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STATE OF WASHINGTON

BY _____
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

PERSONAL RESTRAINT REPLY BRIEF

No. 34375-4-II

ORIGINAL

Forrest Eugene Amos #809903
Box 777 B435
Monroe Corrections Complex
Washington State Reformatory
Monroe, WA 98272-0777

I. IDENTITY OF PETITIONER

FORREST EUGENE AMOS, Petitioner herein, is currently incarcerated at the Monroe Corrections Complex, Washington State Reformatory Unit, Box 777, Monroe, WA 98272-0777.

II. STATEMENT OF RELIEF SOUGHT

It is requested that this Court grant review of Mr. Amos' Personal Restraint Petition and grant Mr. Amos the relief required which is merger of his Robbery First Degree and Assault Second Degree based on Double Jeopardy purposes, resentencing within the statutory authority without the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score because it exceeds the legislature's intent (statutory authority), breaches the plea agreement, violates Double Jeopardy, Collateral Estoppel, speedy sentencing rights, and constitutes vindictiveness on the part of the resentencing judge. Mr. Amos should also be given his right to appeal therefore and this petition should be considered as a direct appeal.

III. FACTS RELEVANT TO MOTION

On January 10, 2006, Mr. Amos filed a Personal Restraint Petition. After processing the petition, the response date was March 12, 2006. The respondent sought a number of extensions and finally filed an untimely response brief on May 7, 2006. This response did not respond to all of the issues raised by Mr. Amos.

On February 16, 2000, Mr. Amos pled guilty as charged to a number of charges which included Robbery First Degree and Assault First Degree. When pleading guilty, Mr. Amos' plea statement said:

On January 16, 2000, in Lewis County, I was in a person's building, I had permission to go in but not to stay as long as I did. I went with the intent to help my friends take some marijuana. While we were there, we assaulted Mr. Hull and caused great bodily injury with a deadly weapon (walkie-talkie), we stole the marijuana, and a gun. I have been convicted of a serious crime in the past, and cannot possess a gun.

See Exhibit A. On April 25, 2000, the plea agreement was modified and the plea to Assault First Degree was reduced to Assault Second Degree. The sentencing judge then imposed a 120 month prison sentence. Mr. Amos then obtained relief from this sentence on April 18, 2005, and was resentenced on July 19, 2005.

After sentencing on April 25, 2000, but before July 19, 2005, Mr. Amos was charged and convicted of a crime he committed while in prison serving his sentence imposed on April 25, 2000.

On April 26, 2004, Mr. Amos committed an assault in Washington State Penitentiary, Walla Walla County. Mr. Amos was charged for this assault in Walla Walla County. See Exhibit G. On June 20, 2005, Mr. Amos pled guilty to a reduced charge of assault. See Exhibit H. On November 7, 2005, Mr. Amos was sentenced under the Sentencing Reform Act (SRA) for this crime being committed while under sentence for another felony and received an automatic consecutive sentence. See Exhibit I.

On July 19, 2005, at resentencing for Mr. Amos' Lewis County convictions the resentencing court used Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score. The resentencing court also held that Mr. Amos' Lewis County convictions for both Robbery First Degree and Assault Second Degree did not merge for Double Jeopardy purposes. See Exhibit D. This resentencing did not comply with the plea agreement which constitutes a breach by the State (respondent) because when pleading guilty one term of the plea agreement only provided the use of any new convictions that occurred between the time of pleading guilty and the date of sentencing. See Exhibits A and B. Mr. Amos now replies to the respondent's erroneous response brief.

IV. GROUND FOR RELIEF AND ARGUMENTS

GROUND ONE

Mr. Amos' Double Jeopardy claim for his conviction and sentence for both Robbery First Degree and Assault Second Degree.

First off, in the respondent's response brief the respondent attempts to "muddy the waters" or distract the court's attention away from the key issue raised by Mr. Amos by asserting that Mr. Amos received a beneficial plea agreement that was part of a "package deal" and now Mr. Amos seeks to "withdraw" from only a portion of the plea agreement because Mr. Amos collateral attacks his conviction and sentence for both Robbery First Degree and Assault Second Degree based on a Double Jeopardy claim.

Also in the respondent's attempt to "muddy the waters" from

the key issue raised by Mr. Amos the respondent relies on fictional facts or facts that were neither charged, found by a jury, nor stipulated to by Mr. Amos when pleading guilty. The respondent relies on a "later in time" assault with the stolen firearm that did not occur nor was charged, found by a jury, or pled to.

