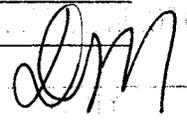


FILED  
COURT OF APPEALS

NO. 39702-1-II

10/1/2010 PM 1:47

STATE OF WASHINGTON

BY: 

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ABDUL KHALIF CALHOUN, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson and the Honorable James R. Orlando, Judges

No. 05-1-03396-9

**Brief of Respondent**

MARK LINDQUIST  
Prosecuting Attorney

By  
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the sentencing court properly considered new criminal history evidence to accurately determine defendant's criminal history and offender score for resentencing? ..... 1

2. Whether defendant received effective assistance of counsel? ..... 1

B. STATEMENT OF THE CASE. .... 1

1. Procedure ..... 1

C. ARGUMENT..... 7

1. THE SENTENCING COURT PROPERLY CONSIDERED NEW CRIMINAL HISTORY EVIDENCE TO ACCURATELY DETERMINE DEFENDANT'S CRIMINAL HISTORY AND OFFENDER SCORE FOR RESENTENCING..... 7

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL ..... 26

D. CONCLUSION. .... 33

## Table of Authorities

### State Cases

<i>Dep't of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 9, 43 P.2d 4 (2002) .....	16
<i>Green v. Rothschild</i> , 68 Wn.2d 1, 10, 402 P.2d 356 (1966).....	30
<i>In re Estate of Burns</i> , 131 Wn.2d 104, 110-111, 928 P.2d 1094 (1997) ..	20
<i>In re Hegney</i> , 138 Wn. App. 511, 542, 158 P.3d 1193 (2007).....	16
<i>In re Pers. Restraint of Hinton</i> , 152 Wn.2d 853, 861, 100 P.3d 801 (2004) .....	23
<i>In re Pers. Restraint of Powell</i> , 117 Wn.2d 175, 184-185, 814 P.2d 635 (1991) .....	23
<i>State v. Belgarde</i> , 119 Wn.2d 711, 722, 837 P.2d 599 (1992).....	19
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	28
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	28
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	28
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988) .....	28
<i>State v. Ford</i> , 137 Wn.2d 472, 480, 973 P.2d 452 (1999) ..7, 13, 14, 15, 16	
<i>State v. Herzog</i> , 48 Wn. App. 831, 834, 740 P.2d 380 (1987).....	7
<i>State v. Hightower</i> , 36 Wn. App. 536, 541, 676 P.2d 1016 (1984).....	12
<i>State v. Hodgson</i> , 108 Wn.2d 662, 669-670, 740 P.2d 848 (1987) ....	17, 21
<i>State v. Jackson</i> , 150 Wn. App. 877, 890, 209 P.3d 553 (2009) .....	8
<i>State v. Johnson</i> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) .....	25
<i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002).....	13, 14, 15, 16

<i>State v. McCorkle</i> , 88 Wn. App. 485, 500, 945 P.2d 736 (1997) .....	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	27, 28
<i>State v. Mendoza</i> , 165 Wn.2d 913, 920, 205 P.3d 113 (2009) .....	7, 8, 13, 14, 15, 16
<i>State v. Olson</i> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995).....	25
<i>State v. Pillatos</i> , 159 Wn.2d 459, 470, 150 P.3d 1130 (2007) .....	17, 18, 19, 20, 22
<i>State v. Romero</i> , 95 Wn. App. 323, 326, 975 P.2d 564, <i>review denied</i> , 138 Wn.2d 1020, 989 P.2d 1139 .....	12, 13
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	27, 28, 30
<i>State v. Worl</i> , 129 Wn.2d 416, 425, 918 P.2d 905 (1996) .....	30

**Federal and Other Jurisdictions**

<i>Cal. Dep't of Corr. V. Morales</i> , 514 U.S. 499, 505, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).....	23
<i>Campbell v. Knicheloe</i> , 829 F.2d 1453, 1462 (9th Cir. 1987), <i>cert. denied</i> , 488 U.S. 948 (1988) .....	29
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir. 1990).....	30
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (9th Cir. 1995).....	29
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	27, 29
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).....	29
<i>Stogner v. California</i> , 539 U.S. 607, 612, 123 S. Ct. 2446, 156 L.Ed.2d 544 (2003).....	23
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	27, 28, 29, 30

<i>United States v. Cronin</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	26
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1046 (1989).....	29
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9th Cir. 1991) .....	30
<i>Weaver v. Graham</i> , 450 U.S. 24, 28-29, 67 L.Ed.2d 17, 101 S. Ct. 960 (1981).....	23
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).....	29

### **Constitutional Provisions**

Amend. 10 .....	12
U.S. Const. art. 1, § 10.....	23
Const. art. 1, section 22 .....	12
Const. art. 1, § 23.....	23
Sixth Amendment of the United States Constitution.....	27, 29

