified documents showing the conviction?
- e. Did the use of a certified driving abstract sufficiently prove a prior conviction?
- f. Did Petitioner waive his challenge to the conviction when he agreed to the validity and admission of a certified judgment and docket from Lincoln County?
- g. Petitioner was found to have made an objection, is remand for an evidentiary hearing to permit the State to prove the conviction, the proper remedy?

2. STATEMENT OF THE CASE

a. Substantive Facts

On January 26, 2003, law enforcement officers responded to an accident on State Route 155 near milepost 76. *RP* 191. The defendant was the driver of a pickup truck that collided with the vehicle of Loretta Aguilar. *RP* 193-195. The defendant entered the

oncoming lane of travel, slamming broadside into the victim's vehicle driver's side door. *RP* 154, 215, 452.

There were no visible signs of the defendant taking evasive action prior to crossing into the oncoming lane of travel. *RP* 215-216. The defendant began braking only after crossing into the oncoming lane. The marks left by his braking were straight. *RP* 215-216. Accident reconstruction expert, Randy Grant, testified that the defendant was traveling at a minimum of 44 mph when he started to apply his brakes. The defendant's speed did not allow him sufficient time to react to presence of the victim's vehicle, and the defendant collided with the victim's vehicle. *RP* 547- 554. The impact killed Loretta Aguilar and seriously injured her young granddaughter, Jessica Saffel, who was seated in the front passenger seat. *RP* 468, 490.

Trooper Lindquist later went to the hospital and contacted the defendant. At the hospital the odor of intoxicants from the defendant was strong and the HGN test showed all six clues. *RP* 244-245.

Toxicologist William Marshall testified the defendant's blood alcohol level taken at the hospital was .14. *RP* 356. Mr. Marshall also testified that based on that level of blood alcohol, at the time of driving the defendant's blood alcohol level would have been approximately .185. *RP* 360-365.

The defendant was found guilty on June 3, 2005, following a jury trial, of Vehicular Homicide and Vehicular Assault. He was sentenced on September 19, 2005. The sentence included three enhancements pursuant to RCW 46.61.520 for the defendant's prior DUI convictions, including a conviction for DUI in Lincoln County on March 19, 1992. *CP 19-28*

At sentencing, the trial court found the State properly proved the prior Lincoln County DUI conviction, based on the certified driving abstract maintained by the Department of Licensing and the defendant's criminal history as maintained in the Judicial Information System. *RP 9/19/2005 pg. 59-61*

In advance of the sentencing hearing, the State had requested certified documentation from Lincoln County District Court for the DUI conviction. But unlike Superior Court felony convictions, there was not a formal standardized judgment and sentence in use or available from the District Court.

Prior to the sentencing hearing, the State provided the trial court and defense a certified copy of the defendant's driving abstract, Okanogan County dockets, and defendant criminal history showing all three of the defendant's DUI convictions. *CP 34-50; RP 9/19/2005 pg. 9*. These were discussed in detail during the sentencing hearing. *RP 9/19/2005 pg. 23-29*. The State was not made aware of any objection to, or dispute with, the defendant's DUI criminal history prior

to the hearing or at the hearing when the conviction documents were presented. *RP 9/19/2005 pg. 28; See also CP 51-59* (Defendant's Sentencing Memorandum). The Petitioner did not object to the admission or use of the certified abstract or other documents.

At best, the statement made by the Petitioner's attorney that he felt the record "is insufficient" regarding the Lincoln County conviction, could be taken as a generalized challenge to sufficiency. *RP 9/19/2005 pg. 32.*¹

Near the end of the sentencing hearing the State was handed a copy of certified Lincoln County District Court docket and the Lincoln County District Court "judgment."² *RP 9/19/2005, pg. 87-88.* The State showed the documents to the defense and then asked to make them part of the record. The defendant's attorney acknowledged the documents were valid and agreed to their being made part of the record. *Id.*

At the Petitioner's sentencing, the trial court found the underlying Lincoln County conviction was proven by a preponderance