Does Mr. Amos' request for a correct sentence within the legislature's intent constitute an attempt to withdraw from the plea agreement or a portion of the plea agreement?

It is believed by Mr. Amos and supported by a long line of cases that Mr. Amos' request for a correct sentence within the Legislature's intent (statutory authority) is not an attempt by Mr. Amos to withdraw from the plea agreement or a portion of the plea agreement. Therefore, the respondent's assertion is incorrect by far.

There is a big difference between "withdrawing" a plea agreement or a portion of the plea agreement and requesting a correct sentence within the Legislature's intent (statutory authority).

Mr. Amos relies on a long line of cases that establish that a plea agreement cannot exceed the Legislature's intent (statutory authority) given to the courts. In re Personal Restraint of Gardner, 94 Wn.2d 504, 617 P.2d 1001 (1980); State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980); In re Personal Restraint of Moore, 116 Wn.2d 30, 803 P.2d 300 (1991); In re Personal Restraint of Fleming, 129 Wn.2d 529, 919 P.2d 66 (1996); In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

In Goodwin, 146 Wn.2d, our Supreme Court took the time to clarify the law and kept with its long-established precedent by adhering to the principles "that a sentence in excess of the statutory authority is subject to collateral attack." See Goodwin, 146 Wn.2d at 873. The Goodwin court further concluded:

[T]hat the fact that a negotiated plea agreement was involved does not require any other conclusion. First, that holding is in keeping with this court's precedent. As explained, the court has granted relief to personal restraint petitioners in the form of resentencing within statutory authority where a sentence in excess of that authority had been imposed, without regard to the plea agreements involved. See Gardner, 94 Wn.2d 504; Moore, 116 Wn.2d 30. Correcting an erroneous sentence in excess

of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed. Carle, 93 Wn.2d at 34. The court has also recognized, on direct appeal, that the erroneous portion of a sentence in excess of statutory authority must be reversed, and a plea agreement to the unlawful sentence does not bind the defendant. Eilts, 94 Wn.2d 489; (citing Goodwin, 146 Wn.2d at 877)(emphasis added).

It has already been held in State v. Freeman, 153 Wn.2d 765, 780, 108 P.2d 753 (2005), that there was "no evidence the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery." Freeman, 153 Wn.2d at 776.

The respondent's assertion that Mr. Amos' request for a correct sentence within the Legislature's intent (statutory authority) is an attempt to "withdraw" from the plea agreement or a portion of the plea agreement is contrary to our Supreme Court's holding in In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

Furthermore, Mr. Amos relies on In re Butler, 24 Wn.App. 175, 599 P.2d 1311 (1979), to further show this Court that Mr. Amos' Double Jeopardy claim is not an attempt to withdraw from a portion of the plea agreement.

The Butler court held, "a defendant's plea of guilty does not waive a claim that the offense is one which the state may not constitutionally prosecute." Butler, 24 Wn.App. at 179. This decision was based on the United States Supreme Court's holding in Menna v. New York, 423 U.S. 61, 46 L.Ed.2d 195, 96 S.Ct. 241 (1975). See also Launius v. United States, 575 F.2d 770 (9th Cir. 1978).

Menna held that although a guilty plea usually results in a waiver of constitutional violations involving factual guilt, such a plea does not waive a claim that the State cannot constitutionally convict the defendant of the particular charge.

Butler, 24 Wn.App. at 179. The Butler court noted that Butler received a beneficial plea agreement which resulted in a reduction of charges (robbery and assault first degree reduced to second degree), but that did not bar Butler's Double Jeopardy claim nor did it bar Butler's petition for relief.

Based on the cases Mr. Amos relies on here and in his petition, his petition shall be heard, decided, and granted the appropriate relief requested, by this Court. the respondent's assertion to this Court that Mr. Amos is "picking at" or attempting to "withdraw" only a portion of his plea agreement is an incorrect assertion and would be contrary to the Supreme Court's holdings in the cases Mr. Amos relies on above.

Mr. Amos only seeks a correct sentence within the Legislature's intent (statutory authority). In no way does Mr. Amos' petition attempt to "withdraw" any portion of the plea agreement nor does the respondent's assertion that this is Mr. Amos' intent have any bearing on this Court granting the relief requested by Mr. Amos. Goodwin, 146 Wn.2d at 877.

