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COURT OF APPEALS
DIVISION II

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
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NO.
COA No. 39676-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

MONTE W. HUNLEY, Respondent.

PETITION FOR REVIEW

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Prosecuting Attorney

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I. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for Grays Harbor County, asks this Court to accept review of that portion of the Court of Appeals decision terminating review designated in section II of this petition.

II. COURT OF APPEALS DECISION

The State seeks review of the published Court of Appeals decision that declared the 2008 amendments to RCW 9.94A.500 and .530 unconstitutional. *See State v. Hurley*, COA No. 39676-9-II, slip op. at 8-11 (May 17, 2011). A copy of the Court of Appeals decision is in the appendix at pages A-1 through A-30. Division II's opinion was filed May 17, 2011, and was amended by the Court on June 2, 2011.

III. ISSUES PRESENTED FOR REVIEW

This Court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). It is also the responsibility of the legislature to establish the sentencing process. *Id.* The judiciary may only alter the sentencing process when the legislatively prescribed procedure violates a defendant's constitutional rights.

One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not presented at trial. *State*

v. *Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). The 2008 amendment to RCW 9.94A.530(2) codifies this rule with respect to criminal history. Division Two held that the Legislature's codification of the contemporaneous objection rule violates a criminal defendant's due process rights. *Hunley*, slip op. at 10. Should this Court accept review of this significant constitutional ruling which will impact hundreds of sentencing procedures each year, and which conflicts with many of this Court's decisions? *See generally* RAP 13.4(b)(1), (3) and (4).

Due process requires that information relied upon at sentencing have some minimal indicium of reliability. *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). The 2008 amendment to RCW 9.94A.500(1) reflects the Legislature's determination that a criminal history summary prepared by the prosecuting attorney is at least as reliable as the criminal history summary in a presentence report or from a federal or state agency. Division Two held that this statute violates a criminal defendant's due process rights. Should this Court accept review of this significant constitutional question which will impact hundreds of sentencing procedures each year? *See generally* RAP 13.4(b)(3) and (4).

IV. STATEMENT OF THE CASE

Grays Harbor County in Washington has a population of approximately 72,000.¹ The community is served by three superior court judicial officers.² These three superior court judges preside over approximately 650 criminal filings a year.³

Monte Hunley was charged in the Grays Harbor County Superior with the crime of attempting to elude a police vehicle. CP 1. The deputy prosecuting attorney (DPA) who represented the State of Washington in this matter was Gerald A. Fuller. *Id.* DPA Fuller has served Grays Harbor for more than 25 years.⁴ A jury found Hunley guilty of the charged offense in a trial that was presided over by the Honorable David Edwards. *See* 2RP 1.⁵

Eleven days prior to the July 13, 2009, sentencing hearing, DPA

¹*See* United States Census Bureau, State and County Quick Facts, <http://quickfacts.census.gov/qfd/states/53/53027.html> (last visited June 10, 2011).

²RCW 2.08.062.

³*See* Administrative Office of the Courts, *Superior Court 2009 Annual Caseload Report*, at 28 (2010) (556 criminal filings); Administrative Office of the Courts, *Superior Court 2008 Annual Caseload Report*, at 28 (2009) (641 criminal filings); Administrative Office of the Courts, *Superior Court 2007 Annual Caseload Report*, at 28 (2008) (666 criminal filings); Administrative Office of the Courts, *Superior Court 2006 Annual Caseload Report*, at 30 (2007) (752 criminal filings); Administrative Office of the Courts, *Superior Court 2005 Annual Caseload Report*, at 30 (2006)(768 criminal filings).

⁴*See, e.g., State v. Runions*, 100 Wn.2d 52, 665 P.2d 1358 (1983) (identifying Gerald L. Fuller, Grays Harbor County Deputy Prosecuting Attorney, as counsel for the State).

⁵The verbatim report of proceedings consists of two volumes. The page numbering of each volume begins with the number "1." To avoid confusion, the State will cite the June 25, 2009, volume as "1RP." The June 30, 2009, and July 13, 2009, volume will be cited as "2RP."

Fuller filed a statement of prosecuting attorney. CP 26. This document summarized Hunley's prior criminal record, identifying each offense by the name of crime, the sentencing court, and the cause number:

Assault 2°	Grays Harbor Juvenile 00-8-104-3
Trafficking in Stolen Property	Grays Harbor County, WA 01-1-440-1
Theft 2°	Grays Harbor County, WA 04-1-23-1
Possession of Stolen Property 1°	Grays Harbor County, WA 05-1-58-1
Burglary 2°	Grays Harbor County, WA 07-1-453-2
Reckless Driving	Aberdeen Municipal Court C49541

CP 27-28.

Seven days later, Hunley filed his statement on sentencing. CP 30. This statement took issue with the jury's finding regarding the enhancement, but contained no objection to the criminal history identified by DPA Fuller. *Id.* Hunley's sentencing hearing presentation was similarly silent with respect to the prosecutor's summary of his criminal history. Specifically, Hunley did not question, challenge, object to, or dispute the criminal history identified by DPA Fuller in the statement of prosecuting attorney, the offender score that was calculated based upon that criminal history, or the standard range that was calculated based upon the offender score. *See* 2RP 54. Hunley's lack of objection to the identified criminal history constituted

an admission. *See* RCW 9.94A.530(2).

Judge Edwards sentenced Hunley based solely upon information “admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). The imposed sentence was within the standard range. CP 7; 2RP 55-56; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.533(11).

Hunley appealed his conviction and his sentence. For the first time on appeal, Hunley challenged the sufficiency of DPA Fuller’s criminal history summary. Hunley claimed that the 2008 amendments to RCW 9.94A.500 and RCW 9.94A.530, which specifically allow a sentencing court to rely upon an unchallenged prosecutor’s summary of a defendant’s criminal history in imposing a sentence, violated his constitutional privilege against self-incrimination and shifted the burden of proof from the State to the defendant. *See* Appellant’s Opening Brief, at 9-11.

Hunley’s appeal was heard by Division Two. Two judges of that Court held that the 2008 amendments to RCW 9.94A.500 and .530 violate due process. *State v. Hunley*, COA No. 39676-9-II, slip op. at 8 (May 17, 2011). Judge Hunt dissented on the grounds that the 2008 amendments merely allowed the sentencing court to treat an unchallenged or objected to prosecutor’s criminal history summary the same as presentence reports have been treated. *Id.*, at 18.

The State files this timely petition for review.

V. ARGUMENT

The Sentencing Reform Act of 1984 (“SRA”) represented a significant change from the prior indeterminate sentencing scheme. Its enactment was met with challenged on numerous constitutional grounds, including separation of powers and due process. The SRA survived each challenge because the fixing of penalties and the selection of procedures for imposing sentences is a function of the legislature and the preponderance of the evidence standard of proof satisfies due process. *See generally State v. Ammons*, 105 Wn.2d 175, 180-81, 185, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

Twenty-seven years later, constitutional challenges to SRA provisions are governed by the same standards as constitutional challenges to other statutes. A statute is presumed constitutional; the party attacking that statute has the burden of proving it is unconstitutional beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). Division Two abandoned the presumption of constitutionality and relieved Hunley of his burden of proof when it declared the 2008 amendments to RCW 9.94A.500 and .530 violative of due process. In doing so, Division Two ignored the Legislature’s primary role regarding sentencing and sentencing procedures and numerous decisions of this Court. Review should be accepted to correct Division Two’s error and to restore the balance

between the legislative and judicial branches.

The SRA has undergone repeated changes over the last quarter century. See *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 7, 100 P.3d 805 (2004) (noting that the SRA had been amended 181 times between 1981 and 2004). One core principle of the original SRA, however, has never been diminished. Specifically, a defendant may not appeal a standard range sentence unless the trial court refused to consider information mandated by the SRA or considered information in violation of the SRA. Compare Former RCW 9.94A.210(1) (Laws of 1984, ch. 209, § 13(1)(b)), with RCW 9.94A.585(1). Accord *State v. Mail* 121 Wn.2d 707, 713, 854 P.2d 1042 (1993).