¹ The entirety of the Petitioner's comment were: "*I would argue to the Court that in regards to the conviction from Lincoln County, that the record is insufficient. I don't believe that the materials provided sufficiently set forth the conviction. In the Lincoln County abstract of record, this simply says DWI and that's what it says. That's without regards to the criminal history.*" *RP 9/19/2005, pg. 31-32.*

However the certified driving abstract submitted with the State's sentencing memorandum did not simply say "DWI" The certified abstract included the defendant's personal identifying information, offense date, the charge of "Driving Under the Influence" the conviction date, and the court where the conviction occurred. *CP 34-50;*

² The certified "judgment" for the 1992 DUI conviction is actually the law enforcement officer's criminal citation with the disposition section of the citation (found on the lower portion of the citation) completed by the District Court.

of the evidence even before the "judgment" was made part of the record. *RP 9/19/2005, pg. 59-61*

b. Procedural Facts

The petitioner's conviction was affirmed by the Court of Appeals Div. III No. 24597-7-III in March 2007. The petitioner filed a Personal Restraint Petition, which was denied September 10, 2007; in Court of Appeals Div. III case No. 26367-3-III. The petitioner then filed a Petition for Review with the Washington State Supreme Court, which was denied on April 30, 2008. *See State v. Adolph*, 163 Wash.2d 1030, 185 P.3d 1194 (Table) (2008)

The petitioner then filed another Personal Restraint Petition (Court of Appeals Div. III No. 27277-0-III). In the subsequent PRP, the petitioner raised a new claim that the State failed to prove his prior Lincoln County DUI conviction. *Order Dismissing PRP, COA 27277-0-III, pg. 1*. On March 3, 2009, Chief Judge John A. Schultheis, of the Court of Appeals Division III, dismissed the petitioner's second personal restraint petition. The Judge found the second petition was successive and barred by RCW 10.73.140. *Order Dismissing PRP, COA 27277-0-III, pg. 1*. The Judge also ruled the defendant waived his challenge to the existence of the Lincoln County conviction where the petitioner agreed to the validity of the documents and agreed to make them part of the trial court record. *Order Dismissing PRP, COA 27277-0-III, pg. 2-3*.

The petitioner then sought discretionary review by the Washington State Supreme Court of the Court of Appeals denial of petitioner's second PRP.

3. ARGUMENT

a. Petitioner has made no showing to obtain relief under Rule 16.4.

RAP 16.4 states in part:

(a) Generally Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c)...

(c) Unlawful nature of restraint: The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions: The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

In the present case the Petitioner has made no showing that his restraint is unlawful. He has presented no facts to support any of the factors set out in RAP 16.4(c).

The trial and appellate courts had jurisdiction over the petitioner and the subject matter. Petitioner has presented no facts to the contrary.

The verdict and sentence were not in violation of the Constitution of the United States or Washington State. Moreover, there have been no significant changes in the law that are material to the Petitioner's conviction, sentence, or other orders entered; and there are no other legitimate grounds to justify the Petitioner's current collateral attack

b. The Petitioner cannot obtain the relief requested where he failed to avail himself of his right to appeal

A defendant who has not appealed an issue may not use a personal restraint petition to raise issues he could have raised in a direct appeal, except for "grave constitutional errors." See *State v.*

Hall, 18 Wn. App. 844, 847 (1977) (quoting *Koehn v. Pinnock*, 80 Wn.2d 338, 340, 494 P.2d 987 (1972)).

Here the Petitioner did appeal his conviction. In his appeal, he failed to raise any challenge to his underlying Lincoln County DUI conviction. His second petition was properly dismissed.

c. The Petitioner's second successive Personal Restraint Petition was properly dismissed pursuant to RCW 10.73.140 and is an abuse of writ.

RCW 10.73.140 mandated dismissal of the successive PRP filed in the Court of Appeals. RCW 10.73.140 states:

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

The Court of Appeals did determine that the Petitioner had previously filed a Personal Restrain Petition and that in addition to waiving the challenge to the DUI conviction, that the petitioner also failed to show good cause why the issue was not raised earlier. *Order*

*Dismissing PRP.*³ The Court of Appeals properly dismissed the petition.