### **Statutes**

Laws of 2008, ch. 231 .....	20
Laws of 2008, ch. 231, § 1 .....	8, 17
Laws of 2008, ch. 231 §§ 1-4 .....	26
Laws of 2008, ch. 231, § 3 .....	17
Laws of 2008, ch. 231, § 4 .....	18
Laws of 2008, ch. 231, § 5 .....	20
Laws of 2008, ch. 231, §§ 2-4 .....	17

Laws of 2008, chapter 231, §§ 1-5 .....	17
RCW 10.01.040 .....	21, 22
RCW 9.94A.345 .....	21, 22
RCW 9.94A.500 .....	7, 16
RCW 9.94A.510 .....	7
RCW 9.94A.525 .....	7, 8, 9, 16, 17, 18, 19, 20, 21
RCW 9.94A.525(21).....	17
RCW 9.94A.530 .....	8, 9, 16, 17, 18, 19, 20, 21
RCW 9.94A.530(2).....	17

**Rules and Regulations**

RAP 2.5(3)(c) .....	30
---------------------	----

**Other Authorities**

Sentencing Reform Act (SRA) .....	4, 7, 16
-----------------------------------	----------

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the sentencing court properly considered new criminal history evidence to accurately determine defendant's criminal history and offender score for resentencing?
2. Whether defendant received effective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On July 12, 2005, the State, charged Abdul Khalif Calhoun, hereinafter "defendant," with two counts of robbery in the first degree; one count of robbery in the second degree; and one count of burglary in the first degree. CP 1-5. On October 25, 2005, the State filed an amended information, changing the defendant's charges to: one count of robbery in the first degree; two counts of assault in the second degree; and one count of burglary in the first degree. CP 7-10. During the pre-trial phase, defendant fired his first court appointed attorney. CP 355. Defendant's second and third court appointed attorneys withdrew from defendant's case after defendant insisted the attorneys sign a contract "promising representation in a manner in which [defendant] saw as constitutionally required," and after defendant continued to bring several pro se motions. CP 36-66 (internal quotations omitted); CP 356, 357.

Defendant's case came before the Honorable Frank Cuthbertson for jury trial. CP 36-66. The jury found defendant guilty as charged in the amended information. CP 11-14. Defendant appeared for sentencing on June 2, 2006 (original sentencing). 1RP2. At the original sentencing, the prosecutor offered into evidence two certified copies of defendant's prior Oregon convictions. 1RP2. The exhibits showed a 1995 and a 2001 conviction for unlawful possession of a controlled substance with intent to deliver, and a 2001 conviction for unlawful possession of a controlled substance. *Id.* The prosecutor also mentioned a 1999 Washington conviction for assault in the second degree, but did not present a certified copy proving that conviction. 1RP3. Based on the three prior Oregon convictions and the current violent offenses, the prosecutor calculated defendant's offender score at nine for each charge.

Defense counsel reviewed the Oregon conviction exhibits and offered no objection to either. *Id.* As to the offender score calculation, defense counsel stated, "Your Honor, I have not made an independent calculation, but I believe that counsel is correct in his calculation of the offender score." 1RP4. At that time, the court entered a finding that defendant's offender score was nine. *Id.* Based on the judge's finding, the prosecutor requested a high end sentence for defendant. 1RP4-5. Defense counsel argued at length for a low end sentence. 1RP6-8. After defense counsel finished his argument, the court gave defendant an opportunity to

1RP8. At this time, defendant argued the court violated his “private individual rights,” and subjected him to fascism. *Id.* He also claimed his appointed attorneys violated his Fifth, Sixth, and Fourteenth Amendment rights by interfering with his defense. *Id.* In conclusion, defendant stated, “even if I am given the high end or, you know, if the Court sees it that I am a menace, that I will still contend to search for intelligence and truth.” 1RP9. Defendant did not object to the inclusion of his prior Oregon convictions, or his offender score calculation. 1RP8-9.

At the conclusion of defendant’s speech, the court sentenced him to the high end standard range for each count, to run concurrently with each other. 1RP10. This resulted in 171 months total confinement. CP 316-326. After the judge sentenced defendant, defendant stated, “I would like to say that I object to the points being offered at nine points. I only have four points in my history.” 1RP11. The judge replied, “We’ve already entered an order in that regard. Thank you very much.” *Id.*

After sentencing defendant, the court recessed, allowing defendant to sign all the necessary paperwork. 1RP11-12. On the stipulation to prior record and offender score, the prosecutor wrote, “defendant objects to the calculation of his offender score.” CP 15-16. The prosecutor and defense counsel signed the stipulation form. Rather than signing the stipulation and judgment and sentence paperwork, defendant wrote on the signature lines, “use my exemption for offset and 62(a) settlement enclosure, RCW 3-419 of this account 541940477 exempt from levy except at except for

value and returned.” CP 15-16, 316-326. Once back on the record, the court granted the prosecutor’s request to acknowledge this as defendant’s signature. 1RP13.

