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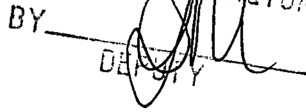
DEPUTY

NO. 43472-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON

Respondent

v

SPENCER OBERG

Appellant

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

The Honorable Edmund Murphy, Judge

PRO SE SUPPLEMENTAL BRIEF OF APPELLANT

SPENCER L. OBERG, Pro Se.
DOC: 306121 Unit: B-135
MCC-WSRU
16700-177th Ave SE
PO Box 777
Monroe, WA 98272-0777

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SUMMARY OF ARGUMENT

To the best of Appellant's knowledge, the facts of this case and the issues presented herein create a matter of first impression in the appellate jurisdiction of the State of Washington. Specifically the applicable statutory sentencing authority in the context of a global plea.

SPENCER OBERG worked with two different county's prosecuting attorneys to negotiate a Global Plea Agreement for the resolution of the charges against him in both counties. OBERG agreed to plead guilty to certain offenses and the State agreed that he would receive concurrent sentences for each case, receive credit for time served in jail, that all charges under the plea would be indivisible for all purposes, and that all causes would be "other current offenses" for sentencing. OBERG had been held in jail since approximately 7/13/2011 due to all of the cases in question out of both counties.

When OBERG was sentenced in King county, the first court to impose sentence on the global plea, the court imposed 76 months to run concurrent with all King county charges **and** all Pierce county charges that are part of the global plea, and was awarded credit for the time he had served in jail. The court also explicitly stated on the Judgment and Sentence documents that all of the charges from

both counties are "other current offenses," which is consistent with the plea agreement that states that all charges and causes under the plea are "indivisible" for all purposes.

OBERG went before the Pierce county court for plea and sentencing proceedings less than two weeks later for the second part of the global plea adjudication. At the hearing, the State effectively argued against awarding OBERG credit for all the time served that was part of the plea and completely ignored the fact that all charges are "indivisible" and "other current offenses" under the plea. The prosecutor then breached the plea and intentionally misled the court by stating that "OBERG has already pled guilty and been sentenced in two **separate** felony cause numbers in King county. This is the second sentencing court."(emphasis added), by not listing the King county cause numbers as "other current offenses" in the criminal history list, and by effectively arguing against the amount of credit for time served guaranteed in the plea by writing in "8 days" in the judgment and sentences. The court followed the State's recommendation in that regard and awarded only 8 days of credit under each cause number and did not consider all cause numbers to be "other current offenses" or "indivisible" at sentencing. The court then imposed 84 month sentences on 2 of the cause numbers to run concurrent with ALL causes from King and Pierce county,

and then imposed 43 months on the third to run concurrently with Pierce county but consecutive with King county.

OBERG is entitled to relief on appeal because the sentencing court erroneously imposed a sentence that exceeded its discretion and authority, the State breached the plea agreement, and the court failed to give him credit for time served to which he was entitled. Also, OBERG's eligibility for DOSA is improperly stricken from the Pierce County plea statements as he is eligible for a DOSA sentencing alternative.

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in sentencing appellant under RCW 9.94A.589(3). (CP at 23, 53, 109; RP at 8, 9, 10.)

2. The sentencing court erred in failing to declare the consecutive sentence exceptional per RCW 9.94A.589(1)(a) and set forth findings of fact and conclusions of law in accordance with RCW 9.94A.535. Even had it done so, it would have lacked such authority as OBERG's 2007 convictions, ALL of his criminal history, are constitutionally infirm. (CP at 20, 50, 106; § 2.4.)

3. The prosecution breached the plea when it intentionally misled the court by stating "OBERG has already pled guilty and been sentenced on two **separate** felony cause numbers in King county. This is the second sentencing court."(emphasis added), by failing to assert that the plea was indivisible for sentencing purposes (ie. all charges

under the plea are "other current offenses"), and by failing to list the King county charges as "other current offenses" on the plea statements and Judgment and Sentences. (RP at 3-4; CP at 16, 46, 119; CP at 12, 49, 105.)

4. The sentencing court erred in imposing an exceptional consecutive sentence and in doing so, violated the terms of the plea agreement.