Moreover, a prisoner's second or subsequent personal restraint petition that raises a new issue for the first time will not be considered if raising that issue constitutes an abuse of the writ. *In re Pers. Restraint of Jeffries*, 114 Wash.2d 485, 487-88, 789 P.2d 731 (1990). If the defendant was represented by counsel throughout post conviction proceedings, it is an abuse of the writ for him or her to raise a new issue that was available but not relied upon in a prior petition. *Jeffries*, 114 Wash.2d at 492 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n. 6, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)).

Although no abuse of the writ will be found where a claim is based on newly discovered evidence or intervening changes in case law, because they would not have been *available* when the earlier petition was filed; where counsel was fully aware of the facts supporting the *new* claim when the prior petition was filed, and there are no pertinent intervening developments, raising the *new* claim for the first time in a successive petition constitutes needless piecemeal litigation and, therefore, an abuse of the writ. *Jeffries*, 114 Wash.2d at 492.

³ Petitioner argued that his violation of RCW 10.73.140 required the Court of Appeals to transfer his PRP to the Supreme Court. This interpretation is in opposition to the plain language of the statute and is not supported by the cases that were cited by petitioner in his Motion for Discretionary Review. See *Motion for Discretionary Review*, pg. 14. For example, in the case of *In re Turay*, 150 Wn.2d. 71, the Supreme Court stated that the Court of Appeals *retains* the power to transfer a petition raising new grounds for relief to the Supreme Court. *Turay* at 86. Moreover, where the subsequent petition is time barred, as in this case, the Court of Appeals *must* dismiss the petition rather than transfer it to the Supreme Court. *Turay* at 87.

The petitioner was represented by counsel through the entirety of his first round of appeals. The facts supporting the newly raised issue were known to counsel, as they formed a basis of the defendant's sentence and were contained in the report of proceedings. The petitioner's successive petition is an abuse of the writ and his petition was properly dismissed.

d. The Lincoln County DUI was proven by a preponderance of the evidence through the use of an accurate and reliable certified documents.

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wash.2d 867, 876, 123 P.3d 456 (2005); *State v. Lopez*, 147 Wash.2d 515, 519, 55 P.3d 609 (2002); *State v. Ammons*, 105 Wash.2d 175, 713 P.2d 719 (1986). The best evidence to establish a defendant's prior conviction is the production of a certified copy of the prior judgment and sentence. *Lopez*, 147 Wash.2d at 519, 55 P.3d 609 (citing *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999)).⁴ However, the State may introduce other comparable

⁴ In *State v. Lopez* 147 Wash.2d at 519, the court also stated "*The State may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than serious fault of the proponent.*", citing *State v. Fricks*, 91 Wash.2d 391, 397, 588 P.2d 1328 (1979) for support.

However, the issue before *Fricks* was wholly unrelated to proving prior criminal history and the admission of court records. *Fricks* dealt with admission of testimony about the contents of a document (a "tally sheet") to prove the amount of money taken, where the tally sheet was not offered as evidence. The court held that the State must comply with the so-called "Best Evidence Rule". As applied to proof of the terms of a writing, the rule requires that the original writing be produced unless it can be shown to be unavailable "...for some reason other than the serious fault of the proponent." *Fricks* at 397. The *Frick's* Court went on to say, "*Even production of the tally sheet would not necessarily make its contents admissible as evidence, however. The tally sheet is itself hearsay which must be shown to be admissible, in this case under the Uniform Business Records as Evidence Act, RCW 5.45.*" Appropriate testimony must establish its identity and mode of preparation in order to lay a foundation for admission. *Id.*

documents of record or transcripts of prior proceedings to establish criminal history. E.g. *Ford* at 480 (citing *Cabrera*, 73 Wash.App. at 168, 868 P.2d 179)⁵

It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *State v. Mendoza*, 165 Wash.2d 913, 920, 205 P.3d 113, 116 (2009) (citing *Ford*, 137 Wash.2d at 480, 973 P.2d 452.) This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing some minimal indicium of reliability beyond mere allegation. *Mendoza* at 920 (citing *Ford* 481, 973 P.2d 452; *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir.1984)).

