

I. Additional Grounds for Review

1. The trial court erred when denying merger of Amos' convictions for robbery first degree and assault second degree based on the principles outlined in *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005), thereby violating Amos' right to be free from double jeopardy and equal protection guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, sections 9 and 12 of the Washington State Constitution.
2. The trial court erred when using Amos' subsequent offense and conviction in the calculation of his offender score at resentencing, thereby exceeding statutory authority [double jeopardy and impermissible double counting]; renders RCW 9.94A.525(1) unconstitutionally vague; violates ex post facto and collateral estoppel; and breaches the plea agreement, violating Amos' rights guaranteed by the Fifth and Fourteenth Amendments, and Article 1, section 10 of the United States Constitution, and Article 1, sections 3, 9, and 23 of the Washington State Constitution.

II. Statement of the Case

On January 26, 2000, the State filed information charging Amos with several crimes: Count I Burglary First Degree; Count II Robbery First Degree; Count III Assault First Degree; Count IV Possession of a Stolen Firearm; Count V Theft of a Firearm; and Count VI Unlawful Possession of a Firearm First Degree. CP1.

On February 16, 2000, Amos pled guilty as charged. Amos Statement on Plea of

Guilty provided:

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

CP13.¹

At sentencing on April 25, 2000, Amos was allowed to withdraw his guilty pleas to Assault First Degree and Possession of a Stolen Firearm. The Possession of a Stolen Firearm was dismissed and the Assault First Degree was reduced to Second Degree Assault. CP 26.²

Amos pled guilty to the reduced charge of Assault Second Degree which charged the elements of “intentionally assaulted Joe Hull with a deadly weapon with intent to commit a felony, Robbery or Burglary in the First Degree.” VRP 10 (4-25-00); CP 27.

The trial court imposed a 120-month sentence based on the crimes charged and Amos’ criminal history found to exist at that time – two counts of Burglary Second Degree, Possession of Stolen Property Second Degree, and Malicious Mischief Second Degree. CP29.

During Amos’ incarceration on February 26, 2004, he assaulted another inmate and was charged in Walla Walla County for Assault First Degree. PRP Exhibit G. He

¹ Here Amos only pled guilty to one assaultive action that was used as a factual basis for both Count II Robbery First Degree and Count III Assault First Degree. ‘Assaulted’ means one.

² The Court: “I will allow him then to withdraw his pleas to count three and four of the second amended information. Have you had a chance to review this second amended information with Ms. Backlund?” The Defendant: “Yes” The Court: “Charge count three as rewritten charge with assault second degree, which is a reduction from the original plea of count three, which was assault in the first degree....” VRP 7 (4-25-00).

later pled guilty to a reduced charge of Assault Second Degree and received an automatic consecutive 29-month sentence due to the fact the offense and conviction occurred while he was under sentence for another felony. PRP exhibits H; I.³

The other sentence Amos was under [and serving] was his sentence, imposed on April 25, 2000, in the Lewis County Superior Court.

On May 4, 2004, Amos filed a Personal Restraint Petition challenging his miscalculated offender score based on the use of two washed out juvenile adjudications. His double jeopardy claim was withdrawn due to his resentencing for the miscalculated offender score and [his] belief that the trial court would follow the recent decision in *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005).

At resentencing on July 19, 2005, the trial court denied Amos' merger claim based on an assaultive action that was neither charged, pled guilty to, nor found by a jury. The court found the conduct in Count III (w/firearm) is separate and distinct from the assaultive conduct (w/walkie-talkie) underlying count(s) I and II. VRP 34 (7-19-05); CP ____.

Also, at resentencing [following correction of the erroneous sentence] the trial court authorized, in calculating his offender score, the use of Amos' subsequent offense and conviction which occurred four years after the original sentencing of April 25, 2000. VRP 28-33 (7-19-05).⁴

III. Grounds for Relief and Argument

Ground One

³ The SRA mandates an automatic consecutive sentence that latters the underlying sentence which the subsequent offense and conviction occurred while serving. See RCW 9.94A.589(2)(a).