5. The prosecution breached the plea agreement by intentionally undermining the terms of the plea by discretely writing in credit amounts in the Judgment and Sentences that are contrary to the agreed credit for time served, of approximately 167 days. (CP at 23, 53, 109; CP at 9, 39, 98.)

6. The sentencing court erred in not awarding OBERG credit for all of his time spent in jail. (CP at 23, 53, 109.)

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the sentencing court err when it imposed sentence under authority of RCW 9.94A.589(3) rather than RCW 9.94A.589(1)(a) where all charges were part of a single global plea agreement?

2. Is the exceptional sentence improper because the sentencing court failed to consider and declare aggravating factors and set forth findings of fact and conclusions of law where the exceptional sentence was not stipulated to by the parties and the prior convictions are constitutionally

infirm?

3. Did the prosecution breached the plea when it intentionally misled the court by stating "OBERG has already pled guilty and been sentenced on two **separate** felony cause numbers in King county. This is the second sentencing court."(emphasis added), by failing to assert that the plea was indivisible for sentencing purposes (ie. all charges under the plea are "other current offenses"), and by failing to list the King county charges as "other current offenses" on the plea statements and Judgment and Sentences, when all charges in question from both counties are part of a single **indivisible** plea and these prosecutorial actions were forbidden thereby?

4. Did the sentencing court exceed its authority and discretion in imposing the exceptional consecutive sentence, where the terms of the plea specifically assured OBERG of concurrent sentences?

5. Did the prosecution breach the plea agreement by effectively ensuring that the court imposed credit for time served that was contrary to the amount agreed on in the plea?

6. Did the sentencing court err in not awarding OBERG credit for all the time he served in jail due to the charges under the global plea when he was held on all those charges concurrently since 7/13/2011?

C. STATEMENT OF THE CASE

The statement of the case presented in the concurrently filed PRP and counsel's brief are incorporated herein, in addition to the following:

OBERG entered into a global plea agreement for the resolution of charges in King and Pierce county pursuant to a memorandum from all involved deputy prosecuting attorneys dated September 2, 2011, as well as pursuant to assurances and guarantees provided to him by his counsel. (PRP at All.)

This plea agreement **is** for the resolution of all charges under King county cause numbers 11-1-06655-6 and 11-1-06585-1 as well as Pierce county cause numbers 11-1-02533-2, 11-1-00523-4 and 10-1-03778-2. (RP at 3, 12, 13, 14.) This plea is "indivisible" and binding on **all** cause numbers for all purposes, including sentencing. (PRP at 5-7.) The subject of this appeal is the sentence imposed as a result of that indivisible plea. It is therefore appropriate to consider the record from both King and Pierce county when considering the merits of this appeal. (Because the King county record has not been transferred to this court, OBERG has attached relevant portions thereof, in addition to other relevant evidence, as exhibits to the PRP that is being filed concurrently with this brief. OBERG requests that this court consolidate the PRP with this appeal for consideration.)

Following OBERG's acceptance of the State's offer as it

was expressed through the aforementioned memorandum and counsel, the **indivisible** plea that includes all causes mentioned supra was accepted by the King county superior court on 10/19/2011. (PRP at 7.) The memorandum from the prosecutors detailing the plea specifically states that the sentences for all cause numbers are to be **concurrent**. (PRP at Ex.A 6,12-13) So does the plea agreement. (PRP at Ex B) OBERG's understanding of the plea was that all sentences would be concurrent and that all cause numbers and charges would be considered "other current offenses" for sentencing purposes. Thus, it was his understanding that the plea was indivisible for any and all purposes, including sentencing. This was affirmed when OBERG spoke to counsel Jay Berneburg via phone on 10/18/2011, the day before the plea hearing. (PRP at 6-7.)

OBERG was sentenced on the King county cause numbers before the Honorable Barbara Mack on Friday 11/4/2011. Judge Mack imposed a sentence of 76 months to run concurrently with **ALL** other cause numbers from both counties under the global plea. (PRP at 8; J/S at 4.) The Judgment and Sentence documents of both King county cause numbers clearly state that all cause numbers under the global plea are "other current offenses" for sentencing purposes. (PRP at 8,16; J/S at 2.) The court awarded credit for time served for the entire time OBERG was in jail due to the cause numbers under the plea. (PRP at 8; J/S at 4.) (He had been held on

a "no bail hold" for the Pierce county charges in addition to being held on bail holds for the King county charges since 7/13/11.) (CP at 127, 130, 133.)