The State's burden under is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged

The adoption of the *Fricks*" best evidence" analysis by *Lopez* in the context of proving criminal convictions with certified documents is flawed. By statute, certified court records and certified public records are per se admissible. See *RCW 5.44.010* (certified records and proceedings of any court of the United States, or any state shall be admissible in evidence in all cases in this state); *RCW 5.44.040* (certified copies of records and documents in the offices of departments of the United States and of this state or any other state shall be admitted in evidence in the courts of this state.).

Only two other published Washington cases involving proof of prior criminal convictions appear to have reiterated the analysis in *Lopez* requiring unavailability of a certified judgment before submitting other comparable evidence. Moreover, neither *Lopez*, nor the two case citing the *Lopez* analysis, involved a certified document being offered to prove the challenged prior conviction. See *Lopez* 147 Wash.2d at 519 (no supporting evidence offered to prove conviction); *State v. Mendoza*, 139 Wash. App. 693, 162 P.3d 439 (2007) (proof of prior based solely on statement of prosecuting attorney); *State v. Rivers*, 130 Wash. App. 689, 128 P.3d 608 (2005) (non-certified judgment offered to prove conviction).

⁵ For some examples of other comparable documents, see: *State v. McCorkle*, 88 Wash. App. 485, 945 P.2d 736 (1997) (FBI rap sheet in conjunction with other evidence); *State v. Vickers*, 148 Wash.2d 91, 119-21, 59 P.3d 58 (2002) (signed docket sheet from Massachusetts court); *State v. Morley*, 134 Wash.2d 588, 611, 952 P.2d 167 (1998) (the entire court-martial record); *State v. Aronhalt*, 99 Wash. App. 302, 306-09, 994 P.2d 248 (2000) (certified verdict forms, judgments, clerk minute entries, and court orders support existence of prior convictions); *State v. Winings*, 126 Wash. App. 75, 107 P.3d 141 (2005) (certified copy of minute order and information showing prior convictions).

criminal history. *Ford* at 480. Facts at sentencing need not be proved beyond a reasonable doubt. Washington courts have long held that in imposing sentence, the facts relied upon by the trial court must have some basis in the record. *Ford* at 482 (citing *State v. Bresolin*, 13 Wash.App. 386, 396, 534 P.2d 1394 (1975)).

Under the SRA, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine any sentence. RCW 9.94A.530(2); *State v. Grayson* 154 Wash.2d 333, 338-339, 111 P.3d 1183, 1186 (2005). "Acknowledged" facts include all those facts presented or considered during sentencing that are not objected to by the parties. *Id.* (citing *State v. Handley*, 115 Wash.2d 275, 282-83, 796 P.2d 1266 (1990). See also *Mendoza*, 165 Wash.2d at 929 (clarifying *Grayson*, that "facts" upon which a trial court may rely do not encompass "bare assertions" as to criminal history.)

If a defendant disputes a factual aspect of a prior conviction as alleged by the State, the sentencing court may either ignore the disputed fact or hold an evidentiary hearing. Evidentiary hearings provide a chance to "contest" disputed facts. *Ammons*, 105 Wash.2d at 185 (1986). But an evidentiary hearing is not required where the defendant does not specifically object to factual statements and request an evidentiary hearing to challenge them. *State v. Garza*, 123 Wash.2d 885, 889, 872 P.2d 1087 (1994).

If a defendant neither objects to information presented at sentencing nor requests an evidentiary hearing, that information is deemed acknowledged. *State v. Blunt*, 118 Wash. App. 1, 8, 71 P.3d 657, 661 (2003) (citing *State v. Handley* 115 Wash.2d 275, 282-83, 796 P.2d 1266 (1990)). Acknowledgment allows the judge to rely on unchallenged facts and information introduced for the purposes of sentencing. *Blunt* at 8 (citing *Ford*, 137 Wash.2d at 482-83, 973 P.2d 452.)

