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II. **STATEMENT OF THE CASE**

The sole issue on appeal is whether the current sentencing court erred in ruling that 1996 Judgment scoring the two 1990 offenses as one was a “mistake” and that the current court was not bound by that determination. RP 73-74. Please refer to the Facts and Procedural Posture in the Appellant’s Opening Brief.

III. **ARGUMENTS IN REPLY:**

1. THE COURT MISCALCULATED THE OFFENDER SCORE.

The State correctly states that the sentencing court in 1990 scored a first degree theft and a second degree burglary as separate offenses rather than the same criminal conduct BR 3. The State then asserts, with no citation to authority, that a prior Judgment & Sentence is of the greatest importance in calculating offender scores, such that the prior court’s determination should be binding on the current court. BR 3-4. But immediately preceding this assertion, the State quotes the actual language of the governing statute, RCW 9.94A.525(5)(a)(i). BR 2-3. This statute unambiguously says that the current court determines how to score “other” offenses for which sentences were served concurrently, where “other” can only refer to offenses other than priors found to be same criminal conduct as discussed in the preceding sentence. RCW 9.94A.525(5)(a)(i).

This Court enforces unambiguous statutory language in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If a statute is clear on its face, its meaning is derived from the language of the statute alone. *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010), (interpreting former RCW 9.94A.525). Even if .525(a)(i) was less clear about the current court's discretion to revisit prior offenses that were scored separately, the Court construes ambiguous statutes in favor of the defendant. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). The rule of lenity applies to the SRA and operates to resolve statutory ambiguities in favor of a criminal defendant. *In re Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994) (applying this principle to a case involving an offender score and in the same criminal conduct context). Either way, under RCW 9.94A.525(5)(a)(i), the 1990 court's scoring decision was not binding on subsequent sentencing courts.

The State's citation to *State v. Lara*, 66 Wn. App. 927, 834 P.2d 70 (1992), merely confuses things. BR 4. *Lara* interprets RCW 9.94A.360, the predecessor statute that was recodified as RCW 9.94A.525 by Laws 2001, ch. 10, § 6. Moreover, *Lara* predates even the 1995 revision of RCW 9.94A.360(6) in which the Legislature limited the current court's discretion. Laws of 1995, ch. 316, §1.

The revised RCW 9.94A.360 read: “Prior adult offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, *shall* be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to *other* prior adult offenses for which sentences were served concurrently whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.400(1)(a)[.]” Former revised RCW 9.94A.360(6)(a)(i) (emphasis added).

The plain meaning of this is that a current sentencing court can rescore previously ruled-upon offenses downward, but not upward. The current court must abide by a previous court’s decision to count two offenses as one, but may independently apply RCW 9.94A.400(1)(a) to treat as a single offense any prior concurrently-sentenced offenses that had not previously been determined to be same criminal conduct.

Like its predecessor provision in RCW 9.94A.360(6)(a)(i), the plain language of RCW 9.94A.525 first discusses prior offenses that have previously been determined to be same criminal conduct, to which the previously-determined score mandatorily attaches. Then it too says that for other prior offenses for which concurrent sentences were imposed, the

current sentencing court has discretion to determine how to score them.

RCW 9.94A.525(5)(a)(i) (emphasis added).

The State is correct that Sherrill's 1990 offenses were not found to encompass the same criminal conduct. But they were "other offenses for which sentences were served concurrently." CP 110.

Therefore, in 1996, the current sentencing court properly exercised its discretion to determine whether to count those offenses as one point or two points. RCW 9.94A.360(6)(a)(i) authorized the court to reevaluate the 1990 offenses and rescore them as a single offense, which the court elected to do. CP 133, 138. The criminal history section of the 1996 Judgment and Sentence unequivocally states that the 1990 burglary and theft convictions "are one offense for purposes of determining the offender score." CP 133.

The State repeats yet again the unsubstantiated assertion that the 1996 determination was a "mistake," rather than a legitimate exercise of the court's statutory discretion. BR 4. But it is clear from the record that this was not a mere careless oversight. Besides being done by the same judge, an offender score of '2' in the sentencing data box is overwritten with several vertical lines forming a thick '1'. CP 133. And the court cited as authority RCW 9.94A.360. CP 133. As discussed above, the 1996 version of .360 authorized the court to rescore as a single offense any

concurrently-sentenced priors other than those that were “found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct[.]” RCW 9.94A.360(6)(a). But, once the 1996 court revised its determination and rescored the 1990 offenses as a single offense for sentencing, the same provision of .360 divested the 2010 court of discretion to ignore that determination. RCW 9.94A.360(6)(a).

The State again argues that RCW 9.94A.525(5)(a)(i) authorized Sherrill’s 2010 sentencing court to determine the offender score without regard to the 1996 court’s same criminal conduct determination. BR 4-5. But, as a matter of law, in 2010, a current sentencing court did not have discretion under the SRA simply to ignore a previous court’s same criminal conduct determination.

After 1996, the two 1990 offenses fell under the first clause of RCW 9.94A.360(6)(a)(i), not the second. They were offenses previously determined to constitute same criminal conduct. They were no longer “other” prior offenses for which concurrent sentences were imposed. Accordingly, RCW 9.94A.525 did not authorize the 2010 court to disregard the 1996 court’s determination. By the plain language of the statute, the court could not simply ignore the 1996 court’s ruling. RCW 9.94A.525(6)(a)(i). The 2010 court, moreover, lacked any evidence upon which to base a decision to overturn the 1996 court.

The State does not address the non-effect of the intervening residential burglary conviction on the 2010 court's power. Sherrill rests on the argument in the Appellant's Brief (AB) at page 13.

The State also does not dispute that the prosecution presented no evidence upon which the 2010 court could have based a finding that the disputed priors were not same criminal conduct. That argument also can be found at AB 13.

The State does not defend the claim that Sherrill's signature on the statement on plea of guilty justified the court's arbitrary imposition of the score stated in that document. The record is clear that Sherrill disputed that score throughout these proceedings and withdrew a motion to withdraw his plea in reliance on the court's promise to revisit the offender score. AB 15.

Res Judicata: Finally, the State does not address Sherrill's argument that the State's failure to appeal either the 1996 or the 2009 offender score bars the State from denying the preclusive effect of those judgments.

Except in special cases, res judicata bars litigation of "every point that properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Spokane County v. Miotke*, ___ Wn. App. ___, 240 P.3d 811, 813-14

(2010), citing *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004). Please refer to the argument at AB 16.

IV. CONCLUSION

Former RCW 9.94A.360(6)(a)(i) gave the 1996 sentencing court discretion to revisit the scoring of the disputed 1990 offenses. RCW 9.94A.525(6)(a)(i) did not give the current sentencing court discretion to revisit the 1996 court's determination to score two 1990 offenses as a single offense. RCW 9.94A.525(16) did not apply, because the current offense in 2010 was not burglary. Therefore, the 1996 determination that the two 1990 offenses counted as a single offense was binding, and the offender score applicable to Sherrill's 2010 sentencing was five points, not six. Accordingly, the Court should vacate Sherrill's sentence and remand for resentencing.

Respectfully submitted this 21st day of December, 2010.

A handwritten signature in black ink, reading "Jordan B. McCabe", is written over a horizontal line.

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CERTIFICATE OF SERVICE

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