OBERG was transferred to Pierce county the following Monday and went before the Honorable Edmund Murphy for a plea and sentencing hearing to "do paperwork" and "wrap things up." (PRP at 8.)

The statement on plea of guilty says that the State will advocate for "credit for time served." (CP at 9, 39, 98.) However, the prosecutor made no mention of credit for time served in her statement to the court, and instead wrote in "8 days" on the Judgment and Sentence forms for each cause number. (RP at ALL; CP at 23, 53, 109.) Both actions were contrary to the plea.

At the beginning of the hearing, the prosecutor addressed the court and stated "Oberg has already pled guilty and been sentenced on two **separate** felony cause numbers in King county. This is the second sentencing court." (RP at 3-4, Emphasis added.) This is a false, intentionally misleading statement that breached the plea.

The representative from the Attorney General's office that was there regarding a sentence modification on a previously imposed and unrelated EHM and Work Release sentence, requested that the court reinstate the remainder of the EHM and Work Release sentences as incarceration time and run that consecutively to any sentence imposed under the

plea that is the subject of this appeal. (RP at 19-20.)

During the plea colloquy, judge Murphy states that the court has the option of "running [this sentence] consecutive to any previously imposed sentence." (RP at 8-10.) This statement is ambiguous and does not specify what is meant by previously imposed sentences. Due to the request of consecutive sentences by the AAG, when viewed objectively, judge Murphy's statements regarding consecutive sentences apply only to that sentence, as it was the only "previously imposed sentence" that is not part of the global plea.

After hearing from the AAG, the Deputy Prosecutor, OBERG's counsel, OBERG's wife, and OBERG, judge Murphy imposed sentece. (RP at 32-34.) He followed the prosecution's improper "recommendation" as to credit for time served and awarded 8 days. (CP at 23, 53, 109.) He then imposed a total of 84 months of prison time in cause numbers 11-1-00523-4 and 11-1-02253-2 to run concurrent with all other cause numbers. (CP at 23, 53; RP at 32-34.) He then imposed 43 months on cause number 10-1-03778-2 and ran it concurrent with the other Pierce county cause numbers but **consecutive** to the King county cause numbers, even though all of those causes are part of the same plea. (CP at 109; RP at 32-34.) An exceptional sentence was not found nor were findings of fact and conclusions of law entered. (CP at 20, 50, 106.)

OBERG's counsel failed to object to the multiple

breaches of the plea and the sentence. This failure constitutes ineffective assistance of counsel.

OBERG now appeals the imposition of the exceptional consecutive sentence, the State's breach of the plea, and the failure of the court to award him credit for time served in jail due to the charges under the plea.

D. ARGUMENT

The facts of the case at bar require that OBERG be sentenced under the authority of RCW 9.94A.589(1)(a) to concurrent sentences per the terms of the global plea agreement, and awarded credit for all the time he served in jail due to the charges under that plea, beginning 7/13/11.

1. THE SENTENCING COURT WRONGLY IMPOSED SENTENCE UNDER AUTHORITY OF RCW 9.94A.589(3) INSTEAD OF RCW 9.94A.589(1)(a).

All of the cases that address the applicability of the different subsections of RCW 9.94A.589 are distinguishable from the case at bar. Specifically, they do not address the applicable standard in the context of a global plea that is indivisible for all purposes, particularly when it is the intent of the parties that all cause numbers be considered "other current offenses" for sentencing purposes. The pertinent parts of the statutes in question are as follows:

RCW 9.94A.589(1)(a)

Except as provided in b or c of this subsection, whenever a person is being sentenced for two or more offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one

crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535...

RCW 9.94A.589(3)

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

The courts have found that subsection (1)(a) applies when sentencing a defendant to multiple "current offenses" in a single proceeding or under a single plea. State v. Bates, 51 Wn.App. 251, 752 P.2d 1360 (Div 1, 1988); State v. Stark, 48 Wash.App. 245, 254-55, 738 P.2d 684, Review denied, 109 Wash.2d 1003 (1987).