The SRA's restriction upon appeals from standard range sentences does not violate a defendant's constitutional rights because the legislature took steps to ensure that a judge does not rely upon "material facts of constitutional magnitude that are not true". *State v. Herzog*, 112 Wn.2d 419, 431, 771 P.2d 739 (1989).

In order to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information, the Legislature has stated:

In determining any sentence, 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. Acknowledgement (sic)

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.

RCW 9.94A.370(2).

Herzog, 112 Wn.2d at 431-32.

“Pursuant to the statute, then, the defendant's failure to object to material facts contained in the presentence report deemed those facts acknowledged for purposes of the sentencing judge's consideration.” *Herzog*, 112 Wn.2d at 432. “The sentencing judge is always free to rely on acknowledged information.” *Mail*, 121 Wn.2d at 712. Requiring a defendant to voice an objection to the information presented in a presentence report is not a violation of his constitutional rights against self-incrimination. *Ammons*, 105 Wn.2d at 184; *State v. Blunt*, 118 Wn. App. 1, 9-11, 71 P.3d 657 (2003).

The “objection requirement” of former RCW 9.94A.370(2) (Laws of 1987, ch. 131, § 1)⁶ was merely a codification of a well-established rule of appellate procedure. One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not

⁶RCW 9.94A.370(2) is currently codified as RCW 9.94A.530. The contemporaneous objection requirement was included in the SRA since its inception. *See* Laws of 2004, ch. 209, § 5.

presented at trial. *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule has been a part of Washington's legal landscape since territorial days.⁷ In one case, this Court remarked that it had adhered to a contemporaneous objection requirement "with almost monotonous continuity." *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing 34 prior cases going back to 1895).

The contemporaneous objection rule is rooted in notions of fundamental fairness and judicial economy and has been applied across a whole range of issues, constitutional, non constitutional, civil and criminal. See Karl B. Tegland, *2A Washington Practice: Rules Practice*, RAP 2.5, at 190 et. seq. (6th ed.2004); *Puckett v. United States*, ___ U.S. ___, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009). This rule is also recognized by the United States Supreme Court. See, e.g. *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944) ("No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). This rule is applied by both federal and state courts to sentencing determinations. See, e.g., *United States v. Dobish*, 102 F.3d 760, 762 (6th Cir. 1996) (when a defendant fails to object

⁷See Code of 1881, § 1088 (provisions of the civil practice act with regard to taking exceptions would also govern in criminal cases); *Blumberg v. H. H. McNear & Co.*, 1 Wash. Terr. 141, 141-42 (1861) (court will not review claims to which error was not assigned).

to an error at sentencing, he forfeits his right to raise that error on appeal); *People v. Williams*, 149 Ill. 2d 467, 599 N.E.2d 913, 926 (1992) (“failure to object to the sufficiency of the reports at the sentencing hearing results in waiver of the issue on review”).

The 2008 amendments to RCW 9.94A.500 and .530 extend the contemporaneous objection requirement to information that is at least as reliable as presentence reports. The 2008 amendments to RCW 9.94A.500 and .530 subject the new information to the very process that the *Herzog* court held protected a defendant’s due process rights.

The pre-2008 amendments to RCW 9.94A.500 and .530 allowed a sentence to be based upon unchallenged information contained within a presentence report. *See* Former RCW 9.94A.530 (Laws of 2005 ch. 68, § 2).⁸ The “presentence report” identified in former RCW 9.94A.500(1) is commonly understood as a report completed by the Department of Corrections (DOC). *State v. Mendoza*, 165 Wn.2d 913, 922, 205 P.3d 113 (2009). While neither statute nor court rule required a presentence report to be submitted under penalty of perjury, CrR 7.1(b) did require that “[t]he report of the presentence investigation shall contain the defendant’s criminal history, as defined by RCW 9.94A.030.”

A defendant’s failure to object to the criminal history contained in the

⁸The relevant language has remained essentially unchanged since the adoption of the SRA. *See generally* Laws of 1984 ch. 209, § 20.

presentence investigation or to other evidence regarding prior convictions precluded an appeal challenging the sufficiency of the proof of the prior conviction or related fact. *See, e.g., State v. Cannon*, 130 Wn.2d 313, 330-321, 922 P.2d 1293 (1996) (criminal history and the circumstances surrounding the current crime); *State v. Mail, supra* (criminal history and facts underlying the prior offenses); *In re Williams*, 111 Wn.2d 353, 365-368, 759 P.2d 436 (1988) (due process not violated by the use of an unobjected to Department of Licensing abstract of the defendant's driver's record to prove the existence of prior convictions). This restriction was consistent with the principle that a defendant can affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. *Mendoza*, 165 Wn.2d at 920.

Initially, a Court could order DOC to prepare a presentence report ("PSI") in every case. *See* Former RCW 9.94A.110(1) (Laws of 1984, ch. 209, § 5). Budget considerations, however, eventually led the Legislature to restrict the preparation of a PSI to a handful of offenses. *See* RCW 9.94A.500 (limiting availability of a PSI to felony sexual offenses and mentally ill defendants). At the same time, the Legislature ordered prosecutors to provide judges with the defendant's criminal history. *See, e.g.,* RCW 46.61.513 (prosecutor to verify the defendant's criminal history); RCW 10.99.045(3)(b) (prosecutor to provide the court with the defendant's criminal history); RCW

10.99.100(2)(a) (same). The prosecutor, therefore, eventually assumed the PSI writer's task of summarizing the defendant's criminal history.

This Court, however, did not extend the benefits of the contemporaneous objection requirement to a prosecutor's summary of a defendant's criminal history. *See generally State v. Mendoza, supra*. This meant that whenever there was no PSI, the State was required to amass certified copies of a defendant's prior convictions or other comparable evidence or face an appeal and resentencing hearing. *See, e.g., State v. Mendoza, supra; State v. Ford*, 137 Wn.2d 472, 476-79, 973 P.2d 452 (1999). Satisfying this burden consumed a significant number of hours, contrary to the SRA's goal of "mak[ing] frugal use of the state's and local governments' resources." RCW 9.94A.010(6).

The Legislature could have reasonably considered that

"an inflexible rule requiring formal proof of earlier court records only by authenticated or certified copies of those records and proof of identity [is] incompatible with considerations of judicial economy and efficiency essential to the disposition of present-day caseloads. Nor do such procedures provide any necessary or useful safeguards to the defendants in cases such as this where the fact that the prior conviction had occurred has never been denied."

People v. Williams, 149 Ill. 2d 467, 599 N.E.2d 913, 925 (1992), *quoting* *People v. Davis*, 65 Ill. 2d 157, 357 N.E.2d 792, 795-96 (1976).

The Legislature could have reasonably determined that a criminal history prepared by a prosecutor is at least as reliable as a criminal history

prepared by a DOC employee. While both a DOC employee's and a prosecutor's concern for their professional reputation will motivate them to provide the court with an accurate criminal history, the prosecutor is also subject to RPC 3.3.⁹ A prosecutor's signature on the criminal history summary, moreover, constitutes a statement that the prosecutor has made a reasonable inquiry into the defendant's criminal history and that the list of prior offenses is well grounded in fact. *See generally* CR 11(a) (made applicable to pleadings in criminal matters by CrR 8.2 and CR 7(b)(3)).