In *Blunt*, the defendant was convicted of vehicular homicide and made a general challenge to sufficiency of the State's evidence that he had the three prior DUI convictions used as enhancements. The Court of Appeals held that the State's evidence bore minimum indicia of reliability, which, especially in the absence of any challenge, proved Blunt's three prior DUIs.⁶ *Blunt* at 8-9. The Court held that Blunt neither challenged these priors nor requested an evidentiary hearing.⁷ *Id.* at 9 (citing *State v. Garza*, 123 Wash.2d 885, 889, 872 P.2d 1087 (1994) (evidentiary hearing not required where defendant fails to specifically object to facts and does not request one). The

⁶ In *Blunt*, the State offered in support of a 2000 Oregon DUI conviction, a Deschutes County Circuit Court Judgment of Conviction and Order of Sentence/Probation ; for a 1993 Lewis County DUI conviction, the State offered a Lewis County District Court "Judgment and Sentence"; and for a 1990 Lewis County DUI conviction, the State submitted a "Lewis County District Court Docket" computer printout and called the Lewis County District Court Administrator, who testified that court files for older cases like this one are destroyed after five years, the "docket" is maintained as "a reference for the Court," nothing seemed out of order with this particular docket; and that she had, however, encountered a prior error in the clerk's office such that she could not be "absolutely" sure that everything on this docket printout was correct. *Blunt* at 4-5.

⁷ Blunt did state that the plea agreement required the State to "to prove each prior conviction" and when asked whether he was denying a his prior conviction stated: "Our position is that the State must prove that." (quotations in original). *Blunt* at 5-6.

Blunt Court held that the facts proven by the State were deemed acknowledged by Blunt. *Id.* (citing *State v. Handley*, 115 Wash.2d 275, 282-83, 796 P.2d 1266 (1990)).

In the present case, the State offered comparable documents in the form of a certified record of the defendant's driving abstract and his criminal history record - without objection from the defense. The defense made a general objection to the "sufficiency", but did not make any specific objection to the admissibility or the use of any of the documents offered by the State at sentencing. Additionally the defendant did not request an evidentiary hearing to challenge any of the documentation.

The documents were therefore acknowledged; permitting the trial court judge to rely on the information introduced for the purposes of sentencing. The trial court properly found the State had proven the prior DUI by a preponderance of the evidence.

e. The abstract is an accurate and reliable document sufficient to prove a prior DUI conviction

The certified driver's abstract offered to support the Lincoln Co. DUI conviction was highly reliable and comparable to either a certified docket or DUI citation (i.e. the "judgment").

Under RCW 46.52.101, the sentencing court is required to prepare and submit the abstract of the case and conviction to the

Dept. of Licensing, when a traffic offense is involved. RCW 46.52.101

states in part:

(1) Every district court, municipal court, and clerk of a superior court shall keep or cause to be kept a record of every traffic complaint, traffic citation, notice of infraction, or other legal form of traffic charge deposited with or presented to the court or a traffic violations bureau, and shall keep a record of every official action by the court or its traffic violations bureau regarding the charge, including but not limited to a record of every conviction, forfeiture of bail, judgment of acquittal, finding that a traffic infraction has been committed, dismissal of a notice of infraction, and the amount of fine, forfeiture, or penalty resulting from every traffic charge deposited with or presented to the court or traffic violations bureau. In the case of a record of a conviction for a violation of RCW 46.61.502 or 46.61.504, and notwithstanding any other provision of law, the court shall maintain the record permanently.

(2) After the conviction, forfeiture of bail, or finding that a traffic infraction was committed for a violation of any provisions of this chapter or other law regulating the operating of vehicles on highways, the clerk of the court in which the conviction was had, bail was forfeited, or the finding of commission was made shall prepare and immediately forward to the director of licensing at Olympia an abstract of the court record covering the case...