Conversely, the courts have recognized that subsection (3) applies when sentencing a defendant to an offense(s) when there are sentences that have already been imposed on **unrelated charges**. State v. Calhoun, 146 Wash.App. 1001 (Div. II 2008) (Court did not violate federal equal protection rights when it exercised its discretion under RCW 9.94A.589(3) in determining whether or not to impose current sentences concurrently or consecutively to previously imposed **unrelated** sentences.)(Emphasis added.) See also State v. Huntley, 45 Wash.App. 658, 662, 726 P.2d 1254

(1986); State v. King, 149 Wn.App. 96, 202 P.3d 351 (Div 3, 2009); State v. Jones, 137 Wn.App. 119, 151 P.3d 1056 (Div 2, 2007); State v. Mathers, 77 Wn.App. 487, 891 P.2d 738 (Div 3, 1995); State v. Lampley, 136 Wn.App. 836, 151 P.3d 1001 (Div 2, 2006); State v. Champion, 134 Wn.App. 483, 140 P.3d 633 (Div 2, 2006). However, the applicable subsection in the context of an indivisible global plea has not been determined.

It is the contention of the Appellant that the applicable subsection should be (1)(a) in all cases involving global plea agreements, whether they involve multiple charges from one county or multiple counties and whether they are adjudicated in one proceeding or multiple proceedings. To hold otherwise would be a violation of Federal Equal Protection and Due Process (US Const. 14th Amendment; WA Const. Art. 1 §§ 22). If the same standard were not applied to all global pleas, a defendant that must go before two different courts in the adjudication of his plea would be subject to subsection (3), whereas a defendant that goes before one court in the adjudication of his plea would be subject to subsection (1)(a). This is of particular concern when both of these defendants are dealing with pleas that encompass charges from more than one county.

For example, the defendant (Moore) in the "Barefoot Bandit" case had the cause numbers from all counties that entered into the global plea adjudicated in a single venue,

as opposed to the case at bar that was adjudicated in two separate venues. Both entered into indivisible global plea agreements for the resolution of causes out of more than one county. The same sentencing statute, namely RCW 9.94A.589(1)(a), should be applied in both cases. To hold otherwise would be contrary to due process and equal protection.

In support of this contention, it is helpful to analyze another statutory provision that applies here. RCW 9.94A.525(1) reads in pertinent part:

> **Convictions entered** or sentenced on the same date as the convictions for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589. (Emphasis added.)

The operative language for the case at bar is 'convictions entered... on the same day'. Even though OBERG physically went before two courts in the adjudication of his plea, his convictions were entered, for all intents and purposes, when he entered into the global plea before the King county court on 10/19/2011. All of the plea documents signed on that date clearly list all of the cause numbers from both counties. (PRP at 7,15-16)

> "Statutory language should be interpreted to effectuate the intent of the legislature. State ex rel. Royal v. Board of Yakima Cy. Comm'rs, 123 Wash.2d 451, 457-58, 869 P.2d 56 (1994). In determining the intent of the Legislature, we first look to the language of the Statute. Id. at 458. If the language of the statute is plain and unambiguous, we must derive the statute's meaning from the wording of the statute itself. Id. at 458; Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction, 104 Wash.2d 344, 348, 705 P.2d 776 (1985)."

State v. Smith, 74 Wash.App. 844, 875 P.2d 1249 (1994) review denied, 125 Wash.2d 1017, 890 P.2d 19 (1995).

In Smith, supra, the court determined that the facts of the case, coupled with statutory interpretation, required that Smith be sentenced under RCW 9.94A.400(1)(a)(recodified as RCW 9.94A.589(1)(a)) because, even though he entered two separate pleas on two separate days, he was sentenced on the same day for both.

In the case at bar, OBERG effectively entered into a single indivisible plea in a single proceeding. Due to the indivisible nature of the plea, once the King county court accepted the plea, it was binding on all cause numbers from both counties. Had the Pierce county court not accepted the plea, it would have been void as a whole.

The reasoning of Division 1 in State v. Moore, 63 Wn.App. 466, 820 P.2d 59 (1991) is helpful here, though the facts and conclusion are distinguishable. In Moore, the court held that the application of §3 and the imposition of consecutive sentences was appropriate even though the charges in question were sentenced on the same day. The court reasoned that, since Moore had pled guilty to some charges and then absconded for two years before being charged with, and ultimately convicted of, another charge, imposing the sentences of the latter and former consecutively was appropriate because the facts of the case were consistent with the legislative intent of that subsection.