⁴ This caused Amos' offender score to be higher than it was when his original sentence was imposed on an incorrect offender score.

THE TRIAL COURT ERRED WHEN DENYING MERGER OF AMOS'
CONVICTIONS FOR ROBBERY FIRST DEGREE AND ASSAULT SECOND
DEGREE BASED ON THE PRINCIPLES OUTLINED IN STATE V. FREEMAN,
153 WN. 2D 765, 780, 108 P.3D 753 (2005), THEREBY VIOLATING AMOS'
RIGHT TO BE FREE FROM DOUBLE JEOPARDY AND EQUAL
PROTECTION GUARANTEED BY THE FIFTH AND FOURTEENTH
AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I,
SECTIONS 9 AND 12 OF THE WASHINGTON STATE CONSTITUTION.

STANDARD OF REVIEW

Double jeopardy claims are reviewed de novo. *State v. Benn*, 130 Wn.App. 308, 123 P.3d 434 (2005). Independent review of the legal sufficiency of the sentencing court's reasons is done as a matter of law. *State v. Hammond*, 121 Wn.2d 787, 794, 854 P.2d 637 (1993).

a. **Merger/Double Jeopardy**

The Fifth Amendment to the United States Constitution states; "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Article I, section 9 of the Washington State Constitution declares: "No person shall be ... twice put in jeopardy for the same offense."

Double jeopardy clauses prohibit: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). “The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.” *Green v. United States*, 355 U.S. 184, 198 (1957).

Focusing on the prohibition of multiple punishments for the same offense the Washington Criminal Code, RCWA 9A, enacted in 1976, created more clearly defined degrees of crimes to prevent the occasion of pyramiding crimes. In 1979 the merger doctrine was adopted by the Washington Supreme Court in *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979). The merger doctrine is a rule of statutory construction which applies where the legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that the defendant committed that crime but the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983).

Recently the Washington Supreme Court in *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005), held that: (1) convictions for first degree robbery and second degree assault were merged; and (2) double jeopardy precluded separate sentences for robbery and assault to facilitate robbery. *Freeman* controls in this case as it is similar to the consolidated case of *Zumwalt*.

Does Amos' Robbery First Degree and Assault Second Degree convictions merge for double jeopardy purposes?

Amos' convictions merge because: (1) The element of Assault Second Degree Amos was charged with [and pled guilty to] was "with intent to commit a felony, Robbery in the First Degree or Burglary in the First Degree, did assault Joe Hull" [See CP 27; VRP 10, 4-25-00]; and (2) if the assaultive action underlying count III Assault First Degree changed when it was reduced to Assault Second Degree and pled guilty to by Amos there would be no factual [assaultive] basis to support Amos' Robbery First Degree conviction.⁵

Amos was originally charged with Robbery First Degree, Assault First Degree and other charges not at issue here. When pleading guilty to those crimes [Robbery and Assault First Degree] Amos stated: "While we were there, we assaulted Mr. Hull and caused great bodily injury with a deadly weapon (walkie-talkie), we stole the marijuana, and a gun." CP 13. This plea statement provided a factual basis for both the Robbery and Assault First Degree convictions. Robbery First Degree requires conduct amounting to assault; Amos' Assault First Degree was *that* assaultive conduct. However, Amos' Assault First Degree was later withdrawn and reduced to Assault Second Degree.⁶

⁵ "using force to intimidate a victim into yielding property is often incidental to the robbery." *State v. Prater*, 30 Wn.App. 512, 516, 635 P.2d 1104 (1981)(citing *Freeman* at 779). "In both cases, to prove first degree robbery as charged and proved by the State, the State had to prove the defendants committed an assault in furtherance of the robbery. Compare RCW 9A.56.200 (first degree robbery) with RCW 9A.36.011 (first degree assault). As charged and proved, *without the conduct amounting to assault, each would be guilty of only second degree robbery*. Compare RCW 9A.56.210, 190 (defining second degree robbery) with RCW 9A.56.200 (defining first degree robbery)." *Freeman* at 778. (emphasis added).