Although a number of courts have found informal prosecutor prepared summaries of criminal history sufficiently reliable for sentencing purposes,¹⁰ the Legislature chose language that allows each sentencing judge to decide what weight to give to the prosecutor prepared summary of criminal history. *See* RCW 9.94A.500(1) ("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

⁹RPC 3.3 requires a prosecutor to only offer evidence to a court that the prosecutor believes to be truthful, and to correct any erroneous information provided to the court by the prosecutor. At least one court has noted that this rule entitles a trial judge to expect total candor from a prosecutor without resorting to the administration of an oath. *See Gray v. State*, 317 Md. 250, 562 A.2d 1278, 1282 (1989).

¹⁰*See, e.g., People v. Faulkner*, 12 Ill. 2d 176, 145 N.E.2d 632, 636-37 (1957) (trial court's reliance on assistant State's Attorney's oral summary of defendant's criminal record in determining the degree of punishment was proper); *People v. Rummerfield*, 4 Ill. 2d 29, 31, 122 N.E.2d 170 (1954) (same). *Accord People v. Deweese*, 27 Ill. 2d 332, 189 N.E.2d 247, 249-50 (1963) ("we have repeatedly held that informal presentation of a defendant's former record is not erroneous at a hearing in aggravation and mitigation, the trial court not being bound at such hearing by the usual rules of evidence.").

validity of the convictions listed therein.”).

In the instant case, Judge Edwards did not abuse his discretion by accepting DPA Fuller’s summary of Hunley’s criminal history without further inquiry. Apart from Hunley’s failure to object, all of Hunley’s convictions arose from offenses committed in Grays Harbor County. Five of the six offenses had been prosecuted by the Grays Harbor County Prosecuting Attorney’s Office while DPA Fuller was a member of that office. Judge Edwards, therefore, could have reasonably concluded that DPA Fuller had personal knowledge of Hunley and of Hunley’s interactions with the Grays Harbor County court system.

Hunley’s failure to object to DPA Fuller’s summary of Hunley’s criminal history, moreover, constituted an “acknowledgment.” *See* RCW 9.94A.530(2) (“Acknowledgment includes . . . not objecting to criminal history presented at the time of sentencing.”). DPA Fuller’s summary of Hunley’s criminal history was provided to Hunley sufficiently in advance of the sentencing hearing as to allow Hunley to determine whether there were any errors. *See* CrR 7.1(a)(3) (requiring a PSI to be provided to a defendant at least 10 days prior to sentencing); CP 26 (Statement of Prosecuting Attorney filed on July 2, 2009). Hunley’s decision to “acknowledge” the existence of the prior convictions relieved the State of its burden to produce evidence. *Mendoza*, 165 Wn.2d at 920.

Since the sentencing judge considered all the information mandated by the SRA, and based Hunley's standard range sentence solely upon acknowledged or proven information, Hunley's sentence was imposed in a constitutional manner and is not reviewable by the appellate courts. *State v. Mail, supra*; *State v. Herzog, supra*. Division Two's opinion to the contrary must be overruled by this Court.

VI. CONCLUSION

The State respectfully requests that this Court accept review of the issues identified in section III. of this pleading.

Dated this 13th day of June, 2011.

Respectfully Submitted,

H. Steward Menefee
Prosecuting Attorney

Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

PROOF OF SERVICE

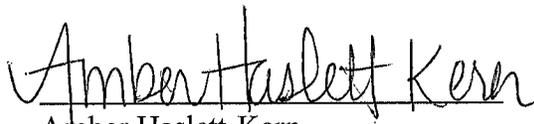
I, Amber Haslett-Kern, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 13th day of June, 2011, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Jodi R. Backlund
Manek R. Mistry
Backlund & Mistry
203 Fourth Avenue East, Suite 404
Olympia, WA 98501-1189

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

Signed this 13th day of June, 2011, at Olympia, Washington.


Amber Haslett-Kern

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 39676-9-II

Respondent,

v.

ORDER AMENDING OPINION

MONTE W. HUNLEY,

Appellant.

It is hereby ORDERED that court's opinion filed on May 17, 2011 is amended as follows:

On page 6, paragraph 2, the following text shall be deleted:

Our Supreme Court has consistently held that the State bears the constitutional burden of proving prior convictions by a preponderance of the evidence.

The following language shall be inserted in its place:

Our Supreme Court has consistently held that the State meets its constitutional burden to prove prior convictions at sentencing when it proves such convictions by a preponderance of the evidence.

And on page 8, paragraph 1, the following language shall be deleted:

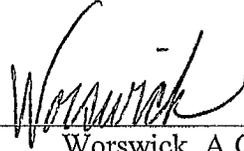
Ford and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by a preponderance of the evidence.

A-1

And the following language shall be inserted in its place:

Ford and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by presenting at least some evidence.

DATED this 2ND day of JUNE, 2011.



Worswick, A.C.J.

I concur:



Van Deren, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MONTE W. HUNLEY,

Appellant.

No. 39676-9

PUBLISHED OPINION

Worswick, A.C.J. — A jury found Monte Hunley guilty of attempting to elude a police vehicle. Hunley appeals, arguing (1) that defense counsel rendered ineffective assistance by failing to request a lesser included offense instruction for reckless driving, and (2) that provisions of the Sentencing Reform Act¹ (SRA) unconstitutionally relieve the State of its burden of proof at sentencing. Holding that reckless driving is not a lesser included offense in attempting to elude a police vehicle and that the challenged SRA provisions violate due process, we affirm Hunley's conviction and remand for resentencing, allowing the State an opportunity to prove the defendant's criminal history.

¹ Chapter 9.94A RCW.

FACTS

On April 18, 2009, Washington State Trooper Ben Blankenship was working stationary radar duty off of Highway 12. He was in full uniform in a marked police car equipped with a light bar and siren. A black Mitsubishi Eclipse with a male driver sped past, and Trooper Blankenship used radar to measure its speed as 87 miles per hour in a 55-mile per hour zone. Trooper Blankenship followed the Eclipse, activating his lights and sirens. The Eclipse did not stop, but turned onto a two lane "rural residential" road with a posted speed limit of 30 miles per hour. Verbatim Report of Proceedings (VRP) (June 30, 2009) at 10. Trooper Blankenship estimated that the Eclipse was traveling at 70 miles per hour along this road.

The Eclipse sped through two stop signs and continued along two-lane roads, traveling approximately 60 miles per hour in 30- or 35-mile per hour zones. The Eclipse then turned off onto a dirt road. When Trooper Blankenship caught up to the Eclipse, it was abandoned. More officers arrived, including an officer with a tracking dog. The officers used the dog to track the car's occupants, finding Hunley nearby just below a riverbank, along with a female who had been in the car with him. Hunley admitted to being the Eclipse's driver.

The State charged Hunley with attempting to elude a police vehicle under RCW 46.61.024. The State also filed a special allegation under RCW 9.94A.834, alleging that one or more persons other than the defendant or the pursuing officer were threatened by Hunley's attempt to elude a police vehicle. A jury found Hunley guilty of attempting to elude a police vehicle, and returned a special verdict in the affirmative on the special allegation. At sentencing, the State offered a statement of prosecuting attorney listing Hunley's prior convictions for

sentencing purposes.² Hunley did not acknowledge his criminal history, but did not object to the statement or dispute its accuracy. Based on the statement of prosecuting attorney, the trial court calculated Hunley's offender score as a five and sentenced Hunley to the top of that standard sentencing range.

ANALYSIS

I. Ineffective Assistance of Counsel

Hunley first argues that he was denied effective assistance of counsel at trial. He claims that because reckless driving is a lesser included offense in attempting to elude a police vehicle, defense counsel rendered ineffective assistance by failing to request a lesser included offense instruction. The State responds that pursuant to a 2003 amendment to RCW 46.61.024, reckless driving is no longer an included offense of attempting to elude a police vehicle. The State is correct.