Using similar reasoning, we can see that the facts of the case at bar are consistent with the legislative intent behind RCW 9.94A.589(1)(a), and thus warrant application of that subsection.

In addition to the above, the case at bar warrants application of subsection (1)(a) and imposition of concurrent sentences because these are the express terms of the plea agreement.

Plea agreements are governed by contract principles. Puckett v. US, 556 US 129, 129 S.Ct. 1432, 173 L.Ed.2d 266 (2009); United States v. Brumer, 528 F.3d 157, 158 (2nd Cir. 2008)("We review plea agreements de novo and in accordance with principles of contract law." United States v. Griffin, 510 F.3d 354, 360 (2nd Cir. 2007)); United States v. Fine, 975 F.2d 596 (9th Cir. 1992)(en banc); In re Quinn, 154 Wn.App. 816, 840, 226 P.3d 208 (Div. 1 2010)("Plea agreements are contracts and are analyzed under basic contract priciples." State v. Harris, 102 Was.App. 275, 280, 6 P.3d 1218 (2000)(citing State v. Sledge, 133 Wash.2d 828, 838, 947 P.2d 1199 (1997))). The terms of a contract or plea agreement are determined by the intent of the parties. United States v. Riera, 298 F.3d 128, 133 (2nd Cir. 2002). Similarly, whether a contract is considered separable or indivisible is also dependent upon the intent of the parties. State v. Turley, 149 Wash.2d 395, 69 P.3d 338

(2003). State v. Chambers, ___ P.3d ___, 2013 WL 454093 (2013). Plea agreements are construed against the government, or drafting party. US v. Podde, 105 F.3d 813 (2nd Cir. 1997); US v. Brye, 146 F.3d 1207 (10th Cir. 1998). Any ambiguities will be resolved against the drafter. US v. Gerrato-Reyes, 176 F.3d 1253 (10th Cir. 1999).

The record before the court on direct review in conjunction with the evidence and arguments presented in the concurrently filed PRP, clearly show that the intent of the parties was for all cause numbers from both counties specified supra to be part of an indivisible plea agreement. Indivisible for all purposes, including sentencing.

In the record before the court there are several manifestations of this intent: The Statement of Defendant on Plea of Guilty for each cause number asserts that the plea is indivisible and global, thus the reason that OBERG is "choosing to enter the plea" and "take advantage of the State's offer." (CP at 13, 43, 102.) OBERG's counsel makes mention of it in his statement to the court. (RP at 3, 24.) Judge Murphy also makes numerous statements that clearly demonstrate that the plea is indivisible and global while he is going over OBERG's plea statements. (RP at 11-14.)

Moreover, all of the plea documents reference all of the cause numbers in question as required by RCW 9.94A.589(1)(a). In re Bradley, 165 Wn.2d 934, 205 P.3d 123, 127 (2009)("...the cross references contained in the plea

documents were mandatory to the terms of Bradley's concurrent sentences, under RCW 9.94A.589(1)(a)). (That is to say that all cause numbers from both counties are referenced in the plea documents associated with each cause number.) The only plea documents filed in the Pierce county record, the Statement of Defendant on Plea of Guilty, reference the King and Pierce county causes in the Prosecutor's statement. (CP at 9, 39, 98.) The memorandum detailing the plea references all cause numbers in consideration of each other. (PRP at 6, 15-16, Ex A.) And the King county plea documents reference all of the cause numbers in consideration of each other as well. (PRP at 15-16, Ex B.) This was done as required by subsection (1)(a) and clearly shows that this is the applicable statutory authority.

There are other manifestations that clearly demonstrate that it was the intent of the parties that the plea be indivisible for all purposes, including sentencing, that are addressed in the PRP filed concurrently with this brief. (PRP at All.) Moreover, the PRP also addresses the terms of the plea that prohibit consecutive sentencing and requires adherence to the 84 months concurrent sentence enumerated in the plea and, arguably the 76 months imposed by King county.