(3) The abstract must be made upon a form or forms furnished by the director and must include the name and address of the party charged, the number, if any, of the party's driver's or chauffeur's license, the registration number of the vehicle involved if required by the director, the nature of the offense, the date of hearing, the plea, the judgment, whether the offense was an alcohol-related offense as defined in RCW 46.01.260(2), whether the incident that gave rise to the offense charged resulted in a fatality, whether bail was forfeited, whether the determination that a traffic infraction was committed was contested, and the amount of the fine, forfeiture, or penalty, as the case may be.

(4) In courts where the judicial information system or other secure method of electronic transfer of information has been implemented between the court and the department of licensing, the court may electronically provide the information required in subsections (2), (3), and (5) of this section....

(7) The officer, prosecuting attorney, or city attorney signing the charge or information in a case involving a charge of driving under the influence of intoxicating liquor or any drug shall immediately request from the director an abstract of convictions and forfeitures. The director shall furnish the requested abstract.

It is clear that the sentencing court prepares and submits the abstract that is then preserved by the Dept. of Licensing. That abstract information, and the conviction records contained therein, is

intended to be relied upon by the State in the prosecution of DUI cases. See RCW 46.52.101(7); RCW 45.52.120 (1), (2). The abstract has been presumed to be reliable and accurate in the context of criminal traffic and licensing violations. See *State v. Gaddy*, 152 Wash.2d 64, 73, 93 P.3d 872 (2004) (the many statutes and standards in place that mandate Dept. of Licensing to maintain current and accurate information support presumption that abstract is accurate and reliable); RCW 46.65.030 (DOL abstract of person's driving record is presumed accurate in habitual traffic offender actions, and it is the defendant's burden to prove its inaccuracy).⁸

When RCW 46.52.101 was enacted in 1999, it incorporated RCW 46.52.100 which was repealed the same year. 56th Leg., Reg. Sess. (Wash. 1999); Laws of 1999, ch. 86, § 4, 8.⁹

RCW 46.52.100 was in effect at the time of the Petitioner's 1992 Lincoln County conviction, and stated in part:

The Monday following the conviction, forfeiture of bail, or finding that a traffic infraction was committed for violation of any provisions of this chapter or other law regulating the operating of vehicles on highways, *every said magistrate of the court or clerk of the court of record* in which such conviction was had, bail was forfeited, or the finding made *shall prepare and immediately forward to the director of licensing at Olympia an abstract of the record of said court covering the case, **which abstract must be certified by the person so required to prepare the same to be true and correct...***

⁸ Accordingly, a wide variety of public records and reports have been held admissible, such as Driving records and reports from DOL. See *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989) (driving record); *DOL v. Smith*, 66 Wn. App 825, 832 P.2d 1366 (1992) (faxed copy of driving record); *State v. Kronich*, 160 Wash.2d 893, 161 P.3d 982 (2007) (DOL reports); *State v. Kirkpatrick*, 160 Wash.2d 837, 161 P.3d 990 (2007); see also RCW 5.44.040 (discussed infra).

⁹ In the enactment of RCW 46.52.101, the legislature also provided courts with the authority to transmit the information to the Dept. of Licensing electronically. RCW 46.52.101(4); 56th Leg., Reg. Sess. (Wash. 1999); Laws of 1999, ch. 86, § 4,

Said abstract must be made upon a form furnished by the director and shall include the name and address of the party charged, the number, if any, of the party's driver's or chauffeur's license, the registration number of the vehicle involved, the nature of the offense, the date of hearing, the plea, the judgment, whether bail forfeited, whether the determination that a traffic infraction was committed was contested, and the amount of the fine, forfeiture, or penalty as the case may be.

See 52nd Leg., Reg. Sess. (Wash. 1991); Laws of 1991, ch. 363, § 123 (emphasis added); compare RCW 46.52.101(2), (3). The abstract prepared and certified as true and correct by the sentencing court is comparable in both accuracy and reliability to any citation (or "judgment") the court would complete.