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington State Constitution guarantee effective assistance of counsel. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 779, 863 P.2d 554 (1993); *State v. Sardinia*, 42 Wn. App. 533, 538, 713 P.2d 122 (1986). Denial of effective assistance is manifest error affecting a constitutional right, reviewable for the first time on appeal. *See State v. Holley*, 75 Wn. App. 191, 196-97, 876 P.2d 973 (1994); RAP 2.5(a). Appellate courts review ineffective assistance claims de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

² The statement of prosecuting attorney was an unsworn document setting forth Hunley's alleged prior convictions, including their cause numbers. It listed the date of one out of six alleged offenses and did not list the date of any of the convictions.

Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). In order to show that he received ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because both prongs must be met, a failure to show either prong will end the inquiry. *See State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Under the *Workman*³ test, a party is entitled to a lesser included offense instruction where "(1) each element of the lesser offense is a necessary element of the greater offense charged (the legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (the factual prong)." *State v. Meneses*, 169 Wn.2d 586, 595, 238 P.3d 495 (2010); *In re Pers. Restraint of Crace*, 157 Wn. App. 81, 106, 236 P.3d 914 (2010). Under the legal prong, an offense is not included in a crime when it is possible to commit the greater offense without committing the lesser offense. *State v. Turner*, 143 Wn.2d 715, 729, 23 P.3d 499 (2001) (quoting *State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)). Under the factual prong, the evidence must support an inference that the defendant committed only the proposed lesser included offense. *State v. Prado*, 144 Wn. App. 227, 241-42, 181 P.3d 901 (2008) (quoting *State v. Karp*, 69 Wn. App. 369, 376, 848 P.2d 1304 (1993)).

Hunley's claim cannot satisfy the legal prong of the *Workman* test because it is possible to attempt to elude a police vehicle without committing reckless driving. A person is guilty of

³ *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

reckless driving when that person drives a vehicle in willful or wanton disregard for the safety of persons or property. RCW 46.61.500(1). In contrast, a person is guilty of attempting to elude a police vehicle when (1) a uniformed police officer signals the person to stop by hand, voice, emergency light, or siren; (2) the police officer is in a vehicle equipped with lights and sirens; (3) the defendant willfully fails or refuses to immediately bring the vehicle to a stop after being signaled to stop; and (4) the defendant drives his or her vehicle in a reckless manner. See RCW 46.61.024(1).

It is well settled that “in a reckless manner” means “driving in a rash or heedless manner, indifferent to the consequences.” *State v. Roggenkamp*, 153 Wn.2d 614, 621-22, 106 P.3d 196 (2005). This is a lower mental state than the “willful or wanton” mental state required for reckless driving. *State v. Ridgley*, 141 Wn. App. 771, 782, 174 P.3d 105 (2007). Because one can drive “in a reckless manner” without “willful or wanton disregard for the safety of persons or property,” one can be guilty of attempting to elude a police vehicle without being guilty of reckless driving. Consequently, reckless driving is not a lesser included offense in attempting to elude a police vehicle and Hunley was not entitled to a lesser included offense instruction under the legal prong of the *Workman* test.⁴

Because Hunley was not entitled to a lesser included offense instruction, any claim to that

⁴ Hunley cites *State v. Argueta*, 107 Wn. App. 532, 539, 27 P.3d 242 (2001) for the proposition that reckless driving is a lesser included offense in attempting to elude a police vehicle. But *Argueta* was decided under a prior version of RCW 46.61.024 which provided the mental element of “wanton or willful disregard,” identical to reckless driving. Former RCW 46.61.024(1) (1983). The legislature amended the attempted eluding statute in 2003, replacing the “wanton or willful” mental state with “reckless manner” and abrogating *Argueta*’s holding. RCW 46.61.024(1).

effect at trial would have failed. Hunley has therefore failed to demonstrate that his trial counsel's performance prejudiced him, and his ineffective assistance claim fails.

II. Burden of Proof at Sentencing

Hunley also contends the 2008 amendments to RCW 9.94A.500 and .530 violate due process.⁵ He argues that these sections of the SRA unconstitutionally relieve the State of its burden to prove prior convictions. We agree.

Our Supreme Court has consistently held that the State bears the constitutional burden of proving prior convictions by a preponderance of the evidence. *See State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). In *Ford*, the court held that the State's "bare assertions, unsupported by evidence" are insufficient to prove a defendant's prior convictions. 137 Wn.2d at 482. The *Ford* court held that, under the basic principles of due process, the facts relied on in sentencing must have some basis in the record. 137 Wn.2d at 482 (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)). The court further held that the prosecutor's assertions are neither facts nor evidence, but merely argument. *Ford*, 137 Wn.2d at 483 n.3. In its analysis, the court noted the critical importance of due process at sentencing, quoting the ABA Standards for Criminal Justice:

The meaning of appropriate due process at sentencing is not ascertainable in strictly utilitarian terms. There is an important symbolic aspect to the requirement of due process. Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision critically affecting the public interest, the interests of victims, and the interests of the persons being sentenced. Even if informal, seemingly casual, sentencing determinations reach the

⁵ Hunley also argues that these amendments violate the right to remain silent at sentencing. Because we find that the amendments violate due process by unconstitutionally shifting the burden of proof at sentencing, we do not address the right to remain silent.

same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions.

Ford, 137 Wn.2d at 484 (quoting *Am. Bar Ass'n*, ABA, Standards for Criminal Justice: Sentencing std. 18-5.17 at 206 (3d ed. 1994)).

Based on this analysis, the court held:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA *but would result in an unconstitutional shifting of the burden of proof to the defendant.*

Ford, 137 Wn.2d at 482 (emphasis added). In other words, constitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden. The court has reaffirmed this rule in subsequent opinions, including *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); and *State v. Mendoza*, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009).⁶

In 2008, the legislature amended RCW 9.94A.500(1) to add, "A criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." Laws of 2008, ch. 231, § 2. And the legislature amended RCW 9.94A.530(2) to add that "not objecting to criminal history presented at the time of sentencing" constitutes acknowledgement of the criminal history. Laws of 2008,

⁶ We note that our Supreme Court recently reaffirmed *Mendoza* in *State v. Weaver*, No. 84982-0 (Wash. Apr. 7, 2011). Because *Weaver* is based on the pre-2008 SRA, it does not change our analysis below. See No. 84982-0, slip op. at 4-5.

ch. 231, § 4. These amendments attempt to overrule *Ford* and its progeny by providing that a criminal history summary provides prima facie evidence of criminal history, and that failure to object to this summary constitutes acknowledgement. However, the legislature has no power to modify or impair a judicial interpretation of the constitution. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 497, 585 P.2d 71 (1978). *Ford* was based on the constitutional principle of due process. 137 Wn.2d at 482. Thus, the 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) cannot constitutionally convert a prosecutor's "bare assertions" into evidence or shift the burden of proof by treating the defendant's silence as acknowledgement.

RCW 9.94A.500(1) is not facially unconstitutional. Rather, it is unconstitutional as applied when used to relieve the State of its burden of proof at sentencing. So long as a "criminal history summary" includes sufficient evidence of prior convictions, it does not violate due process for the State to use such a summary as prima facie evidence of criminal history. However, RCW 9.94A.530(2) is facially unconstitutional insofar as it provides that the defendant's failure to object to the "bare assertions" in a criminal history summary constitutes acknowledgement. *Ford* and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by a preponderance of the evidence.

Here, the statement of prosecuting attorney is exactly the type of "bare assertion" rejected in *Ford*. The unsworn document simply lists the crimes that the prosecutor believes Hunley to have been convicted of. Under *Ford*, such allegations are not evidence. The trial court violated Hunley's right to due process of law by sentencing him based on facts for which there was no

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evidence in the record. Therefore, we vacate Hunley's sentence.

Hunley argues that he should be resentenced with an offender score of zero. We disagree.