Perhaps more importantly, it was OBERG's understanding that these were the terms of the plea agreement and that the judges could not go outside the standard range or impose consecutive sentences. "The terms of the plea agreement are

defined by what the defendant reasonably understood them to be when [he] entered into the plea." State v. Wakefield, 130 Wash.2d 464 (1996)(citing State v. Cosner, 85 Wash.2d 45, 51-52, 530 P.2d 317 (1995)); State v. Oliva, 117 Wash.App. 773, 779, 73 P.3d 1016 (2003). See also United States V. Quan, 789 F.2d 711, 713 (9th Cir.)(the reviewing court looks to what the defendant reasonably understood when [he] entered the plea to determine whether a plea agreement has been broken.) cert. dismissed, 478 US 1033, 107 S.Ct. 16, 92 L.Ed.2d 770 (1986).

OBERG entered into the agreement with the understanding that the plea was indivisible for all purposes, that he could ONLY receive concurrent sentences, that none of the judge's could exceed the standard range, and that the Pierce County court would follow King County's sentencing decision. (PRP at A11.)

Therefore, OBERG is entitled to specific performance of the plea and imposition of concurrent sentences under RCW 9.94A.589(1)(a).

2. THE SENTENCING COURT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT THE EXCEPTIONAL CONSECUTIVE SENTENCE, AND, HAD IT DONE SO WOULD HAVE LACKED SUCH AUTHORITY AS THE CONVICTIONS THAT ENCOMPASS OBERG'S ENTIRE CRIMINAL HISTORY ARE CONSTITUTIONALLY INFIRM.

The only aggravating factors that a judge can find to support an exceptional sentence without a jury determination are prior convictions.

RCW 9.94A.535 (in pertinent part):

> The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conslusions of law.
>
> A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations of this section...
>
> **(2)** Aggravating Circumstances -- Considered and imposed by the court.
>
> **(c)** The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

This statutory language stems from the US Supreme court's holding in Blakely v. Washington, 542 US 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004):

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (citing Appredi v. New Jersey, 530 US 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

However, to be used as an aggravating factor, a prior conviction must be valid. "[A] prior conviction must itself have been established through procedures satisfying the fair

notice, reasonable doubt, and jury trial guarantees [to be used as an aggravator by the judiciary]." Jones v. United States, 526 US 227, 249, 119 S.Ct 1215, 143 L.Ed.2d 311 (1999). If a prior conviction(s) is based on an unconstitutional guilty plea, it has not been properly established for the purposes of Apprendi and Blakely and, therefore cannot be relied upon by the sentencing court to establish an exceptional sentence.

In the case at bar, OBERG's entire criminal history, other than the charges under the instant plea, were the result of another global plea reached between OBERG and the state in Pierce county in 2007 for all charges contained under cause numbers 06-1-04641-4, 06-1-04831-0, 07-1-01280-1, and 07-1-01586-0. One of the judgment and sentences is facially invalid and the plea as a whole is involuntary and constitutionally infirm. (See PRP for the 4 cause numbers specified supra.) "[A] facially invalid guilty plea cannot be used in offender score." State v. Binder, 106 Wn.2d 417, 419, 721 P.2d 967 (1986). See also State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Moreover, "[W]hen the prior conviction is an element of an offense which the state must prove, the defendant has the right to collaterally attack the voluntariness of the guilty plea upon which the prior judgment of conviction was entered." Washington v. Swindell, 22 Wash.App. 626, 590 P.2d

1292 (1979); State v. Reid, 40 Wn.App. 319, 698 P.2d 588 (1985). In the case at bar, the prior convictions were an element of the firearm charges in King county that are part of the instant plea, and they were aggravating factors alleged by the state and, ultimately, could have been relied on by the court to impose an exceptional sentence.

Referring to the above authority of RCW 9.94A.535, we can see that the sentencing judge in the case at bar failed to comply with the statutory requirement of declaring OBERG's consecutive sentence exceptional and setting forth findings of fact and conclusions of law to support it. However, and more importantly, even if the judge would have done so, he would have lacked such authority due to the invalidity of OBERG's criminal history.

As such, this honorable court should vacate the consecutive sentence and impose that sentence concurrently with the other cause numbers under the plea.

3. THE PROSECUTION BREACHED THE PLEA AGREEMENT.

OBERG's understanding of the plea agreement is briefly set out in the previous section. Refer to the concurrently filed PRP for a detailed explanation of this understanding, as well as evidence and authority to support it. (PRP at All.)