Moreover, for convictions occurring prior to 1998, the abstract is likely the only reliable certified conviction record available. Prior to 1998, there was no requirement that the courts permanently maintain conviction records for DUI (RCW 46.61.502) and Physical Control (RCW 46.61.504). The language now found in the last sentence of RCW 46.52.101(1), first appeared in a 1998 amendment to RCW 46.52.100. See 55th Leg., Reg. Sess. (Wash. 1998); Laws of 1998, ch. 204, § 1; see also *State v. Blunt* 118 Wash. App. 1, 8, 71 P.3d 657, 661 (2003)(court files for 1990 DUI case were destroyed after 5 years).

Although the Legislature ordered courts to "maintain the record (of conviction for a violation of RCW 46.61.502 or 46.61.504) permanently" in RCW 46.52.101(1), and CrRLJ 7.2(e) (3) requires that "each judgment and sentence form, either electronic or hard copy,

shall be preserved by the court in perpetuity"; courts do not generally maintain a digitized copy of the original conviction document. Instead, the district and municipal courts have taken the position that only a record of the judgment and sentence must be kept in perpetuity and that this requirement is satisfied by the DISIS record. *See generally, Office of the Secretary of State, Washington State Archives, District and Municipal Court Records Retention Schedule Version 6.0* (March 2009), Item No. 2.3.3.

The actual hard copies of the judgment and sentence that Petitioner claims the State must present at sentencing are still routinely destroyed by court staff after a relatively brief period of time. *See, e.g., THURSTON COUNTY DISTRICT COURT, Public Records Request Form*, available at;

<http://www.co.thurston.wa.us/distcrt/Records%20Request%20Form%20updated%20July%201,%202009.pdf> (last visited Nov. 20, 2009) ("*Closed cases over 3 years met State retention guidelines and have been destroyed – only an electronic docket is available and will be sent in lieu of your request unless noted otherwise.")

As a result, it is often not possible for the prosecution to obtain a certified hard copy of original citations/judgment from a District or Municipal court. The form of such archival conviction records, and the ability to obtain them, varies from jurisdiction to jurisdiction. The prosecutor, as the later proponent of the conviction record, has no

control or authority over the record keeping of those District and Municipal courts.

Yet, because the courts *are* required to prepare and certify abstracts of those convictions, to be maintained by the Dept. of Licensing, the abstracts are the most available and reliable record of conviction.¹⁰

The use of the certified abstract in this case proved the Lincoln County DUI by a preponderance. The abstract is a highly reliable and accurate record of the conviction and the information contained within it was prepared by the sentencing court at or near the time of the conviction. Further, the abstract provide by the sentencing court was certified as to accuracy at the time it was submitted to the Dept. of Licensing. The State's admission of the certified abstract to prove the conviction goes far beyond the minimum due process requirements that the sentencing court base its decision on information bearing some minimal indicium of reliability beyond mere allegation.

To find that such a record is not sufficient to prove a conviction by the preponderance, and instead as Petitioner suggests, require presentment of a hard copy of the original citation; would do nothing to improve the accuracy or reliability of the conviction data provided at

¹⁰ The Dept. of Licensing was required to maintain the records of conviction. In 1994 the retention period was increased from 5 years to 10 years. 53rd Leg., Reg. Sess. (Wash. 1994); Laws of 1994, ch. 275, § 14. (amending RCW 46.01.260). Under the current version of the statute, such records must be maintained permanently. See RCW 46.01.260(2)(a). Additionally, a record of conviction for a DUI is not subject to vacation. See RCW 9.96.060(2)(c).

sentencing; but may operate to provide immunity from scoring or enhancements that should attach to prior serious traffic convictions, based on the particular record keeping and archival procedures of the court in the jurisdiction where the prior conviction occurred.

Such a proposition would not only frustrate the statutory sentencing provisions that require scoring or punishment associated with prior serious criminal traffic convictions – but would undermine the numerous statutory procedures in place to ensure the accuracy, reliability, and *availability* of conviction data from the abstracts maintained by the Dept. of Licensing. It would also conflict with the apparent practice of various courts who now utilize electronic data storage of conviction records in lieu of maintaining copies of original sentencing documents.

f. Petitioner waived his challenge to the conviction.