On remand, the State may present evidence of Hunley's past convictions. "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 Wn.2d at 930. "But where, as here, there is no 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." *Mendoza*, 165 Wn.2d at 930. Moreover, this remedy is consistent with RCW 9.94A.530(2), which provides, "On remand for resentencing . . . the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

Before concluding, we address some of the arguments made by the dissent. First, the dissent argues that Hunley waived any objection to his criminal history by failing to object. But we may consider manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a). Moreover, the dissent's argument is directly contrary to *Ford* and we cannot accept it. *See Ford*, 137 Wn.2d at 477 ("In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.")

The dissent also argues that *Ford* was decided under the SRA and did not announce a constitutional rule. But the Supreme Court unambiguously stated that treating the defendant's

silence as acknowledgement would not only violate the SRA, but would also *unconstitutionally* shift the burden of proof.⁷ *Ford*, 137 Wn.2d at 482.

We acknowledge that the *Ford* court emphasized that it was placing “no additional burden on the State not already required under the SRA.” 137 Wn.2d at 482. But this does not lead to the conclusion that *Ford* is based only on the SRA and not on due process. The *Ford* court noted that in *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), the court “held that the use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence.” 137 Wn.2d at 479-80 (emphasis added). The *Ammons* court based this holding on the rule that defendants have “a liberty interest which minimal due process protects” at sentencing. 105 Wn.2d at 186. We recognize that *Ammons* did not announce that preponderance of the evidence is the lowest evidentiary standard permissible at sentencing. But in holding the State to that standard, the *Ford* court was adhering not only to the statutory requirements of the SRA, but also to the constitutional requirement of minimal due process. We disagree with the dissent not as to the constitutionally required standard of evidence at sentencing, but rather as to the character of the State’s assertions of Hunley’s criminal history. In our view, the State provided no evidence whatsoever of Hunley’s criminal history, failing to satisfy even minimal due process.

Next, the dissent attempts to distinguish *Ford* on the grounds that there, the State relied

⁷ The dissent questions our reliance on this holding by pointing to the *Ford* court’s statement that “[a] criminal defendant is simply not obligated to disprove the State’s position, at least insofar as the State has failed to meet its primary burden of proof.” 137 Wn.2d at 482. This holding does not impugn our analysis because, in our view, the State failed to meet its primary burden of proof by failing to present any evidence of Hunley’s criminal history.

on oral assertions as to the defendant's criminal history. Here, in contrast, the State relied on a written summary of the defendant's criminal history. But under *Mendoza*, this is a distinction without a difference. There, the State filed a statement of prosecuting attorney which listed the defendant's criminal history, listing the sentencing court and the date of each crime. *Mendoza*, 165 Wn.2d at 917-18. The court held that such a statement was not evidence of criminal history. *See Mendoza*, 165 Wn.2d at 929. So too here, the unsworn, written criminal history summary was not evidence of Hunley's criminal history.

We acknowledge that the legislature has amended RCW 9.94A.500(1) to provide that a criminal history summary shall be prima facie evidence of criminal history. But as noted above, under *Ford*, due process requires the State to offer *some* evidence of criminal history, and a prosecutor's assertions are not evidence. Defendants have a constitutional right to be sentenced based on evidence in the record; the legislature cannot strip this right by passing a law which simply labels the State's bare assertions as evidence.⁸

Finally, the dissent argues that the 2008 amendments to the SRA do not shift the burden of proof at sentencing because they do not require the defendant to provide evidence refuting the State's asserted criminal history. Rather, the defendant need only object to the statement of criminal history. Because the defendant need not produce evidence, argues the dissent, the burden of proof is not shifted. This argument is logically sound, but again, based on

⁸ We further acknowledge that the *Mendoza* court noted, "No question has been raised in these cases about the constitutional limits of the legislature's ability to define when an acknowledgment occurs." 165 Wn.2d at 922 n.2. This fact does not impact our analysis here. In our view, *Ford* leaves room for only one conclusion as to the constitutionality of the 2008 amendment to RCW 9.94A.530(2).

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the unambiguous language of *Ford*, we cannot agree. The *Ford* court held that relying on the defendant's silence as acknowledgement "would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford*, 137 Wn.2d at 482. This is binding precedent, and in the absence of any Supreme Court directive to the contrary, we are compelled to follow it.

We affirm Hunley's conviction but remand for resentencing.

Worswick, A.C.J.

I concur:

Van Deren, J.

Hunt, J. (concurring in part and dissenting in part) — I concur in the majority’s affirmance of Hunley’s conviction, but I dissent from their remand for resentencing. I respectfully disagree with their holdings that (1) the 2008 amendments to RCW 9.94A.500(1) and .530(2) are unconstitutional; and (2) the trial court erred in applying these statutes in sentencing Hunley without first *sua sponte* requiring the State to document his prior convictions outlined in the State’s presentence summary—the accuracy of which Hunley did not challenge below and does not challenge on appeal. I would affirm Hunley’s sentence.

I. *Ford*

The majority holds that the State’s written presentence summary of Hunley’s prior offenses is constitutionally insufficient under *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999). See Majority at 6-8. The majority concludes that this summary amounts to nothing more than a “bare assertion[.]” of Hunley’s prior convictions, unsupported by evidence. Majority at 8. In my view, *Ford* does not compel the majority’s conclusion. Unlike *Ford*, Hunley neither challenged the State’s summary of his prior convictions⁹ nor demanded that the State provide supporting

⁹ The presentence summary that the State prepared for Hunley, titled “Statement of Prosecuting Attorney,” listed Hunley’s prior convictions by type and degree of crime, cause number, and sentencing court. Clerk’s Papers (CP) at 27-28. I agree that it might be preferable for such summaries to include additional information, such as conviction and sentencing dates, length of sentence, and release date, if applicable; but their absence here does not change my analysis.

Hunley never objected to the absence of such information, claimed that the evidence presented was inadequate or incorrect, or requested additional information about his prior convictions beyond what the State had provided in its summary. Furthermore, by virtue of RCW 9.94A.500(1) and .530(2), he was on notice that the sentencing court could consider the State’s summary of his prior convictions if he voiced no objection. Therefore, in my view, he has waived any objections and cannot now complain for the first time on appeal that necessary evidence of his uncontested prior convictions was lacking.

documentary proof at sentencing. Ford, in contrast, expressly objected to the State's calculation of his offender score, arguing that his three prior California convictions should not count toward his offender score because they resulted only in civil commitment. *Ford*, 137 Wn.2d at 475. The State orally asserted that these prior convictions would be classified as felonies under comparable Washington law, but it did not introduce supporting evidence. *Ford*, 137 Wn.2d at 475-76. Yet, despite Ford's objection, "California statutes under which Ford was convicted were not offered into evidence," "[n]o comparable Washington statutes were identified," and the trial court apparently "did not engage in any comparison of statutory elements." *Ford*, 137 Wn.2d at 475-76.

The State conceded on appeal that it had not introduced evidence to support its felony comparability classification of Ford's California convictions. But it asserted that (1) a timely express objection by Ford at sentencing would have allowed the State to develop the record to support its classifications, *Ford*, 137 Wn.2d at 478; and (2) thus, Ford's failure to object was the reason for the absence of additional evidence. *Ford*, 137 Wn.2d at 478. Rejecting this argument, the Supreme Court concluded that the State had "fail[ed] to recognize [its] duties and obligations under the [Sentencing Reform Act]," which requires classification of a defendant's out-of-state convictions according to comparable Washington offenses and proof of a defendant's criminal history by a preponderance of the evidence. *Ford*, 137 Wn.2d at 479-80, 483. The *Ford* court reasoned that, although the Sentencing Reform Act of 1981¹⁰ (SRA) in effect at the time allowed the sentencing court to rely on information contained in a presentence report if "acknowledged"

¹⁰ RCW Ch. 9.94A.

by a defendant's failure to object at sentencing: (1) this SRA "acknowledgment" provision did not extend to the prosecutor's "bare assertions" of the defendant's criminal history, *Ford*, 137 Wn.2d at 483, which, in *Ford*, were bare *oral* assertions; and (2) because the State offered no evidence that Washington law would have classified Ford's challenged California convictions as felonies, the SRA did not authorize the sentence imposed. *Ford*, 137 Wn.2d at 485-86.