⁶ "I will allow him then to withdraw his pleas to count three and four of the second amended information. Have you had a chance to review this second amended information with Ms. Backlund? THE DEFENDANT: Yes. THE COURT: Charge count three as rewritten charge with assault in the second degree, which is a reduction from the original plea of count three, which was assault in the first degree...." VRP 7, (4-25-00).

Reducing the assault charge to a lower degree does not change the assaultive action that underlies such charge.⁷

If the Second Degree Assault was a reduction from the original plea to count III [Assault First Degree] how could the underlying conduct change to a different assaultive action that was not charged in the original plea to count III [Assault First Degree]?

The trial court erred in holding that the assaultive conduct changed when Amos withdrew his plea to Assault First Degree and entered a plea to Assault Second Degree. VRP 34, (7-19-05). This holding put them in a catch-22 scenario because if the assaultive action changed when Amos' plea to Assault First Degree was withdrawn and reduced to Assault Second Degree there would be no assault to support a factual basis for Amos' Robbery First Degree.

The foregoing establishes that the trial court erred in denying merger of Amos' Robbery First Degree and Assault Second Degree convictions. There is no evidence to the contrary.

i. **Gratuitousness/unnecessary violence not an appropriate basis for avoiding merger.**

In the trial court's complete confusion of whether there was one or two assaultive actions, and *which* one underlies the robbery, they stated: "it was simply a gratuitous assault, as far as I'm concerned, to actually hit Mr. Hull with the walkie-talkie...." VRP 36, (7-19-05).

⁷ "which is a reduction from the *original plea* of count three...." VRP 7, 4-25-00. (emphasis added).

The *Freeman* court established that merely because the defendant used more violence than necessary to accomplish the crime is not an appropriate basis for avoiding merger.⁸

- b. Is Amos' double jeopardy claim barred by his guilty plea, him receiving the benefit of his bargain, or *State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006)?

On March 29, 2007, this court ordered briefing on whether Amos' double jeopardy claims were barred based on the above reasons.

- i. Guilty plea/plea bargain agreement.

Amos' double jeopardy claim challenges only a sentencing error that resulted in a sentence in excess of statutory authority. We do not need to examine Amos' guilty plea or plea bargain agreement because the *Freeman* court held "We find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery." *Id.*

⁸ "The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose and effect independent of the crime." *Freeman* at 779.

At 776. The Washington Supreme Court has set a long established precedent that a guilty plea cannot exceed the statutory authority given to the court and is subject to collateral attack without regard to the negotiated plea agreement involved. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). See *In re Pers Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)(“an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law.”); *Thompson*, 141 Wn.2d at 723, 10 P.3d 380 (“The actual sentence imposed pursuant to a plea bargain must be statutorily authorized....”). A defendant “cannot empower a sentencing court to exceed its statutory authorization.” *State v. Eilts*, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980). The fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority. *In re Pers. Restraint of West*, 154 Wn.2d 204, 110 P.3d 1122 (2005).

Furthermore, in *Butler*, 24 Wn.App. 175, 599 P.2d 1311 (1979), despite the fact Butler received the benefit of his plea agreement [resulting in a reduction of Robbery and Assault First Degree to Second Degrees] the court held that a defendant’s plea of guilty does not waive a claim that the offense is one which the State may not constitutionally prosecute. See *Menna v. New York*, 423 U.S. 61, 46 L.Ed. 2d 195, 96 S.Ct. 241 (1975). “*Menna* held that although a guilty plea usually result in a waiver of constitutional violations involving factual guilt, such a plea does not waive a claim that the State cannot constitutionally convict the defendant of the particular charge.” *Butler*, at 178.

It is well noted throughout case law that a guilty plea or plea bargain agreement does not bar a double jeopardy/sentence in excess of statutory authority claim which is Amos' challenge here.

ii. *State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006).