Does Mr. Amos' conviction and sentence for both Robbery First and Assault Second Degree merge for Double Jeopardy purposes?

The applicable law on this issue is the merger doctrine.

The merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime the state must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979). Recently, our Supreme Court has decided this exact same issue of whether Robbery First Degree and Assault Second Degree merge for double jeopardy purposes in State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005). The Freeman court held convictions for first degree robbery and second degree assault were merged, and double jeopardy precluded separate sentences for robbery and assault to facilitate robbery.

In Freeman the court noted when determining whether two crimes merge "the test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime." Freeman, 153 Wn.2d at 779 (emphasis added).

"Using force to intimidate a victim into yielding property is often incidental to the robbery." Prater, 30 Wn.App. at 516 (citing Freeman, 153 Wn.2d at 779)(emphasis added).

"The grievousness of harm is not the question." Read, 100 Wn.App. at 791-92 (citing Freeman, 153 Wn.2d at 779) (emphasis added).

"We also conclude that a case by case approach is required to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes. Generally, it appears that these two crimes will merge unless they have an independent purpose or effect." Freeman, 153 Wn.2d at 780 (emphasis added).

Turning to the facts of this case, Mr. Amos' assaultive action was done to facilitate the robbery and was used to support his convictions for both Robbery First Degree and Assault Second Degree. Therefore, shall merge for Double Jeopardy purposes.

In order for this Court to get an in depth understanding of this case we must start at the very beginning. On January 26, 2000, the state charged Mr. Amos with first degree robbery, first degree assault, and a number of other charges which are irrelevant when deciding this issue of merger. So we only look at Mr. Amos' charges for Robbery First Degree and Assault First Degree.

On February 16, 2000, Mr. Amos pled guilty as charged which included pleading guilty to first degree robbery and first degree assault. When pleading guilty, Mr. Amos' plea statement to the stipulated facts relevant to support the charges state:

On January 16, 2000, in Lewis County, I was in a person's building, I had permission to go in but not to remain as long as I did. I went with the intent to help my friends take some marijuana. While we were there, we assaulted Mr. Hull and caused great bodily injury with a deadly weapon (walkie-talkie), we stole the marijuana, and a gun. I have been convicted of a serious felony in the past, and cannot possess a gun.

See Exhibit A (emphasis added). This plea statement was sufficient to constitute convictions for all crimes charged which included first degree robbery and first degree assault. So as it stands now, the assault Mr. Amos stipulated to in his plea statement constituted sufficient basis for Mr. Amos' plea to first degree assault and first degree robbery because, as charged and proved by the state, Robbery First Degree required a taking of personal property "against such person's will, by use or threatened use of immediate force, violence and fear of injury to such person or his property..." See Exhibit C (emphasis added).

[T]o prove first degree robbery as charged and proved by the State, the State had to prove the defendants committed an assault in furtherance of the robbery.

Freeman, 153 Wn.2d at 778. It is clear as charged and proved in Mr. Amos' case the state had to prove Mr. Amos used force (assaulted) to take the personal property from the victim. So the stipulated assault in Mr. Amos' plea statement would have to be used to justify both Mr. Amos' convictions for first degree robbery and first degree assault.

Now, because first degree assault does not merge with first degree robbery we must complete the facts of the case. On April 25, 2000, Mr. Amos was allowed to withdraw his plea to first degree assault in exchange for a reduced charge of second degree assault. See Exhibit B.

The April 25, 2000, verbatim report reads:

THE COURT: I will allow him then to withdraw his pleas to count three and four of the second amended information. Have you had a chance to review this second amended information with Ms. Backlund?

THE DEFENDANT: Yes.

THE COURT: Charge count three as rewritten charge with assault in the second degree, which is reduction from the original plea of count three, which was assault in the first degree,....(emphasis added).

The key point here is the charge of first degree assault was reduced a degree to second degree assault and did not change the assaultive action stipulated to when pleading guilty to assault first degree. As pointed out earlier in this brief, the plea statement when pleading guilty as charged which included Robbery First Degree and Assault First Degree, one assaultive action was stipulated to and charged and proved by the state and used to constitute factual basis for both Robbery First Degree and Assault First Degree.