II. RCW 9.94A.500(1) and .530(2) Amended

In 2008, in response to *Ford* and other recent sentencing cases, our legislature amended the SRA "to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history." Laws of 2008, ch. 231, § 1. To meet this objective, the legislature amended RCW 9.94A.500(1) to allow the State to prove a defendant's criminal history by submitting a "criminal history summary," which, the legislature further provided, "shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1).

The legislature also amended RCW 9.94A.530(2) to allow a sentencing court to rely on the State's criminal history summary when the defendant does not object, as had been the practice with presentence reports under earlier versions of the statute. The amended version of this statute 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. Acknowledgment 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(2), Laws of 2008, ch. 231, § 4(2) (new language emphasized).

The majority holds that the 2008 amendments to RCW 9.94A.500(1) and .530(2) violate due process because they “unconstitutionally relieve the State of its burden to prove prior convictions.” Majority at 6. Respectfully, I disagree. *Ford*, on which the majority heavily relies, delineates three different “burdens” that the SRA and due process principles place on the State and the defendant with respect to the defendant’s prior convictions at sentencing: “the ultimate burden”¹¹ and the “primary burden of proof,”¹² both borne by the State; and “the burden of

¹¹ The “ultimate burden,” which the SRA places on the State, requires the State to “introduce evidence of some kind to support the alleged criminal history.” *Ford*, 137 Wn.2d at 480. *Ford* made clear that this “ultimate burden” is statutory, while the “primary burden” is constitutional. The State must satisfy this statutory “ultimate burden” by a preponderance of the evidence. See RCW 9.94A.500(1); *Ford*, 137 Wn.2d at 480.

¹² The “primary burden of proof,” which due process principles impose on the State, requires the State to provide sentencing information that has “some minimal indicium of reliability beyond mere allegation.” *Ford*, 137 Wn.2d at 481 (emphasis omitted) (internal quotation marks omitted) (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)). In contrast, the State must satisfy its statutory burden of proof under RCW 9.94A.500(1) by a preponderance of the evidence.

The majority points out that in *Ford* our Supreme Court described its holding in *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, (1986) as: “[T]he use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence.” Majority at 10 (emphasis omitted) (quoting *Ford*, 137 Wn.2d at 479-80 (citing *Ammons*, 105 Wn.2d at 186)). The *Ford* court’s characterization of *Ammons* is accurate, but it does not support the majority’s proposition.

In *Ammons*, the question before our Supreme Court was whether due process requires the State to prove a defendant’s prior convictions beyond a reasonable doubt for sentencing purposes. *Ammons*, 105 Wn.2d at 185. Our Supreme Court answered this question in the negative and then held that the preponderance of the evidence standard was sufficient to satisfy due process requirements. See *Ammons*, 105 Wn.2d at 185-86. But the *Ammons* court did not hold that the preponderance of the evidence standard was *necessary* to satisfy due process.

In my view, a close reading of *Ammons* reveals that our Supreme Court did not make preponderance of the evidence the constitutional “floor”; instead, *Ammons* leaves open the possibility that a lesser quantum of evidence could satisfy due process. Therefore, my reading of *Ammons* is consistent with my assertion that *Ford* delineated two separate burdens: (1) the

refutation,” borne by the defendant. *See Ford*, 137 Wn.2d at 480-82. The State met its two burdens here; Hunley never had to bear the third burden.

A. “Ultimate” Statutory Burden of Proof Remains on the State

The *Ford* court held that the pertinent portion of the SRA then in effect placed on the State the “*ultimate* burden of ensuring the record supports the existence and classification of out-of-state convictions.” *Ford*, 137 Wn.2d at 480 (emphasis added). The State’s mere oral assertions, unsupported by any evidence whatsoever, did not meet this burden in *Ford*.

The *Ford* court’s holding responded to (1) the State’s “blame[ing]” its failure to produce *any* evidence to support the comparability of Ford’s California convictions on Ford’s “failure to object at sentencing,” *Ford*, 137 Wn.2d at 478; and (2) the State’s contention that, “had Ford objected to the State’s asserted classification at sentencing and requested an evidentiary hearing, a record would have been developed to decide the issue.” *Ford*, 137 Wn.2d at 478. Our Supreme Court rejected this argument as “fail[ing] to recognize the State’s duties and obligations under the SRA,” *Ford*, 137 Wn.2d at 479, by relieving completely the State’s “ultimate burden of ensuring the record supports the existence and classification of out-of-state convictions.” *Ford*, 137 Wn.2d at 480. The *Ford* court concluded that eliminating this “ultimate burden” of the State would be “inconsistent with the principles underlying our system of justice.” *Ford*, 137 Wn.2d at 480 (internal quotation marks omitted). I fully agree with the majority’s citation of *Ford* for

SRA’s statutory standard, which requires a preponderance of the evidence; and (2) the constitutional burden, which requires “some minimal indicium of reliability beyond mere allegation,” less than a preponderance of the evidence. *Ford*, 137 Wn.2d at 481 (emphasis omitted) (internal quotation marks omitted).

this holding and underlying principle. *See* Majority at 6-7.

I disagree, however, with the majority's expansion of *Ford* to hold here that the State did not meet its burden by presenting an uncontroverted written summary of Hunley's criminal history, on which, under the currently applicable statutes, the trial court was entitled to rely in the absence of Hunley's challenge or request for additional documentary proof from the State. In holding that the SRA placed on the State an "ultimate burden" to demonstrate "the alleged criminal history" sufficiently, the *Ford* court did not specify the type of evidence the State must produce; it did note, however, that this ultimate burden "is not overly difficult to meet."¹³ *Ford*, 137 Wn.2d at 480. Nevertheless, the State's bare "oral[] assert[ions]" during the sentencing hearing that Ford's California convictions were comparable to Washington felonies and failure to provide any written summary or other evidence of Ford's prior convictions did not meet this relatively easy burden. *Ford*, 137 Wn.2d at 475. In short, unlike here, the State did not produce prima facie evidence of Ford's criminal history on which the trial court was entitled to rely under the applicable sentencing statutes.¹⁴

¹³ The *Ford* court did not take issue with the "preponderance of the evidence" level of proof, which our legislature established in RCW 9.94A.500(1).

¹⁴ In my view, our Supreme Court's recent decision in *State v. Weaver*, No. 84982-0-I, 2011 WL 1313955 (Wash. April 7, 2011) does not compel a different conclusion. *Weaver* analyzes former RCW 9.94A.530(2) (2000) and affirms its previous holding that "'presentence reports' in former RCW 9.94A.530(2) d[o] not include the prosecutor's statement of criminal history." *Weaver*, WL 1313955 at ¶ 7 (internal quotation marks omitted) (citing *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009)). Eight years after promulgating the *Weaver* version of the statute, our legislature amended RCW 9.94A.530 to read, "Acknowledgement includes . . . not objecting to criminal history presented at the time of sentencing." Laws of 2008, ch. 231, § 4(2). Accordingly, *Weaver*, which applied a different, earlier version of the statute, does not apply here.

B. Primary Due Process Burden of Proof Remains on the State

The *Ford* court went on to hold that, in addition to the State's failure to satisfy its "ultimate burden" under the SRA, the State's total lack of evidence of Ford's prior convictions also violated "the minimum requirements of due process." *Ford*, 137 Wn.2d at 480-81. The *Ford* court held that "fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicium of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481 (citations omitted). The court rejected the State's contention that Ford's failure to object relieved the State of its due process obligation to provide "some minimal indicium of reliability beyond mere allegation":¹⁵ "A criminal defendant is simply not obligated to disprove the State's position, at least insofar as the State has failed to meet its *primary burden of proof*" by producing only "bare [oral] assertions." *Ford*, 137 Wn.2d at 482 (emphasis added).