Amos contends that *Ermels* does not apply and is distinguishable to his case, and therefore does not bar his double jeopardy claim.

Ermels applies to a situation where a defendant stipulated to an exceptional sentence and whether a defendant's guilty pleas to multiple charges are divisible or indivisible. As Amos points out above he could not empower the trial court through his guilty plea based on a negotiated plea bargain agreement to exceed their statutory authorization nor could he waive a claim that the State could not constitutionally convict him of the particular charge when he pled guilty. *State v. Eilts*, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980); *In re Butler*, 24 Wn.App. at 178.

Also, Amos never attempted to withdraw from any of his guilty pleas to the multiple charges, therefore *no* analysis is required to determine whether his guilty pleas are divisible or indivisible.

Ermels does not apply to this case.

C. Equal Protection

The sentencing disparity between Amos and his codefendant, Mathew Collett,⁹ violates double jeopardy because the disparity in their sentences arises from unequal application of the merger doctrine for double jeopardy purposes. Mr. Collett's Robbery First Degree and Assault Second Degree convictions were merged in light of *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) at [his] resentencing.¹⁰ Amos, however, was denied merger of his robbery and assault convictions even though those convictions were based on the same criminal actions as Mr. Collett's.

“The equal protection clause of both the State and federal constitutions require that ‘persons similarly situated with respect to the legitimate purpose of law receive like treatment.’” *In re Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993)(quoting *Harman v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978).

This State's appellate courts have responded to equal protection challenges to disparate sentencing between codefendants by examining whether a rational basis supported the disparity. *State v. Handley*, 54 Wn.App. 377, 773 P.2d 879 (1989). “The decisions have uniformly held that where a rational basis existed, equal protection was not violated.” *Id.* At 382. In *State v. Clinton*, 48 Wn.App. 671, 741 P.2d 52 (1987) the court held equal protection requires a sentencing judge to consider relevant distinctions between codefendant's sentences. The *Handley* court requires a clear showing of

⁹ Lewis County Cause No. 00-1-0034-5

¹⁰ Amos filed a motion in this court requesting Collett's resentencing transcripts be made part of the record to insure effective and equitable review of his equal protection claim. RAP 8.3.

“intentional or purposeful discrimination” in sentencing disparity between codefendants. *Id.* At 383. It is not necessary to show intentional or purposeful discrimination when the sentencing judge exceeds statutory authority. *State v. Barton*, 75 Wn.2d 947, 950, 454 P.2d 381 (1969)(the application of a statute that grants a trial judge discretion within prescribed limits as to the duration of a sentence is not a denial of equal protection).¹¹

Amos and Collett are similarly situated in that they were charged with the same crimes based on the same criminal action and received the same plea agreement. The sentencing judge exceeded his authority by applying merger to Collett’s convictions and not Amos’, thus violating equal protection and double jeopardy.

GROUND TWO

THE TRIAL COURT ERRED WHEN USING AMOS’ SUBSEQUENT OFFENSE AND CONVICTION IN THE CALCULATION OF HIS OFFENDER SCORE AT RESENTENCING THEREBY EXCEEDING STATUTORY AUTHORITY [DOUBLE JEOPARDY AND IMPERMISSIBLE DOUBLE COUNTING]; RENDERS RCW 9.94A.525(1) UNCONSTITUTIONALLY VAGUE; VIOLATES EX POST FACTO AND COLLATERAL ESTOPPEL; AND BREACHES THE PLEA AGREEMENT, VIOLATING AMOS’ RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 10

¹¹ “We find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.” *Freeman*, at 776.

**OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS 3, 9,
AND 23 OF THE WASHINGTON STATE CONSTITUTION.**

STANDARD OF REVIEW

A miscalculated offender score is reviewed de novo. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). A challenge to an offender score calculation is sentencing error that may be raised for the first time on appeal. *State v. Roche*, 75 Wn.App. 500, 513, 878 P.2d 497 (1994); *State v. Rowland*, 97 Wn.App. 301, 304, 983 P.2d 696 (1999).¹²

Did the trial court properly rely on *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992) and *State v. Shilling*, 77 Wn.App. 166, 889 P.2d 948 (1995), when using Amos' subsequent offense and conviction in the calculation of his offender score at resentencing?¹³

Collicott is not controlling in this case. *Collicott* set a trend by holding the SRA permitted the use of a subsequent conviction for the purpose of determining the offender

¹² Amos raises new arguments regarding constitutional errors that resulted from the use of his subsequent offense and conviction in the calculation of his offender score and therefore are properly raised for the first time on appeal. In addition, those constitutional errors standing alone are manifest and properly raised for the first time on appeal pursuant to RAP 2.5(a).

¹³ VRP 31-33 (7-19-05).

score at the defendant's resentencing. However, in *Collicott* and all other following cases, the subsequent conviction [at issue] resulted from a *pending* offense at the time the defendant was *originally* sentenced. This has no bearing when the subsequent conviction resulted from a subsequent *offense*. This is the key issue here and is what makes this case distinguishable from other cases permitting the use of a subsequent conviction in the calculation of the offender score.

In *Collicott* the resentencing judge noted:

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

Collicott, 118 Wn.2d at 653-54 (emphasis added). The different situation is due to RCW 9.94A.589(a); when the offense was committed *after the original sentencing* the SRA mandates an automatic consecutive sentence for the subsequent offense and conviction.¹⁴

a. **Exceeding Statutory Authority**

The trial court exceeded its statutory authority when including Amos' subsequent offense and conviction in the calculation of his offender score at resentencing because the SRA mandated an automatic consecutive sentence for such offense and conviction *based on the sole fact that it occurred while under sentence for another felony*. RCW 9.94A.589(2)(a) provides:

Whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term

¹⁴ Amos was sentenced on April 25, 2000, to 120 months. *Four years later*, while serving *that* sentence, Amos committed another offense in Walla Walla County and received an automatic consecutive sentence under RCW 9.94A.589(2)(a). VRP 33 (7-19-05).

of confinement, the latter term shall not begin until expiration of all prior terms.

The explicit language of RCW 9.94A.589(2)(a) clearly defines *what* the legislature intended to be considered a subsequent offense and conviction. Or the trial court to count the same offense and conviction [deemed a subsequent offense and conviction] as a *prior* conviction under RCW 9.94A.525(1) would render one statute meaningless and continue to frustrate Amos' sentence.¹⁵

RCW 9.94A.525(1) provides:

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

Different statutes should be construed to give meaning to each other and to avoid absurd or strained consequences. *In re Eaton*, 110 Wn.2d 892, 901, 757 P.2d 961 (1988). They must be read together to determine legislative purpose in order to achieve a "harmonious total statutory scheme...that maintains the integrity of the respective statutes." *State v. O'Neill*, 105 Wn.2d 853, 862, 700 P.2d 711 (1985).

He 'rule of lenity' favors the defendant in order to preclude construing a statute as to allow enhanced penalties under both RCW 9.94A.589(2)(a) and RCW 9.94A.525(1). *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

i. Double Jeopardy and Impermissible Double Counting

¹⁵ If Amos' subsequent offense and conviction is also counted as a prior conviction the statutes would be rendered meaningless and Amos' sentence would require a voiced expression by the trial court whether they be served concurrently. See RCW 9.94A.589(3); *State v. Moore*, 63 Wn.App. 466, 820 P.2d 59 (1991).

Both of Amos' double jeopardy and impermissible double counting claims arise from the trial court exceeding its statutory authority.¹⁶ Double jeopardy is violated when multiple punishments are imposed for the same offense while impermissible double counting occurs when a court imposes two upward enhancements premised on the same conduct. *State v. Bobie*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); *State v. DeSantiago*, 108 Wn.App. 855, 33 P.3d 394 (2001).