Defendant filed a timely notice of appeal. CP 30. On appeal, this court found defendant’s two second degree assault convictions violated double jeopardy protections. CP 36-66. On March 17, 2009, this court issued a mandate reversing both assault convictions and remanding defendant’s case for resentencing. *Id.* On appeal, defendant did not challenge the criminal history determination or his offender score from his original sentencing. *Id.*

On May 29, 2009, defendant came before the Honorable Frank Cuthbertson for resentencing. 2RP 2. At this hearing, the prosecutor presented four certified copies of judgment and sentences to prove defendant’s prior criminal convictions. 2RP 3. Defense counsel objected to the exhibits, arguing the State should be held to the evidence it presented at defendant’s original sentencing. *Id.* To allow both parties an opportunity to brief the issue, the court continued defendant’s resentencing. 2RP 6-8.

On July 1, 2009, defense counsel filed a sentencing memorandum in which he argued the prosecutor could not present new criminal history evidence at resentencing. CP 132-139. Defense counsel also argued that amendments to the Sentencing Reform Act (SRA) made in 2008 could not apply retroactively to defendant’s case. *Id.*

The parties appeared before the court again on July 1, 2009, to discuss whether the State could offer new criminal history evidence not considered at defendant's original sentencing. 2RP 15-17. The argument centered on two issues: 1) did defendant make a timely and specific objection to his criminal history determination at his original sentencing sufficient to preclude the consideration of new evidence at resentencing, and 2) did the 2008 SRA amendments apply to defendant's case, thereby permitting consideration of the new evidence regardless of whether defendant objected at the original sentencing. 2RP 17-19. As defense counsel did not submit his sentencing memorandum to the court until the morning of the hearing, the court set over resentencing until July 17, 2009, so the court could review defense counsel's brief and any additional authority presented by the parties. 2RP 25-28.

On July 14, 2009, the prosecutor filed a supplemental resentencing memorandum. CP 140-272. In this brief, the prosecutor conducted a comparability analysis with regards to defendant's four Oregon convictions, and provided documentation proving defendant's criminal history. CP 140-272. Defense counsel provided supplemental briefing to the court on July 15, 2009, and July 17, 2009. CP 273-276, 277-279. On July 17, 2009, the court heard arguments from both parties. The judge ruled the prosecutor could present new criminal history evidence not before the court at defendant's original sentencing. 7/17/ RP 45.

The parties made their final appearance before the court on August 13, 2009. At this hearing, the prosecutor presented exhibits showing: a 1995 Oregon conviction for unlawful possession of a controlled substance with intent to deliver (one point); a 1998 Oregon conviction for unlawful possession of a controlled substance with intent to deliver (one point); a 1999 Washington conviction for second degree assault (two points); a 2001 Oregon conviction for unlawful possession of a controlled substance with intent to deliver (one point), and a 2001 Oregon conviction for possession of a controlled substance (one point). 8/13 RP 53-55. The court admitted the criminal history evidence over defense counsel's objections. 2RP 56.

Based on the evidence before the court, the prosecutor calculated defendant's offender score at eight. 2RP 58. This score included six points for defendant's prior offenses and two points for defendant's other current offenses. *Id.* The prosecutor requested a high end sentence. 2RP 58. The court found, based on a preponderance of the evidence, that defendant's correct offender score was eight and sentenced defendant to 144 months for the robbery conviction, and 102 months for the burglary conviction, to run concurrently with each other. 2RP 64; CP 316-326.

From entry of this judgment and sentence, defendant filed this timely notice of appeal. CP 331-340.

C. ARGUMENT.

1. THE SENTENCING COURT PROPERLY CONSIDERED NEW CRIMINAL HISTORY EVIDENCE TO ACCURATELY DETERMINE DEFENDANT'S CRIMINAL HISTORY AND OFFENDER SCORE FOR RESENTENCING.

The Sentencing Reform Act (SRA) requires that a sentence be based on a proper offender score. RCW 9.94A.510; *see also* RCW 9.94A.525. RCW 9.94A.500 requires the court conduct a sentencing hearing before imposing a sentence. At a sentencing hearing, the State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The preferred method of proving the existence of a prior conviction is a certified copy of the judgment and sentence. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). However, the State may also introduce other comparable transcripts or documents of record to establish criminal history. *State v. Herzog*, 48 Wn. App. 831, 834, 740 P.2d 380 (1987). The State is obligated to ensure the record before the

sentencing court supports the criminal history determination. *Mendoza*, 165 Wn.2d at 920. The sentencing court must base its decision on information bearing some “minimal indicium of reliability beyond mere allegation.” *Mendoza*, 165 Wn.2d at 920 (internal citations omitted).