Furthermore, to show this Court the assault was done to facilitate the Robbery First Degree the Court need only to view the amended charging information (Exhibit C). Exhibit C states the same as the April 25, 2000, verbatim report which states the elements of Assault Second Degree Mr. Amos pled guilty to.

THE COURT: As to the second amended information, count three, charging you with assault in the second degree,

where it is claimed on or about January 16th of 2000, in Lewis County, intentionally assaulted Joe Hull with a deadly weapon with intent to commit a felony robbery... first degree,...., what is your plea?

THE DEFENDANT: Guilty.

April 25, 2000, verbatim reports, pages 10-11 (emphasis added).

The state charged Mr. Amos with the intent to commit a robbery first degree when charging him with assault second degree. So regardless what the respondent says to this court with regard to whether Mr. Amos' assault second degree merges with Mr. Amos' robbery first degree, the bottom line is the charging information provides the necessary insight to this issue. The respondent only attempts to "muddy the waters" around the key issue which is the assault second degree had the intent to commit the robbery first degree.

In the respondent's response brief, they assert that Mr. Amos' robbery first degree was based on his assaultive action with fists and walkie-talkies to steal the marijuana and pistol and Mr. Amos' assault second degree was based on his "later in the stages of the robbery" assault with the stolen firearm to further steal more items. This assertion is fictional at best. Mr. Amos only pled to an assault with a deadly weapon to wit: a walkie-talkie. This is supported by Mr. Amos' first plea statement when pleading guilty to assault first degree and his second plea statement when pleading guilty to assault second degree.

Mr. Amos' first plea statement states in relevant part:

While we were there, we assaulted Joe Hull and caused great bodily injury with a deadly weapon (walkie-talkie)

See Exhibit A (emphasis added). Mr. Amos' second plea statement states in relevant part:

On 1/16/00, in Lewis County, I assaulted an individual with a deadly weapon. I was in possession of a firearm at the time of the assault.

See Exhibit B and the April 25, 2000, verbatim reports at page 11.

This Court needs to note again that Mr. Amos' first and second degree assault were based on the same assaultive action with the deadly weapon (walkie-talkie). The April 25, 2000, verbatim report at page 7, states in relevant part:

THE COURT: Charge count three as rewritten charge with assault in the second degree, which is a reduction from

the original plea of count three, which was assault in the first degree,....

Mr. Amos never pled or stipulated to the "later in the stages of the robbery" assault with the stolen firearm nor was Mr. Amos charged with such or found guilty of by a jury of such later in time assault with the stolen firearm. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), would apply here if the state continues to assert that Mr. Amos' assault second degree was based on an assault that never was charged, found by a jury, pled to, or stipulated to by Mr. Amos.

On another note, it is believed by Mr. Amos that the respondent's assertion that Mr. Amos committed a "later in the stages of the robbery" assault with the stolen firearm is irrelevant based on our Supreme Court's ruling in State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005).

[T]he test is not whether the defendant used the least amount of force necessary to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime.

Freeman, 153 Wn.2d at 779 (emphasis added). The Freeman court further said:

[T]he fact the violence used was excessive even in relation to the crime charged is not an appropriate basis for avoiding merger,....

Freeman, 153 Wn.2d at 779 (emphasis added). With these rulings it is irrelevant how much force was used. The fact of the matter is the purpose or effect of the assaultive action and in the respondent's own response brief they outline the assault as a necessary assault to facilitate the completion of the robbery. Therefore, merger shall occur regardless the type of assaultive action behind the completion of the robbery first degree.

On one final note, the respondent hopelessly relies on Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932) to support Mr. Amos' conviction for both Robbery First Degree and Assault Second Degree. This further shows this court that the respondent is trying to "muddy the waters" or distract the court's attention away from the key issue of this case because the Freeman court held that:

"[A]s we recently ruled, Blockburger 'is not dispositive of the question whether two offenses are the same....Although the result of this test is presumed to be the legislature's intent.'"

In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003)(citing Freeman, 153 Wn.2d at 777). Merger of Mr. Amos' conviction and sentence for both Robbery First Degree and Assault Second Degree shall occur for Double Jeopardy purposes. The leading Supreme Court case is State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) supports this holding. Mr. Amos' conviction and sentence for Assault Second Degree shall be vacated and resentencing shall occur. In re Butler, 24 Wn.App. 175, 599 P.2d 1311 (1979).