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such

promise must be fulfilled." Santobello v. New York, 404 US 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). When such a promise is breached, defendant may seek to withdrawal his plea or have the original plea enforced through specific performance. Id at 499. If the the prosecutor fails to perform his side of the agreement, the guilty plea becomes involuntary, and the ensuing sentence is subject to collateral attack. United States v. Clark, 781 F.2d 730, 731 (9th Cir. 1986). This same principle extends to promises asserted by counsel that are presumably agreed upon by all parties. Blackledge v. Allison, 431 US 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

When a criminal defendant pleads guilty with the understanding that he will receive a particular sentence, the defendant has given up important constitutional rights based on the expectation that the prosecutor will adhere to the terms of the agreement. State v. Carreno-Maldonado, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). The defendant's purpose in entering into a plea agreement with the prosecution is based on the expectation that the prosecution will adhere to the terms of the plea. Id at 88. The prosecution's breach of a plea is a structural error that is not subject to harmless error review. Id at 87-88.

A breach of a plea agreement is a constitutional issue that may be raised for the first time on appeal. State v. E.A.J., 116 Wn.App. 777, 785, 67 P.3d 518 (2003), rev.

denied, 150 Wn.2d 1028 (2004); RAP 2.5(a)(3). If the State has breached the plea agreement, the disposition cannot stand. Id.

A plea agreement is a contract in which ambiguities are construed against the drafter. United States v. Transfiguracion, 442 F.3d 1222, 1227-28 (9th Cir. 2006); State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Unlike commercial contracts, plea agreements require a criminal defendant waive fundamental constitutional guarantees. Transfiguration, at 1227; State v. Harrison, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003); US Const. amends. 5, 6, 14; Wash. Const. Art. I, §§ 3, 22. Therefore, due process considerations mandate the prosecution's rigorous compliance and "require a prosecutor to adhere to the terms of the agreement." Harrison, at 556 (citing United States v. Harvey, 791 F.2d 294 (4th Cir. 1986)); see also Transfiguracion, at 1228.

Issues concerning the interpretation of a plea agreement are questions of law reviewed de novo on appeal. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). The prosecution is required to operate within "the literal terms of the plea it made." Transfiguracion, at 1228. Ambiguities are construed in favor of the defendant. Id.

a. Misrepresentation of the nature of the plea and the sentencing classification of the charges thereunder.

In the case at bar, the prosecution has breached the terms of the plea agreement in several ways.

First, Ms. Hauger breached the plea by stating to the court that "OBERG has already pled guilty and been sentenced on two **separate** felony cause numbers in King county. This is the second sentencing court." RP at 3-4. (Emphasis added). This statement breaches the terms of the plea in two ways: 1) It tells the court that the King county cause numbers are separate from the causes currently before the court, when they are really part of an **indivisible** agreement. 2) It is asserting that, by virtue of the **separate** nature of the causes and the court's position in the order of sentencing, the court is imposing sentence under authority of RCW 9.94A.589(3) and thus has the authority to impose consecutive sentences. These are contrary to the terms of the plea, which, as stated before, require concurrent sentences under RCW 9.94A.589(1)(a).

The next breaches go hand in hand: The prosecutor failed to assert that the charges from King and Pierce county were indivisible for sentencing purposes and that they were all "other current offense." (PRP at 6,15-16) In fact, as stated above, she directly made a statement to the contrary at the start of the hearing. The prosecutor also failed to list the King county charges as "other current offenses" on the plea statements and judgment and sentences, as was required by the terms of the plea. (PRP at Id.)

These breaches led the court to treat the pleas as separate rather than indivisible and impose sentence under the

improper statutory authority. The plea agreement specifically calls for **concurrent sentences** under RCW 9.94A.589(1)(a).

b. Effectively argued against the amount of credit for time served called for in the plea.

The prosecutor also breached the plea by effectively arguing for the imposition of credit for time served in an amount contrary to the terms of the plea.

A court must give credit for time served before trial in order to comply with the double jeopardy, due process, and equal protection clauses of the constitution:

> Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence.

Ranier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974); US Const. Amends. 5, 14; WA Const. Art. 1 §§ 3, 9.

Furthermore, RCW 9.94A.505(6) provides:

> The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

OBERG was confined in regard to ALL of the charges included in the Global plea for which he was being sentenced. Awarding credit for that time served to these cause numbers is appropriate.