C. No Shifting of Burden or Placing Burden of "Refutation" on Defendant

Thus, the *Ford* court described a third burden, "the burden of refutation," which, the court held, is constitutionally impermissible to place on the defendant "where the State offers no evidence in support of its position" and, therefore, fails to meet its constitutionally-imposed "primary" burden. *Ford*, 137 Wn.2d at 481-82. In so holding, however, the *Ford* court did not foreclose the possibility that the inverse of this statement is true: If the State satisfies its primary, constitutional burden of proof, then it would be constitutionally permissible to place some kind of burden on the defendant to challenge the State's proof; the court then described the defendant's

¹⁵ *Ford*, 137 Wn.2d at 481 (quoting *U.S. v. Ibarra*, 737 F.2d at 827 (emphasis omitted)).

“burden of refutation.”¹⁶ *Ford*, 137 Wn.2d at 481.

Yet, our legislature’s post-*Ford* amendment of RCW 9.94A.500(1) and RCW 9.94A.530(2) did not impose such a “burden of refutation” on a criminal defendant; nor, contrary to the majority’s assertion, did the legislature attempt to “overrule” or to contravene *Ford*. Majority at 7. Instead, the only “burden” the legislature placed on the defendant is to object to the “criminal history presented at the time of sentencing” if he does not want the trial court to consider it as prima facie evidence of his prior convictions. RCW 9.94A.530(2); RCW

¹⁶ For example, this “burden of refutation” might entail the defendant’s asking the State to present additional documentary evidence of his prior convictions, which, I reemphasize, Hunley did not do.

The majority interprets *Ford* as holding that “relying on the defendant’s silence as acknowledgement ‘would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.’” Majority at 12 (quoting *Ford*, 137 Wn.2d at 482). With all due respect, I believe the majority overlooks the Supreme Court’s language preceding its *Ford* quote, which language undercuts the majority’s interpretation. Earlier in the paragraph that the majority cites, the *Ford* court states, “A criminal defendant is simply not obligated to disprove the State’s position, *at least insofar as the State has failed to meet its primary burden of proof.*” *Ford*, 137 Wn.2d at 482 (emphasis added).

Thus, the *Ford* court left open the possibility that (1) the “burden of refutation” could be placed on the defendant; and (2) the sentencing court could take cognizance of the defendant’s failure to trigger that burden by requesting additional evidence—provided that the State satisfied its primary, constitutional burden by establishing the defendant’s prior convictions with “some minimal indicium of reliability beyond mere allegation.” *Ford*, 137 Wn.2d at 481 (quoting *U.S. v. Ibarra*, 737 F.2d 827 (emphasis omitted)). *Ford* held that the State may not rely on “mere [oral] allegation,” *Ford*, 137 Wn.2d at 481, of a defendant’s criminal history coupled with the defendant’s failure to object.

But *Ford* did not hold, as the majority asserts, that the sentencing court is prohibited under all circumstances from taking note of the defendant’s failure to object to the State’s written criminal history summary and then proceeding to sentence the defendant in reliance on this uncontested summary. This opening in the *Ford* opinion provides the window of opportunity for the legislature’s amendment of RCW 9.94A.530 to allow the trial court to treat as an “acknowledgement” a defendant’s failure to object to his criminal history presented at the time of sentencing, on which the trial court may justifiably rely.

9.94A.500(1).

The legislature amended RCW 9.94A.500 to include the following sentence:

A criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein.

RCW 9.94A.500(1). Correspondingly, the legislature amended RCW 9.94A.530 to authorize sentencing courts to rely on information that is “acknowledged” during “the time of sentencing,” including “criminal history presented at the time of sentencing” to which the defendant does “not object[.]” RCW 9.94A.530(2). Neither amendment, either separately or operating in tandem, requires the defendant to produce *any evidence* to refute the State’s summary of his prior convictions. Instead, he need only object to the criminal history the State has presented.¹⁷ This

¹⁷ The majority mentions Hunley’s claim that the State violated his right to remain silent during sentencing, but it does not further address this particular issue. *See* Majority at 6 n.5. Nevertheless, the majority appears to fold this concept into its holding that the amended statutory procedure for including prior convictions in a defendant’s offender score unconstitutionally shifts the burden of proof from the State to the defendant by allowing the State to present a summary of the defendant’s criminal history and requiring additional documentary proof only if the defendant so requests or objects. *See* Majority at 7.

In my view, this assertion circumvents the conceptual distinction between calculating an offender score to determine a standard sentencing range and the State’s absolute burden to prove the elements of a substantive charged crime and specific factual sentencing aggravators beyond a reasonable doubt.

Furthermore, to the extent that Hunley and the majority characterize the statutory amendment as violative of a defendant’s Fifth Amendment right to remain silent, I again respectfully disagree. The legislature’s disjunctive use of the terms “admitted, acknowledged, or proved” in RCW 9.94A.530(2), by its plain language, provides at least three separate methods of presenting information on which the sentencing court may rely. “When the term ‘or’ is used it is presumed to be used in the disjunctive sense, unless the legislative intent is clearly contrary.” *Childers v. Childers*, 89 Wn.2d 592, 595-96, 575 P.2d 201 (1978) (quoting 1A C. Dallas Sands, Norman J. Singer & J.G. Sutherland, *Statutes and Statutory Construction* § 21.14 n.1 (4th ed. 1972)). The defendant’s own admission is one; the State’s submission of proof is another. And “acknowledgement” is a third, which, by statutory definition, does not require a defendant to

objection (1) bars the trial court from considering the State's criminal history as proof of his convictions because the defendant has not "acknowledged" it under RCW 9.94A.530(2); and (2) triggers an additional burden on the State to produce more evidence proving the defendant's prior convictions¹⁸ because at that point it cannot rely on the summary as prima facie evidence under RCW 9.94A.500(1).¹⁹

D. No Legislative Impairment of *Ford*

I disagree with the majority's assumption that in amending RCW 9.94A.530(2) and RCW 9.94A.500(1), the legislature was attempting to "modify or impair a judicial interpretation of the constitution." Majority at 8 (citing *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 497, 585 P.2d 71 (1978)). This assumption ignores the *Ford* court's distinction between the State's statutory "ultimate burden" under the SRA, which the 2008 amendments modified, and the State's constitutional "primary burden of proof" as a key component of due process, which these amendments left intact.²⁰ *Ford*, 137 Wn.2d at 480-482. In amending the SRA in 2008, the

waive his right to remain silent: "Acknowledgment 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(2) (emphasis added).

¹⁸ As the *Ford* court noted, a defendant could request, for example, "a certified copy of the judgment," which, as the Supreme Court acknowledged and none of us dispute, is "[t]he best evidence of a prior conviction." *Ford*, 137 Wn.2d at 480 (citing *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994)).

¹⁹ As previously noted, the pertinent portion of RCW 9.94A.530(2) allows the sentencing court to rely only on "information [] 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 [aggravating circumstances, not applicable here]."

²⁰ The Rules of Evidence, promulgated by our Supreme Court, provide an analogous, though

legislature provided that (1) the State could satisfy the SRA's burden of proving a defendant's prior convictions *for sentencing purposes*²¹ through "criminal history summar[ies]";²² and (2) when analyzing whether the State has satisfied the SRA's "ultimate burden," the sentencing court may consider as an "acknowledge[ment]"²³ of the information in the State's summary of his

somewhat attenuated, evidentiary scheme in ER 904. To prove a material fact in a civil action, ER 904 declares certain documents admissible unless the other party objects, which then may trigger an additional burden on the offering party to prove authenticity or to demonstrate admissibility. Although ER 904 addresses substantive proof in civil actions, and not sentencing hearings following convictions in criminal actions, it does establish precedence for (1) placing on the first party a burden of production—to come forward with presumably admissible evidence, analogous to the statutory *prima facie* evidence of prior convictions at issue here; and (2) then shifting to the other party the burden of objecting to the evidence before the first party is required to produce additional evidence supporting the initial documentary evidence. Furthermore, there are myriad instances in which our trial courts of various levels routinely use computer-generated print outs of defendants' prior convictions for sentencing purposes.