GROUND TWO

Is Mr. Amos' offender score miscalculated with the use of a subsequent offense and conviction in the calculation of his offender score?

Mr. Amos believes that the resentencing court erred when using his subsequent offense and conviction in the calculation of his offender score at resentencing to correct an erroneous sentence in excess of statutory authority because the legislature intended for a subsequent offense and conviction to be counted and punished as such under RCW 9.94A.589(2)(a) and not counted and punished as a prior conviction under RCW 9.94A.525(1)(8).

[W]henver a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

RCW 9.94A.589(2)(a).

A prior conviction which exists before the date of sentencing for the offense for which the offender score is being computed.

RCW 9.94A.525(1).

If the present conviction is for a violent offense...count two points for each prior adult and juvenile violent felony conviction....

RCW 9.94A.525(1)(8), in relevant part. The key issue is the application of these two statutes, RCW 9.94A.589(2)(a) and RCW 9.94A.525(1)(8), to the present case. There is no possible way both of these statutes can work in relation to each other by counting the same offense and conviction as a subsequent offense

and conviction under RCW 9.94A.589(2)(a) then turn around and count it as a prior conviction under RCW 9.94A.525(1)(8).

In both statutes, the Legislature provided two completely different intents. Under RCW 9.94A.589(2)(a) the Legislature intended to punish those felonies committed while the person was under sentence for another felony, with a consecutive sentence. Then under RCW 9.94A.525(1)(8), the Legislature intended to punish a person's actions based on his prior criminal history.

Based on the facts of this case, Mr. Amos committed his Assault Second Degree while he was in prison serving out his 120 month sentence imposed in Lewis County and Mr. Amos received an automatic consecutive sentence as a MATTER OF LAW FOR IT. See Exhibits G, H, I. So with that, Lewis County should of had no statutory authority (Legislative intent) to use Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score by counting it as a prior conviction.

The respondent fails to realize that State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992), is not controlling nor does it have anything to do with offenses that occurred after the defendant's sentencing. Collicott set a trend by holding the SRA permitted the use of a subsequent conviction for the purposes of determining the offender score at the defendant's resentencing. However, in Collicott, 118 Wn.2d, and all other cases, the basis for this holding is the use of a subsequent conviction for a pending offense. It has no bearing on the use of a subsequent conviction resulting from a subsequent offense.

Mr. Amos believes that this is the key issue and makes his case distinguishable from Collicott, 118 Wn.2d, and other cases. Even in Collicott, 118 Wn.2d, the resentencing judge said:

I find that with some difficulty, though, to include a burglary. That is why I asked the question whether the burglary was committed before the commission of these offenses. I'm told, if it were committed after but before today, that would be perhaps a different situation.

Collicott, 118 Wn.2d at 653-54. Mr. Amos believes that the different situation noted in Collicott, 118 Wn.2d, is due to the language in RCW 9.94A.589(2)(a). When construing two statutes, the Court needs to follow the policy of the court. See State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978); Simpson v. United

States, 435 U.S. 6, 55 L.Ed.2d 70, 98 S.Ct. 909 (1978). Workman held:

Referring to the policy of the court to interpret a criminal statute so as to increase the penalty imposed, absent clear evidence of Legislative intent to do so, the court held this "rule of lenity" would preclude construing the statutes as to allow enhanced penalties under both. Simpson v. United States, 98 S.Ct. supra at 914 (citing Workman, 90 Wn.2d at 454). The Simpson court further relied on the principle of statutory construction that the terms of a specific statute take precedence over a general statute, where both address the same concern.

Simpson, at 914 (citing Workman, 90 Wn.2d at 454).

In essence, it is clear that both RCW 9.94A.589(2)(a) and RCW 9.94A.525(1)(8) provide two ways the Legislature intended to enhance a defendant's sentence so the rule of lenity shall apply in order to prevent the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree as both a subsequent offense and conviction under RCW 9.94A.589(2)(a) requiring an automatic consecutive sentence and a prior conviction under RCW 9.94A.525(1)(8) requiring two points being added to Mr. Amos' underlying sentence that must expire before his consecutive sentence can start.

The principle of statutory construction that the terms of a specific statute take precedence over a general statute should also prevent the use of Mr. Amos' subsequent offense and conviction for assault second degree as both a subsequent offense and conviction under RCW 9.94A.589(2)(a) and a prior conviction under RCW 9.94A.525(1)(8).