In the present case, the Petitioner agreed to the validity and admission of the Lincoln County judgment and docket. The agreement waived his challenge to the existence of the DUI conviction. 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. *Bergstrom* at 92-94 (citing *In re Pers. Restraint of Goodwin*, 146 Wash.2d 861, 874, 50 P.3d 618 (2002)).

g. If Petitioner was found to have made an objection, remand for a hearing to permit the State to prove the conviction is the proper remedy

In the present case, the Petitioner made a generalized objection of sufficiency. Such a broad objection is not sufficient.

When a defendant raises a specific objection at sentencing *and the State fails to respond with evidence* of the defendant's prior convictions, then the State is held to the record as it existed at the sentencing hearing. *Mendoza*, 165 Wash.2d at 930, 205 P.3d 113 (citing *State v. Lopez*, 147 Wash.2d at 520-21, 55 P.3d 609).

However, where there is no specific objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence at sentencing. *Id.*

Additionally, if the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object" before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce additional evidence. *Bergstrom*, 162 Wash.2d 87, 92-94; *Mendoza*, 165 Wash.2d at 930, 205 P.3d 113.

For example, in *State v. Rivers*, 130 Wash. App 689, 128 P.3d 608 (2005), the Appellate Court held the State failed to meet its

burden when it failed to offer a court-certified copy of a prior strike offense conviction with no explanation why it failed to do so, and the defendant contested the State's assertion that he was a persistent offender. *Id.* at 705. However, because the State offered some supporting evidence, a specific objection from the defendant was required to hold the State to the existing record. *Id.* at 705-706. The proper remedy was to remand to the sentencing court to permit the State the opportunity to meet its burden. *Id.* at 707. *See also State v. McCorkle*, 88 Wash. App. 485, 945 P.2d 736, 743 (1997) (general, blanket objections to reliability of documents and sufficiency does not bar State from proving convictions at sentencing on remand).

The State proved the underlying conviction by a preponderance. The defendant did not provide a sufficient record to show his specific objection to the *existence* of the underlying conviction. Giving petitioner the benefit of the doubt, at best trial counsel objected to sufficiency of the evidence to prove the preponderance standard. Even if the defendant had objected to either the existence of the conviction or the use of the documents; and the Court found the State *had not* proved the conviction by preponderance, then the proper remedy would have been to remand the matter for an evidentiary hearing to permit the State to prove the conviction. In the present case, the State provided evidence of the

conviction before sentencing, and then supplemented the record with additional evidence of the conviction at the sentencing hearing.

However, in the present case the subsequent uncontested admission of the judgment/citation would have made even a "specific" objection moot.

4. CONCLUSION

Petitioner's second PRP did not present any basis to grant review under RAP 16.4. The second petition was not timely and equitable tolling did not apply to extend the filing period. Dismissal was required and relief should not be provided.

The Petitioner failed to raise a challenge to his DUI conviction in his previous appeal or previous petition, thus his most recent petition and motion are an abuse of writ.

The State sufficiently proved the underlying conviction by a preponderance of the evidence using a certified conviction record; without objection from the Petitioner. Petitioner waived his challenge to the reliance upon the documents in the record.

Finally, even if the court found an objection was made, remand for an evidentiary hearing to permit proof of the conviction would be the proper remedy.

Dated this 23rd day of November 2009

Respectfully Submitted by:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

PROOF OF SERVICE

I, Karl F. Sloan, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 23rd day of November, 2009, I e-filed the document to which this proof of service is attached with the Washington Supreme Court by sending this document to supreme@courts.wa.gov.

A copy of this document was served by e-mail on the following individuals:

Maureen M. Cyr, Attorney for Appellant, at Maureen@washapp.org

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

Signed this 23rd day of November, 2009, at Okanogan, Washington.

By



Karl F. Sloan, WSBA# 27217
Attorney for Respondent

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