On remand for resentencing following appeal, the State and the defendant must have the opportunity to present all relevant evidence regarding criminal history, including criminal history not previously considered. RCW 9.94A.525, RCW 9.94A.530. This is true regardless of whether a defendant objects to the criminal history presented below. Laws of 2008, ch. 231, § 1; *State v. Jackson*, 150 Wn. App. 877, 890, 209 P.3d 553 (2009). This procedural policy ensures all offenders receive an accurate sentence. *Id.* On appeal, defendant argues that when determining his criminal history at the resentencing, the court should have only considered criminal history evidence offered at defendant’s original sentencing.

- a. Defendant did not properly object to his criminal history determination at his original sentencing.

On appeal, defendant claims his pro se objection at his original sentencing precluded the State from presenting new criminal history evidence at his resentencing. Brief of Appellant at 18. Under the 2008 SRA amendments (discussed *infra*), the court may consider all relevant criminal history evidence at resentencings regardless of whether a criminal

defendant objected to his original criminal history determination. RCW 9.94A.525; RCW 9.94A.530. However, if this court does consider the objection issue raised by defendant, defendant failed to properly object to his criminal history determination at his original sentencing. The State is only held to the existing record on remand for resentencing if a defendant makes a timely and specific objection to the State's evidence at sentencing and the State still fails to prove its case after an evidentiary hearing based on the objection. *State v. McCorkle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997).

At defendant's original sentencing, the prosecutor presented certified copies of defendant's prior 1995 and 2001 convictions out of Oregon. 1RP2. The prosecutor also mentioned a 1999 Washington conviction for which the prosecutor did not have a certified judgment and sentence copy. *Id.* at 3. Defense counsel signed the stipulation on prior record listing these convictions, thereby affirmatively acknowledging defendant's criminal history. CP 15-16. Based on defendant's criminal history, the prosecutor calculated defendant's offender score at 9. *Id.* After this determination, the court addressed defense counsel.

The Court: Thank you. [Defense Counsel], have you had an opportunity to look at Exhibits 1 and 2?

Defense Counsel: I have, Your Honor.

The Court: I'm going to admit Exhibits 1 and 2 for purposes of the sentencing hearing only. [Defense Counsel], on the offender score for Mr. Calhoun.

Defense Counsel: Your Honor, I have not made an independent calculation, but I believe that counsel is correct in his calculation of the offender score.

The Court: I'm going to enter a finding at this time that the offender score is nine, and I'll hear [the prosecutor] on the State's sentencing recommendation.

1RP4. The Court then gave both sides a chance to make sentencing recommendations. *Id.* The State requested a high end sentence. 1RP4-6. Defense counsel argued at length for a low end sentence. 1RP6-8. The court also gave defendant an opportunity to comment. *Id.* at 8. Defendant took advantage of this opportunity but did not comment on his criminal history or offender score calculation. *Id.* at 8-9. Defendant also did not address what he believed to be an appropriate sentence for his convictions. *Id.* at 9. After defendant's speech, the court sentenced him to the high end of the range and imposed all fees and conditions of sentencing. *Id.* at 10-11. After the court sentenced defendant, defendant stated, "I would like to say that I object to the points being offered at nine points. I only have four points in my history." *Id.* at 11. This objection was not timely, specific, or proper.

**i. Defendant did not make a timely and specific objection at his original sentencing.**

To allow a sentencing court an opportunity to fix any alleged errors, a defendant must timely object when the alleged error occurs. Therefore, if defendant disagreed with his criminal history or offender score, he should have objected when the court accepted the criminal history and offender score calculation. Rather, defendant's pro se objection occurred *after* the court sentenced defendant. 1RP 11. At that point, the time to object had come and gone. Defendant argues on appeal that he also objected in writing, however the record indicates all documents were signed *after* the court sentenced defendant, creating yet another temporal problem with defendant's argument. *See* RP 11-13.

In addition to the temporal problems, defendant did not state on the record why he believed his offender score to be four rather than nine. 1RP 11. Without clarification, this court has no way to determine what error defendant believes the State made, nor what remedy would be appropriate. Defendant had ample opportunity to make a timely and specific objection to his criminal history and offender score calculation. He remained silent. Defendant's untimely and unspecific objection gave neither the trial court, the State, nor this court any way to determine a proper response to the

objection. Therefore, any error defendant now attempts to connect to the objection is waived.