RCW 9.94A.589(2)(a) is the more specific statute strictly pertaining to offenses occurring while under sentence for another felony and RCW 9.94A.525(1)(8) pertains to prior convictions.

RCW 9.94A.589(2)(a) governs over RCW 9.94A.525(1)(8) therefore, since Mr. Amos received an automatic consecutive sentence under state law in Walla Walla County, Lewis County, in turn, should not be able to use the same subsequent offense and conviction for Assault Second Degree as a prior conviction. Based on the rule of lenity and the principle of statutory construction that the specific statute takes precedence over the general statute, Lewis County has no statutory authority (Legislative intent) to use Mr. Amos' subsequent offense and conviction for Assault Second Degree as a prior conviction in the calculation of his offender score.

Does the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree as both a subsequent offense and conviction under RCW 9.94A.589(2)(a) and as a prior conviction under RCW 9.94A.525(1)(8) violate Double Jeopardy?

To further show this Court that the Legislature did not intend for RCW 9.94A.589(2)(a) and RCW 9.94A.525(1)(8) to work in relation with each other results from the Double Jeopardy violation that occurs when both statutes are used at the same time.

Under RCW 9.94A.589(2)(a) Mr. Amos received an automatic consecutive sentence because his Assault Second Degree occurred on February 26, 2004, when Mr. Amos was in prison serving his 120 month sentence imposed on April 25, 2000, in Lewis County. See Exhibit I. Then on July 19, 2005, more than five years after Mr. Amos was sentenced in Lewis County, Mr. Amos was resentenced due to the use of washed out juvenile offenses in the calculation of his offender score. At resentencing Mr. Amos' subsequent Assault Second Degree offense and conviction in Walla Walla County was counted as a prior conviction under RCW 9.94A.525(1)(8) enhancing Mr. Amos' underlying offender score and sentence by two points which must expire before his consecutive sentence for Assault Second Degree can start.

In essence, the same offense is being used twice to increase Mr. Amos' sentences. The Legislature did not intend for the same offense to be sentenced under both RCW 9.94A.589(2)(a) and RCW 9.94A.525(1)(8). The Legislature's intent is clear in the statutes. RCW 9.94A.589(2)(a) provides:

Whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

RCW 9.94A.525(1) provides:

A prior conviction which exists before the date of sentencing for the offense for which the offender score is being computed.

Section (8) provides in relevant part:

If the present conviction is for a violent offense...count two points for each prior adult and juvenile violent felony conviction...

Based on this language, how can the same offense and conviction be punished as a subsequent offense and conviction under RCW 9.94A.589(2)(a) because it occurred while Mr. Amos was under sentence

for his Lewis County convictions and as a prior conviction under RCW 9.94A.525(1)(8)?

The subsequent Assault Second Degree offense and conviction in question cannot be used as both a subsequent offense and conviction under RCW 9.94A.589(2)(a) and a prior conviction under RCW 9.94A.525(1)(8).

The multiple punishments result from Lewis County counting Mr. Amos' subsequent offense and conviction for Assault Second Degree as a prior conviction enhancing his underlying offender score and sentence by two points. After Walla Walla County gave Mr. Amos an automatic consecutive sentence as a matter of law because the Assault Second Degree offense and conviction occurred while Mr. Amos was under his Lewis County sentence. See Exhibits D, G, H, and I.

Essentially, Mr. Amos would have received no more than five points and a sentence of no more than 75 months plus a 36 month enhancement for a total of 111 months rather than the 120 months imposed due to the use of Mr. Amos' subsequent Assault Second Degree offense and conviction as a prior conviction.

In this light, Mr. Amos has to at the very least serve 9 more months because of the use of his subsequent offense and conviction for Assault Second Degree as a prior conviction in the calculation of his offender score before his automatic consecutive sentence can start for the same subsequent offense and conviction.

A Double Jeopardy claim is based on what the Legislature intended. State v. Calle, 120 Wn.2d 769, 888 P.2d 155 (1995); Ball v. United States, 470 U.S. 856, 864, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). There is no intent that can be relied on to have RCW 9.94A.589(2)(a) and RCW 9.94A.525(1)(8) work in relation to one another by counting the same offense and conviction as both a subsequent offense and conviction under RCW 9.94A.525(1)(8).