Viewing RCW 9.94A.589(2)(a) and RCW 9.94A.525(1) together it is obvious by the explicit language that a conviction cannot be counted as both a subsequent offense and conviction under RCW 9.94A.589(2)(a) requiring an automatic consecutive sentence and a prior conviction under RCW 9.94A.525(1) increasing the offender score for the underlying sentence which must expire before the consecutive sentence can start.

In this case Amos receive an increased offender score [as an enhancement and punishment] at resentencing due to the use of his subsequent offense and conviction in the calculation of his offender score.¹⁷ VRP 28-33 (7-19-05). In addition, before Amos' resentencing occurred for his underlying sentence he received an automatic consecutive sentence [as an enhancement and punishment] for his subsequent offense and conviction based on the sole fact he was under sentence for another felony [Amos' underlying sentence which he was resentenced on]. RCW 9.94A.589(2)(a). PRP Exhibit I. Double jeopardy and impermissible double counting violation occurred when Amos' underlying sentence was increased at his resentencing with the use of his subsequent offense and

¹⁶ Both claims are based on what the legislature intended. *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995); *State v. DeSantiago*, 108 Wn.App. 855, 33 P.3d 394 (2001).

¹⁷ RCW 9.94A.525(1) is "a clearly defined process that *enhances* a sentence by taking into account prior conviction." *DeSantiago* at 880. (Emphasis added).

conviction [which he received an automatic consecutive sentence for, RCW 9.94A.589(2)(a)] in the calculation of his offender score.¹⁸

Amos' subsequent offense and conviction should not have been used in the calculation of his offender score at resentencing on his underlying sentence after he already received an automatic consecutive sentence for the same conviction pursuant to State law, RCW 9.94A.589(2)(a). Double jeopardy and impermissible double counting were violated here.

b. RCW 9.94A.525(1) is unconstitutionally vague as applied

The term "date of sentencing" under RCW 9.94A.525(1) is unconstitutionally vague as applied to Amos' case. A prohibition can be vague as applied. *State v. Smith*, 130 Wn.App. 721, 123 P.3d 896 (2005).

Due process requires that criminal statutes be properly worded so that they give fair warning of the type of conduct they purport to criminalize. *Bowie v. City of Columbia*, 378 U.S. 347, 350-51, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). *State v. Wilson*, 117 Wn.App. 1, 11, 75 P.3d 573 (2003). The term "date of sentencing" being applied to encompass Amos' resentencing date in order to use his subsequent offense and conviction [under RCW 9.94A.589(2)(1)] as a prior conviction in the calculation of his offender score creates vagueness because RCW 9.94A.525(1) defines a prior conviction

¹⁸ Rather than the 5 points [57-75 months] Amos would have been resentenced under after the corrected offender score the trial court used his subsequent offense and conviction to increase Amos' offender score to 7 points [87-116 months]. In sum, Amos has to spend at least 14 additional months in prison on his underlying sentence that must expire before his automatic consecutive sentence can start.

to be one which exists before the “date of sentencing” and does not imply that “date of sentencing” encompasses a resentencing date [in the future].

Freedom from restraint is a fundamental right protected by the due process clauses of the federal and Washington Constitutions. *Marks v. United States*, 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). A State law that impinges on a fundamental right is constitutional only if it furthers a compelling State interest and is narrowly tailored to further that interest.

In all cases the State has a legitimate interest in sentencing criminals based on their criminal history. RCW 9.94A.525. However, to exceed what is considered criminal history [prior convictions] RCW 9.94A.525(1) and consider subsequent offenses and convictions under RCW 9.94A.589(2)(a) as a prior conviction at a defendant’s resentencing date does not further the State’s interest but rather impinges on the State’s interest under RCW 9.94A.589(2)(a). The applicable statute for Amos’ subsequent offense and conviction is RCW 9.94A.589(2)(a) [which was used] because the legislature intended for those subsequent offenses and convictions that occurred while [already serving time] under sentence for another felony to serve another State interest; to provide harsher punishments [automatic consecutive sentences] for those who commit crimes while under another sentence.