OBERG was assured credit for time served beginning at the time he was arrested on approximately 7/13/2011 on ALL cause numbers under the plea agreement. (PRP at 9,20.) This would require awarding him credit for time served starting on that date until the date he was sentenced in Pierce county on the three Pierce county cause numbers under the plea. The prosecutor agreed to "credit for time already served." (CP at 9, 39, 98.) And then proceeded to write in "8 days" credit on the judgment and sentences. (CP at 23, 53, 109.) And did not mention credit for time served on the record at all to avoid drawing attention to the breach.

8 days is not the credit for time served guaranteed by the plea. OBERG was held on ALL of the charges since 7/13/2011. That is, he was held on "No Bail" holds for the Pierce county charges and "Bail" holds for the King county charges, beginning the date he was arrested -- 7/13/2011. (CP at 127, 130, 133; PRP at 9,19)

On the face of the record before the court on direct review, it is ambigious as to what "credit for time served" acutually means. (CP at 9, 39, 98.) However, because OBERG was detained under authority of both King and Pierce county courts for ALL of the cause numbers included in the plea since 7/13/11, and because he was guaranteed by his counsel that he would receive credit for ALL the time he spent in jail on all of the cause numbers (PRP at 9,20), this ambiguity must be resolved in favor of OBERG.

Because OBERG was in custody as a result of all of the charges under the plea at the same time and his plea guaranteed him credit for all of his time spent in jail, credit for time served must therefore be computed starting 7/13/2011. This would result in approximately 167 days of credit -- 125 days plus 1/3 for 'good time', rounded to the nearest whole day.

E. CONCLUSION

In light of the above and the concurrently filed PRP, OBERG requests that this honorable court vacate his consecutive sentence and impose a concurrent sentence under the authority of RCW 9.94A.589(1)(a) and per the terms of the plea agreement, as well as award him credit for time served on ALL cause numbers from 7/13/2011, the date he was arrested, for a total of 167 days.

In the alternative, OBERG requests that this court vacate his consecutive sentence and remand this case to the superior court with instructions to impose concurrent sentences and award credit for time served in the amount of 167 days.

RESPECTFULLY SUBMITTED this 13 day of May, 2013.

SIGNED: ____________________

SPENCER L. OBERG, Pro se.
306121 B-135
Monroe Correctional Complex-WSR
16700-177th Ave SE
PO Box 777
Monroe, WA 98272-0777

CERTIFICATION OF MAILING

I, SPENCER L. OBERG, declare that, on the date below, I deposited the foregoing PRO SE SUPPLEMENTAL BRIEF OF APPELLANT, PERSONAL RESTRAINT PETITION, and MOTION AND DECLARATION TO PROCEED IN FORMA PAUPERIS, or copies thereof, in the internal mail system of Monroe Correctional Complex-WSR and made arrangements for postage, addressed to:

David Ponzoha, Clerk/Admin.
Court of Appeals, Div. 2
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Ave So, Rm 946
Tacoma, WA 98402-2100

Eric Broman, Attorney
Nielsen, Broman & Koch, PLLC
1908 E. Madison St.
Seattle, WA 98122

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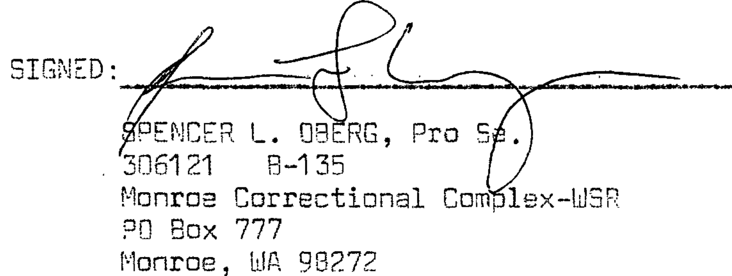
COURT OF APPEALS
DIVISION II
2013 MAY 15 PM 1:07
STATE OF WASHINGTON
BY ___ DEPUTY

I hereby invoke the "Mail Box Rule" set forth in GR-3.1 -- the above listed documents are considered filed on the date that I deposited them into DOC's legal mail system.

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

DATED this 13 day of May, 2013.

SIGNED: 

SPENCER L. OBERG, Pro Se.
306121 B-135
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272