Lewis County has no statutory authority and violates Mr. Amos' right to be free from Double Jeopardy when Mr. Amos' subsequent offense and conviction for Assault Second Degree was used as a prior conviction when calculating Mr. Amos' offender score after Mr. Amos was already subject to an automatic consecutive sentence for the same subsequent offense and conviction as a matter of law.

GROUND THREE

Did the State breach Mr. Amos' plea agreement by using his subsequent offense and conviction for Assault Second Degree in the calculation of his offender score at resentencing?

Mr. Amos believes that the State breached his plea agreement at his resentencing because of the use of his subsequent offense and conviction for Assault Second Degree in the calculation of his offender score.

On February 16, 2000, and April 25, 2000, Mr. Amos entered into a plea agreement with the State. That plea agreement was for 120 months in prison which was based on the current offenses Mr. Amos pled guilty to and his prior criminal history. Mr. Amos' prior criminal history consisted of four juvenile convictions which were Burglary Second Degree, Possession of Stolen Property Second Degree, Malicious Mischief Second Degree, and Burglary Second Degree. Furthermore, the plea agreement stated:

If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions....

If I am convicted of any new crimes before sentencing,, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty is still binding on me.

See Exhibits A and B.

Mr. Amos never committed any new crimes nor was he convicted of any new crimes between the time of pleading guilty and the date of sentencing on April 25, 2000. It was not until February 26, 2004, that Mr. Amos committed a new crime and was convicted of it on June 20, 2005. This new crime and conviction did not occur between the time of pleading guilty and the date of sentencing on April 25, 2000, therefore, cannot affect Mr. Amos' plea agreement. See Exhibits G and H.

The terms of the plea agreement are defined by what the defendant reasonably understood them to be when he or she entered the plea. State v. Cosner, 85 Wn.2d 45, 51-52, 530 P.2d 317 (1975). Also see United States v. Quan, 789 F.2d 711, 713 (9th Cir. 1986) (The reviewing court looks to what the defendant reasonably understands when entering the plea to determine whether a plea

agreement has been broken) cert. dismissed, 478 U.S. 1033, 107 S.Ct. 16, 92 L.Ed.2d 770 (1986).

It can only be said that Mr. Amos understood that his plea agreement would only be affected if he committed and was convicted of any new crimes between the time he pled guilty on February 16, 2000, and the date he was sentenced on April 25, 2000. There is nothing that would indicate that Mr. Amos understood that if he committed a new crime and was convicted after he was sentenced on April 25, 2000, that he would be subjected to an increased standard sentence range and prosecutor's recommendation for his underlying plea agreement.

The remedies provided in Washington courts give the defendant the choice of either withdrawing his plea and pleading anew, or of being resentenced on his original plea consistent with the plea agreement. In re Palodichuk, 22 Wn.2d 34, 38, 757 P.2d 970 (1988) (Those principles operate to bind the court, as well, once a plea agreement has been validly accepted).

It is the choice of Mr. Amos that he be resentenced on his original plea consistent with the plea agreement. The respondent makes the assertion to this Court that Mr. Amos was sentenced consistent with the original plea agreement but that is false. If Mr. Amos was sentenced consistent with the original plea agreement the State would of not been able to use Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score because it did not occur between the time of pleading guilty on February 16, 2000, and the date of sentencing on April 25, 2000. The subsequent offense and conviction used at Mr. Amos' resentencing occurred years after Mr. Amos' sentencing date on April 25, 2000. See Exhibits G and H.

Resentencing without the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree is required under the specific terms of the original plea agreement.

GROUND FOUR

Does the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score at resentencing violate Collateral Estoppel?

The respondents in their response brief misunderstood Mr. Amos' claim in ground four. In ground four, Mr. Amos believes the Doctrine of Collateral Estoppel bars the redetermination of how many prior convictions exist at his resentencing date because the trial court had already made a correct and valid determination at his date of sentencing. Nowhere does Mr. Amos allege that the Doctrine of Collateral Estoppel bars the calculation of his offender score at resentencing as the respondent asserts to this Court in their response brief.

Does the Doctrine of Collateral Estoppel bar the redetermination of Mr. Amos' criminal history at resentencing?

There are no authorities pertaining to this specific scenario but looking at the language of the Doctrine of Collateral Estoppel and the language of RCW 9.94A.500(1) it would provide the Court with the answer to this question.