²¹ These amendments address prior convictions for sentencing purposes only. They do not address the use of prior convictions to prove elements of crimes, such as being a felon in possession of a firearm, for example, which the State must prove beyond a reasonable doubt, not by a mere preponderance of the evidence.

²² In a footnote, the *Ford* court stated, "[A] prosecutor's assertions are neither fact nor evidence, but merely argument." *Ford*, 137 Wn.2d at 481 n.3. The prosecutor in *Ford* provided no written criminal history summary; he made only bald oral assertions. *Ford*, 137 Wn.2d at 475-76. In contrast, here, the prosecutor presented a written criminal history summary, which, under RCW 9.94A.500(1), constitutes "prima facie evidence" of a defendant's prior criminal history for offender score purposes. Thus, this amended statute implies that such summary is more than "mere argument" for sentencing purposes. Moreover, the prosecutor's summary here appears to have been based on computer records of Hunley's criminal history, which provides "minimum indicia of reliability," even under *Ford*. *Ford*, 137 Wn.2d at 481.

²³ The majority cites *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009) to support its holding that the State's summary of a defendant's criminal history is not sufficient evidence of his prior convictions. See Majority at 9. But *Mendoza* stresses the lack of documentary proof or the defendant's "acknowledgement" of his prior convictions as dual grounds for remand for resentencing; in other words, both were lacking in that case. *Mendoza*, 165 Wn.2d at 917-19. The court later notes, "[W]e have emphasized the need for an *affirmative* acknowledgement by

criminal history the defendant's lack of objection to the summary²⁴ and his failure to demand additional documentary proof from the State.²⁵

It is the legislature's duty to establish the punishments for crimes. *See State v. Manussier*, 129 Wn.2d 652, 667, 921 P.2d 473 (1996) ("This court has consistently held that fixing penalties for criminal offenses is a legislative, and not a judicial, function.") (footnote omitted), *cert.*

the defendant of *facts and information* introduced for the purposes of sentencing." *Mendoza*, 165 Wn.2d at 928 (citing *Ford*, 137 Wn.2d at 482-83). The dictionary defines "acknowledgement" as having "received" and "recognized the authority or claims of" the thing being acknowledged, which, under this statutory scheme, is the defendant's criminal history summary. Webster's Third International Dictionary 17 (1969).

The *Mendoza* court further noted, however: "Mendoza and Henderson did nothing *affirmative* with respect to their criminal histories. And the sentencing courts below did not have any *facts or information* on which to find by a preponderance of the evidence that the criminal history was valid." *Mendoza*, 165 Wn.2d at 929. As I discuss throughout this dissent, such was not the case here. More importantly, as the *Mendoza* court also noted post-*Ford*, "No question has been raised . . . about the constitutional limits of the legislature's ability to define when an acknowledgement occurs." *Mendoza*, 165 at 922 n.2.

²⁴ I further note that, unlike independent evidence of substantive crimes that may initially be within the State's exclusive control, a person previously convicted of crimes in a court of law is likely to be at least as knowledgeable about his prior convictions as the State, if not more knowledgeable. In my view, this reason alone underscores the inherent reasonableness of the legislature's statutory creation of prima facie evidence of a defendant's prior convictions when the State presents his criminal history summary that the defendant does not challenge in any way.

²⁵ The amended version of RCW 9.94A.530(2) treats the State's summary of a defendant's criminal history in the same way as the same statute's predecessor version treated a defendant's criminal history information contained in a presentence report, the use of which our Supreme Court expressly approved in *Ford*. *Ford*, 137 Wn.2d at 480-81. Here, neither the majority nor Hunley persuade me that there is any difference of constitutional due process significance between these two statutory procedures for presenting prima facie evidence of a defendant's criminal history for offender score calculation purposes, especially, where, as here, the defendant did not object to his criminal history's accuracy, challenge the sufficiency of the State's evidence, or request additional documentation.

denied, 520 U.S. 1201 (1997). The SRA, as amended, purported to standardize punishments using defined parameters,²⁶ which entailed delineating what information a sentencing court considers when imposing a sentence within statutorily-defined standard ranges for specific categories of crimes.²⁷ This information includes the defendant's prior conviction history, which has direct bearing on where, within the applicable statutory parameters, the presumptive sentencing range falls for a particular defendant convicted of a specified crime.²⁸ This legislative prerogative includes prescribing the format in which the defendant's criminal history is presented, so long, of course, as the format does not contravene our state or federal constitutions. And, as I explain above, under the statutory scheme that the legislature prescribed in its 2008 amendments to the SRA, the burden of proving a defendant's prior convictions at sentencing always remains on the State and never passes to the defendant.

As the Supreme Court noted post-*Ford*, "No question has been raised . . . about the constitutional limits of the legislature's ability to define when an acknowledgement occurs." *State v. Mendoza*, 165 Wn.2d 913, 922 n.2, 205 P.3d 113 (2009). Furthermore, we must presume these statutory amendments to be constitutional. *See Sch. Dists.' Alliance for Adequate Funding*

²⁶ See RCW 9.94A.010 ("The purpose of [the SRA] is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences.")

²⁷ See 9.94A.530(2) ("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 [aggravating circumstances, not applicable here].")

²⁸ See RCW 9.94A.510, .515, .517, .518 (sentencing grid and related provisions).

of *Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). Moreover, in concluding that the State could not satisfy the SRA's procedural requirements for establishing Washington comparability of Ford's prior California convictions with mere oral assertions, our Supreme Court cautioned that other courts should not construe its holding as placing a heavier burden on the State than the SRA required. See *Ford*, 137 Wn.2d at 482. Thus, distinguishing *Ford* on statutory interpretation principles alone, I would hold that Hunley has not overcome his heavy burden to prove that these presumptively constitutional statutory amendments are "unconstitutional beyond a reasonable doubt." *Sch. Dists.' Alliance*, 170 Wn.2d at 605 (citing *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995)).

CONCLUSION

The trial court sentenced Hunley in compliance with the presumptively constitutional, amended SRA requirements for proving a defendant's prior convictions. The State followed these amended SRA procedures by presenting a criminal history summary, which, under RCW 9.94A.500(1), the sentencing court could consider as prima facie evidence of Hunley's prior convictions if Hunley did not object. I would reject Hunley's due process challenge and affirm his sentence. Accordingly, I respectfully dissent from the majority's conclusion that the 2008 amendments to RCW 9.94A.500 and .530 are unconstitutional and its remand for resentencing Hunley.

I concur in part and dissent in part:

39676-9-II

Hunt, J

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

MONTE W. HUNLEY,

Appellant.

NO.39676-9-II

PROOF OF SERVICE

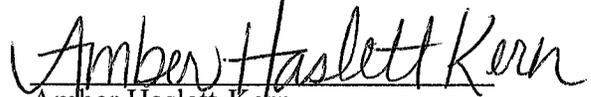
I, Amber Haslett-Kern, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 13th day of June, 2011, I deposited in the mails of the United States of America, postage prepaid, a copy of the Notice of Association of Counsel and Appointment of Special Deputy in an envelope addressed to:

Jodi R. Backlund
Manek R. Mistry
Backlund & Mistry
203 Fourth Avenue East, Suite 404
Olympia, WA 98501-1189

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

Signed this 13th day of June, 2011, at Olympia, Washington.


Amber Haslett-Kern