**ii. The defendant had no right to hybrid representation.**

“In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . .” Const. art. 1, section 22, amend. 10. “[T]here is no constitutional right, either state or federal, to ‘hybrid representation,’ through which an accused may serve as co-counsel with his or her attorney.” *State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564, *review denied*, 138 Wn.2d 1020, 989 P.2d 1139 (1999). In state courts as well as federal courts, the great weight of judicial authority is that there is no right to be represented by counsel and to simultaneously actively conduct one’s own defense. *State v. Hightower*, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984) (citations omitted). That is particularly true in the State of Washington where the rights are granted in the disjunctive. *Id.* “The right to self-representation in a criminal matter . . . is an all-or-nothing process.” *Romero*, 95 Wn. App. at 326.

Here, defendant was represented by counsel throughout the proceedings. The record demonstrates that his attorney addressed the court, the jury, and the witnesses throughout the trial. At no time did

defendant make a motion to proceed pro se. Thus, only counsel was authorized to object and make legal arguments to the court. As such, the trial court was entitled to rely on defense counsel's affirmative acknowledgement of defendant's criminal history and offender score calculation and ignore defendant's untimely objection. See *Romero supra*. Nothing in the record supports defendant's argument that he properly objected to his criminal history at the original sentencing.

b. Case law relied upon by defendant does not support his position on appeal.

Defendant relies on a long list of cases to support his argument that the court improperly considered new criminal history evidence at defendant's resentencing. Brief of Appellant at 17-34.<sup>1</sup> These cases differ in one fundamental way from defendant's case. The question addressed by the courts in *Ford*, *Lopez*, and *Mendoza* was not simply whether the State may present new criminal history evidence upon *any* remand for resentencing. Rather, these cases determined whether the State may present new criminal history evidence upon remand for resentencing *after a criminal defendant successfully challenges his criminal history determination on appeal*. These courts therefore had to first and foremost

---

<sup>1</sup> Defendant primarily relies on the following cases: *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999); *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002); and *State v. Mendoza*, 165 W.2d 913, 205 P.3d 113 (2009).

determine whether the State failed to sufficiently prove the appellants' criminal histories. *If* the State failed to do so, *then* these courts decided whether the State would have the opportunity to fix its mistake upon remand.

Here, defendant did not challenge his criminal history determination in his original appeal. Nor does it appear that defendant is now challenging his original criminal history determination. Therefore, this court has not been asked to either determine whether a mistake occurred in this regard, nor determine what remedy would be appropriate if a mistake had occurred. This court remanded defendant's case for resentencing pursuant to a double jeopardy issue, and did not restrict the resentencing court to the record and evidence from the original sentencing. As such, the above cases do not appear applicable. However, if this court does find the above cases apply to the issues defendant raises on appeal, *Ford*, *Lopez*, and *Mendoza* support the court's decision to consider new criminal history evidence at defendant's resentencing.

In *Ford* and *Mendoza*, the defendants each appealed their sentences, arguing for the first time on appeal that the State failed to sufficiently prove their criminal histories. *Ford*, 137 Wn.2d at 476; *Mendoza*, 165 Wn.2d at 918. In both cases, the Washington Supreme Court remanded the cases for resentencing, but held the State could

present new evidence of criminal history at the resentencing, because the defendants failed to specifically object to the evidence below. *Ford*, 137 Wn.2d at 486; *Mendoza*, 165 Wn.2d at 930. Like in *Ford* and *Mendoza*, the case at hand involves no objection at the original sentencing to the criminal history or offender score calculation (*see supra* at 8). Therefore, under these two cases, the State had the authority to present new criminal history evidence upon remand for resentencing. *Id.*

Defendant also relies on *Lopez* which is easily distinguishable from defendant's case. In *Lopez*, the defendant specifically objected at his sentencing to the evidence offered by the State supporting his criminal history. *Lopez*, 147 Wn.2d at 519. After objecting, the State was given an opportunity to respond, but chose to not offer any additional evidence. *Id.* at 521. On appeal, Lopez again argued the State failed to meet their burden to prove his criminal history. *Id.* at 519. The Washington Supreme Court reversed Lopez's sentence and remanded for resentencing based on "the existing record" because Lopez specifically objected to the issue below, and the State chose not to provide further evidence. *Lopez*, 147 Wn.2d at 520. Once again, defendant in the instant case *did not* object below. The State had no notice that defendant found the evidence proving his criminal history deficient. Even now, the State has no way to determine if defendant actually disagreed with the criminal history

determination. Therefore, under *Ford*, *Mendoza*, and *Lopez*, the court properly allowed the State to present new criminal history evidence at defendant's resentencing.

- c. Under the 2008 amendments to the Sentencing Reform Act, the court properly considered all relevant evidence not offered at defendant's original sentencing.

Even if this court were to hold defendant properly objected at his original sentencing, the resentencing court still had the authority, under the 2008 amendments to the SRA, to consider new criminal history evidence at resentencing. On appeal, defendant argues the 2008 amendments to the SRA, specifically RCW 9.94A.500, RCW 9.94A.525, and RCW 9.94A.530, cannot apply to defendant's case. Brief of Appellant at 34. This presents a question of law which this court reviews de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.2d 4 (2002).