Pursuant to RCW 9.94A.500(1) provides in relevant part:

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist (emphasis added).

The Doctrine of Collateral Estoppel applies in criminal cases and bars the relitigation of issues that have already been litigated. State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992). The application of Collateral Estoppel in a criminal action is a two-step operation: the first is to determine what issues were raised and resolved by the former judgment, and the second is to determine whether the issues raised and resolved in the former judgment are identical to those sought to be barred in the subsequent action.

As required by RCW 9.94A.500(1) at the defendant's sentencing "the court shall specify the convictions it has found to exist."

On April 25, 2000, the sentencing court found that Mr. Amos had four juvenile convictions that existed at the time which were Burglary Second Degree, Possession of Stolen Property Second Degree, Malicious Mischief Second Degree, and Burglary Second Degree. This was a correct determination at the time Mr. Amos was sentenced. So by the time Mr. Amos obtained resentencing for a miscalculation of his criminal history that was found to exist, the State should have not had the right to redetermine Mr. Amos' criminal history at the time of resentencing because the issue was already determined

a year earlier at Mr. Amos' sentencing.

The Court should also note that it has already been held that correcting an erroneous sentence in excess of statutory authority does not affect the finality of the judgment and sentence that was correct and valid when imposed. In re Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). So because the determination of Mr. Amos' criminal history was not in excess of statutory authority at the date Mr. Amos was sentenced on April 25, 2000, that determination was final at the date Mr. Amos was resentenced to correct a sentence in excess of the statutory authority.

With this outlook which is supported by the language of the Doctrine of Collateral Estoppel, the language of RCW 9.94A.500(1), and case law the State shall be barred from redetermining Mr. Amos' criminal history at his resentencing to correct the erroneous sentence in excess of statutory authority. Therefore, Mr. Amos' subsequent offense and conviction for Assault Second Degree should not of been used in the calculation of his offender score at resentencing by counting it as a prior conviction. Resentencing is required without the use of Mr. Amos subsequent offense and conviction for Assault Second Degree.

It is important that this Court note that Mr. Amos' subsequent offense and conviction in question occurred well after the date he was sentenced on April 25, 2000, so it did not even exist as a pending offense at Mr. Amos' sentencing.

The Court also needs to be aware that the respondent's response to this issue raised in ground four of Mr. Amos' petition is another attempt by the respondent to "muddy the waters" or distract the court's attention away from the key issue raised by Mr. Amos.

CONCLUSION

In conclusion, Mr. Amos believes that due to the respondent's failure to respond to the other four grounds raised by Mr. Amos in his petition, this Court must construe the respondent's failure as conceding to the four other grounds raised by Mr. Amos or as the respondent's attempt to draw the Court's attention away from the over-powering issues raised by Mr. Amos in those four additional grounds. It is common sense that a failure to respond to a claim is an admittance to the claim.

The grounds raised by Mr. Amos that the respondent failed to respond to consist of the use of Mr. Amos' subsequent offense and conviction for Assault Second Degree in the calculation of his offender score at resentencing violates Double Jeopardy, speedy sentencing rights, and constitutes vindictiveness on the part of the resentencing judge. Then Mr. Amos raised in his last ground that his right to direct appeal was denied after resentencing.

Mr. Amos' should not only be resentenced pursuant to the errors replied to in this reply brief but to those errors Mr. Amos raised in the four grounds the respondent failed to respond to.

Signed and dated this 31ST day of May, 2006.



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FORREST EUGENE AMOS,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

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STATE OF WASHINGTON

DECLARATION OF MAILING

BY [Signature]
DEPUTY

I, Forrest Eugene Amos, appearing pro se, do hereby declare under the penalties of perjury that the forgoing is true and correct to the best of my knowledge.

That on 31st day of May, 2006, I did process through the law library at the Washington State Reformatory in Monroe, Washington, in accordance with the institutional mail policy, postage prepaid, United States Mail addressed to the following:

Court Of Appeals, Division 2

David Ponzoha, Clerk

950 Broadway, Suite 300

Tacoma, WA 98402

One (1) true and complete copy of the following documents:

Reply Brief

Dated this 31st day of May, 2006, at Monroe, WA.

Respectfully submitted

Forrest Eugene Amos
Petitioner, pro se
Forrest Eugene Amos