- i. **The 2008 amendments to RCW 9.94A.525 and RCW 9.94A.530 are procedural in nature.**

Absent clear legislative intent to the contrary, crimes are punished under the laws in effect at the time of a crime's commission. *In re Hegney*, 138 Wn. App. 511, 542, 158 P.3d 1193 (2007). However, this rule applies only to substantive changes in the law, not procedural changes. *State v. Hodgson*, 108 Wn.2d 662, 669-670, 740 P.2d 848

(1987). Procedural changes do not alter the consequences of the crime, and therefore, do not deny a criminal defendant relevant notice. *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007).

In 2008, the legislature enacted Laws of 2008, chapter 231, §§ 1-5. This act amended RCW 9.94A.530, and reenacted and amended RCW 9.94A.525. Laws of 2008, ch. 231, §§ 2-4. In doing so, the legislature expressed their intent “to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history.” Laws of 2008, ch. 231, § 1.

The relevant amendment to RCW 9.94A.525(21) states:

The fact that a prior conviction was not included in an offender’s offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. ~~((Accordingly))~~ Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Laws of 2008, ch. 231, § 3 (2008 amendments underlined). The relevant amendment to RCW 9.94A.530(2) states:

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 state in the presentence reports and not objecting to criminal history presented at the time of sentencing. 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, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, 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.

Laws of 2008, ch. 231, § 4 (2008 amendments underlined).

These amendments are procedural in nature as they do not deny criminal defendant's fair notice. When defendant committed his crimes in 2005, he had sufficient notice that any sentence imposed upon conviction for those crimes would be based upon his criminal history and offender score calculation. *See* RCW 9.94A.525, RCW 9.94A.530 (2005 version). Based on this fair notice, amendments to the SRA allowing sentencing courts to consider all relevant evidence of a defendant's criminal history, even upon resentencing, do not affect defendant's substantive rights. *See Pillatos*, 159 Wn.2d at 470 (Procedural amendments to Washington's exceptional sentencing system did not offend principles of fair notice as

criminal defendants already had warning of the risk of an exceptional sentence). Additionally, the type of evidence considered reliable to prove a defendant's criminal history did not change as a result of the 2008 amendments. Therefore, defendant cannot argue the amendments that allowed the prosecutor to unfairly offer documents not originally admissible to prove his criminal history at the original sentencing. As defendant had fair notice of what crimes could be considered in his criminal history, what evidence could be offered to prove those crimes, and how those crimes could contribute to defendant's offender score, the 2008 amendments are procedural in nature. The changes merely clarify the procedures courts must follow at resentencings to ensure criminal defendants receive accurate sentences. *See* RCW 9.94A.525, RCW 9.94A.530.

**ii. The legislature intended the amendments apply to defendant's resentencing.**

If a statutory amendment concerns procedural changes, this court must look to the legislative intent in determining whether the statute may be applied retroactively or prospectively. A statute operates retroactively if the triggering event for its application occurred before the effective date of the statute. *Pillatos*, 159 Wn.2d at 471; *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992). "A statute is not retroactive merely

because it applies to conduct that predated its effective date.” *Pillatos*, 159 Wn.2d at 471. The statute must attach new legal consequences to events completed before its enactment in order to operate in a retroactive fashion. *Id.* Conversely, a statute operates prospectively when the triggering event occurs after enactment. *Pillatos*, 159 Wn.2d at 471 (citing *In re Estate of Burns*, 131 Wn.2d 104, 110-111, 928 P.2d 1094 (1997)).

RCW 9.94A.530 went into effect on June 12, 2008, and applies to any sentencings and resentencings occurring on or after the effective date. Laws of 2008, ch. 231. By its plain language, the triggering event for application of RCW 9.94A.530 is a sentencing or resentencing. On March 17, 2009, this court filed a mandate ordering defendant be resentenced pursuant to this court’s opinion. CP 36-66. The court resentenced defendant on August 13, 2009. CP 316-326. As the triggering event for RCW 9.94A.530’s application, defendant’s resentencing, occurred *after* the statute’s effective date, the statute’s application to defendant’s case is prospective and the court properly applied its terms to defendant’s case.

In reenacting and amending RCW 9.94A.525, the legislature expressed its intent to apply the statute to “all sentencings and resentencings commenced before, on, or after the effective date,” of June 12, 2008. Laws of 2008, ch. 231, § 5. By the plain language of this section, the triggering event for RCW 9.94A.525’s application could occur

even prior to the June 12, 2008, effective date. While this could lead to retroactive application of this statute, thereby requiring further inquiry into the appropriateness of its application, the issue is moot in defendant's case. As discussed above, the triggering event for these two statutes in defendant's case was his August 13, 2009, resentencing which occurred *after* the statutes' effective date. The application of RCW 9.94A.525 and RCW 9.94A.530 to defendant's case is prospective and therefore not improper.

**iii. Neither RCW 9.94A.345 nor RCW 10.01.040 bar application of the 2008 amendments to defendant's resentencing.**

Defendant claims RCW 9.94A.345, the "timing statute," and RCW 10.01.040, the "savings statute," prohibit the State from applying the 2008 SRA amendments in question to defendant's case. Brief of Appellant at 36. RCW 9.94A.345 provides that "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 10.01.040 generally requires that crimes be prosecuted under the law in effect at the time they were committed. As discussed *supra* at 16, the savings statute only applies to substantive changes in the law. *Hodgson*, 108 Wn.2d at 669-670.

Similarly, the timing statute is not intended to block the application of procedural statutory changes. *Pillatos*, 159 Wn.2d at 473.

In this case, the law in effect when defendant committed his crime (2005), and the law in effect when defendant was resentenced (2009), called for defendant's sentencing range to be determined based upon his criminal history and offender score. The 2008 procedural changes allowing the State and criminal defendants to present all relevant evidence proving or refuting criminal history at resentencings did not substantively change the "law in effect" when defendant committed his crimes. Therefore, application of the 2008 procedural changes to defendant's case does not violate the letter or purpose of the savings statute or the timing statute. *See Pillatos*, 159 Wn.2d at 472-473 (Where both past and present laws allowed for exceptional sentences, applying procedural changes in the law did not violate the letter or purpose of RCW 9.94A.345 nor RCW 10.01.040).

**iv. Applying the new procedures does not violate the ex post facto clause.**

Defendant claims that applying the 2008 procedural changes to defendant's case violates ex post facto protections. Brief of Appellant at 38. Even assuming *arguendo* the 2008 changes were applied retroactively to defendant's case, defendant mischaracterizes his protections under ex

post facto clauses. The Washington Supreme Court has stated:

The ex post facto clauses forbid the State from enacting laws which impose punishment for an act which was not punishable when committed or increase the quantum of punishment annexed to the crime when it was committed. U.S. Const. art. 1, § 10, cl. 1; Const. art. 1, § 23; *see Weaver v. Graham*, 450 U.S. 24, 28-29, 67 L.Ed.2d 17, 101 S. Ct. 960 (1981) (and cases cited therein). “Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” *Weaver*, at 30.

*In re Pers. Restraint of Powell*, 117 Wn.2d 175, 184-185, 814 P.2d 635 (1991). A defendant is subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment.

*In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004) (citing *Stogner v. California*, 539 U.S. 607, 612, 123 S. Ct. 2446, 156 L.Ed.2d 544 (2003)). The mere risk that an offender might receive a higher sentence under new procedures does not in and of itself violate the ex post facto clause. *Cal. Dep't of Corr. V. Morales*, 514 U.S. 499, 505, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The key is whether the defendant had notice of the punishment at the time of the crime. *Powell*, 117 Wn.2d at 184-185.

As discussed at length above, the 2008 changes at issue in this case are procedural and do not affect defendant's substantive rights.

Furthermore, the prosecutor did in fact determine defendant's criminal history and calculate defendant's offender score based on the 2005 SRA. *See* CP 114-117. Defendant's criminal history yielded an offender score of eight and a standard range sentence of 108-144 months for his first degree robbery conviction, and a standard range sentence of 77-102 months for his first degree burglary conviction. *Id.* While the procedural changes did allow the prosecutor to prove a 1999 Washington conviction and a 1998 Oregon conviction not proved at defendant's original sentencing, thereby affecting the standard sentencing range, the changes did not alter defendant's notice that the two convictions were eligible for inclusion in defendant's criminal history. Defendant therefore had notice of the punishment at the time of the crime and was punished under the laws in place when defendant committed the crimes. This does not amount to an ex post facto violation.

As the 2008 amendments to the SRA are procedural in nature and were applied prospectively to defendant's resentencing per clear legislative intent, the court properly considered new criminal history evidence to prove defendant's complete criminal history. This allowed the court to impose an accurate sentence. The legislature clearly intended all offenders be sentenced using the most accurate criminal history evidence

available. The prosecutor's and the court's actions below reflect this intent.

d. Defendant's two issues raised in passing should not be considered on appeal.

An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Mixed in with other unrelated issues, defendant claims the State improperly calculated defendant's offender score. Brief of Appellant at 30, 32. Defendant also includes a brief claim that presenting new criminal history evidence at a resentencing constitutes prosecutorial vindictiveness. Brief of Appellant at 40. Defendant provides no sufficient argument or authority to support these claims, and therefore this court should decline to review the issues.

Even if this court is inclined to address these issues, the issues have no merit. First, the State properly calculated defendant's offender score. At defendant's resentencing, the State provided certified copies of judgment and sentences, verdict forms, and criminal history stipulation forms to prove the following prior offenses:

1. 1995 unlawful possession of a controlled substance with intent to deliver (one point).
2. 1998 unlawful possession of a controlled substance with intent to deliver (one point).

3. 1999 second degree assault (two points).
4. 2001 unlawful possession of a controlled substance with intent to deliver (one point).
5. 2001 unlawful possession of a controlled substance (one point).

CP 114-117, 140-272. Combined with defendant's current offenses of robbery in the first degree (two points) and burglary in the first degree (two points), defendant had an offender score of eight (six points for prior offenses and two points for other current offenses). CP 331-340. This calculation matches that done by the prosecutor below.

Second, the prosecutor presented new criminal history evidence at defendant's resentencing to follow the legislature's intent that *all* criminal defendant's be sentenced based on the most accurate and complete criminal history evidence available, even upon resentencing. Laws of 2008, ch. 231 §§ 1-4. The prosecutor cannot be vindictive when merely carrying out the legislature's clearly expressed intent in amending the SRA.

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been

conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective

representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934

F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant claims he received ineffective assistance of counsel at both his original sentencing and his resentencing. Brief of Appellant at 1 (Assignment of Error #4). Defendant raised and argued an ineffective assistance of counsel claim during his original appeal. CP 36-66. This court rejected defendant's argument, stating defense counsel demonstrated "zealous advocacy in a less-than-ideal working relationship." *Id.* Under the doctrine of "law of the case," "the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled.'" *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996), citing *Green v. Rothschild*, 68 Wn.2d 1, 10, 402 P.2d 356 (1966). A legal issue decided in a subsequent appeal may be overruled and reconsidered only where the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice. *Id.*; see also, RAP 2.5(3)(c). As this court's determination that defendant received effective assistance of counsel during his original trial and sentencing is not clearly erroneous, the

decision stands and cannot be reconsidered now. *See* CP 36-66. The State will focus on defendant's claim as it pertains to his resentencing only.

Defendant claims he received ineffective assistance of counsel at resentencing because his attorney failed to "secure a copy of the crucial transcript in time to use it at the resentencing hearings." Brief of Appellant at 25 (referring to the transcript from defendant's original sentencing). First, defendant cannot show any prejudice from defense counsel's failure to secure the sentencing transcript sooner. As discussed at length above, regardless of what happened at the original sentencing, the 2008 amendments to the SRA allowed the State to present all relevant evidence necessary to accurately determine defendant's criminal history and offender score. *Supra* at 15-24. Furthermore, even after the court finally reviewed the transcript, it found defendant did not make a timely and specific objection at his original sentencing, rendering the issues raised by defense counsel at resentencing moot. 2RP 39. There is no reason to believe the court would have reached a different conclusion had defense counsel procured the transcript earlier in the proceedings. As defendant cannot show any prejudice resulting from defense counsel's delay in procuring the original sentencing transcript, defendant cannot succeed on his claim of ineffective assistance of counsel.

In addition to not showing prejudice, defendant cannot show his counsel's performance fell below an objective standard of reasonableness. Defense counsel adamantly objected to the court considering any evidence

not considered at defendant's original sentencing. In addition to objections on the record, defense counsel submitted three sentencing memorandums to the court arguing against consideration of new criminal history evidence. CP 132-139, 273-276, 277-279. After the sentencing court ruled it would consider new criminal history evidence for purposes of resentencing, defense counsel properly objected, thereby preserving the issue for appeal. 2RP 42. Subsequent to the court's ruling, defense counsel continued to object each time the prosecutor offered criminal history evidence to the court. 2RP 3, 43, 45, 48, 49, 56, 59. Defense counsel zealously advocated for defendant to be sentenced based on the criminal history evidence before the court at defendant's original sentencing.

A review of the entire record indicates counsel effectively advocated for his client. Counsel made numerous objections during the resentencing and briefed several issues. Counsel cannot be said to be ineffective for not promptly procuring the original sentencing transcript when the error did not prejudice defendant. Counsel can also not be said to be ineffective merely because the court overruled his objections to the new criminal history evidence. As defendant cannot prove counsel's performance was deficient or that counsel's performance prejudiced defendant, defendant's claim cannot prevail.

FILED  
COURT OF APPEALS

10 AM '10 PM 1:47

STATE OF WASHINGTON  
COURT OF APPEALS  
*[Handwritten signature]*

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court affirm the judgment and sentence below.

DATED: August 17, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

*[Handwritten signature of Melody Crick]*

MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

\_\_\_\_\_  
Amanda Kunzi  
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*[Handwritten signature]*  
\_\_\_\_\_  
Date Signature