C. Ex Post Facto [Due Process]

RCW 9.94A.525(1) violates ex post facto as prohibited by article 1, section 10 of the United States Constitution and article 1, section 23 of the Washington State Constitution because the State Court's interpretation of "date of sentencing" makes the punishment of Amos' crimes more burdensome after their commission and deprives him of a defense that was available by law at the time of committing the crimes.¹⁹

Although the courts have held ex post facto is a limitation upon the powers of the legislature and does not of its own force apply to the judicial branch of government, Amos has raised a due process violation in connection with his ex post facto violation.²⁰

Due process is akin to an ex post facto issue, though, because "the principle on which the [ex post facto] clause is based [is] the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties" and this is "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. at 191 (citing *State v. Aho*, 137 Wn.2d 736, 743, 975 P.2d 512 (1999)).

Under the laws at the time Amos' crimes were committed, his prior convictions were those "which exists before the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). See also RCW 9.94A.500(1).

The only prior conviction Amos had were two counts of Burglary Second Degree, Possession of Stolen Property Second Degree, and Malicious Mischief Second Degree [all as a juvenile]. CP 28, 29.

¹⁹ *State v. Collicott*, 118 Wn.2d 649, 664, 827 P.2d 263 (1992), held the SRA permitted the use of a subsequent conviction for the purpose of determining the offender score at the defendant's resentencing.

An ex post facto law is a law that (1) punishes a crime previously committed that was innocent when done, (2) makes more burdensome the punishment for a crime after its commission, or (3) deprives a defendant of a defense that was available at the time of committing the alleged criminal act. The law must be substantive and retrospective and must disadvantage the person affected by it. *State v. Wilson*, 117 Wn.App. 1, 75 P.3d 573 (2003).

²⁰ See section 'b' of this Statement of Additional Grounds for Amos due process argument.

Over five years later Amos was resentenced due to the mistake in using two [pre-15] juvenile adjudications in the calculation of his offender score. At his resentencing [July 19, 2005] the trial court used a subsequent offense and conviction in the calculation of Amos offender score [thereby increasing his sentence] which never existed at his original sentencing on April 25, 2000.²¹ VRP 28-33 (7-19-05). Without the use of this subsequent offense and conviction in Amos' offender score he faced a potential sentence of 57-75 months rather than the sentence of 87-116 months he faced at his resentencing. There is obviously "more burdensome" punishment Amos faced on his underlying sentence on top of the automatic consecutive sentence he received for the same subsequent offense and conviction [pursuant to RCW 9.94A.589(2)(a)] which cannot start until expiration of his underlying sentence [the sentence at issue here].

Also Amos would have had a defense at his original sentencing which was an insufficiency of evidence defense as RCW 9.94A.500(1) requires "a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. It is a know fact Amos subsequent offense and conviction did not exist at Amos original sentencing. VRP 33 (7-19-05).

In order to not disturb the ex post facto prohibition courts have held "It is the law in effect at the time a criminal offense is actually committed that controls disposition of the case." *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). If the law in 2000 was applied to Amos' case upon resentencing the trial court would have been

²¹ While Amos was serving his Lewis County sentence he committed a new crime. PRP Exhibit G. Amos was given an automatic consecutive sentence because the SRA mandated those offenses and convictions which occur while under sentence for another felony be served consecutively. RCW 9.94A.589(2)(a). PRP Exhibit I.

prohibited from using his subsequent offense and conviction in the calculation of his offender score.

d. Collateral Estoppel

Collateral estoppel should have barred the redetermination of Amos' prior convictions [criminal history] found to exist at his sentencing date [April 25, 2000] when he was resentenced to correct a miscalculated offender score because the determination of his criminal history was correct and valid at the time Amos judgment and sentence was imposed.

In re Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980) held correcting an erroneous sentence in excess of statutory authority does not affect the finality of the judgment and sentence that was correct and valid when imposed. RCW 9.94A.500(1) requires the court to specify those convictions it has found to exist by a preponderance of the evidence standard at a defendant's sentencing. Since Amos' criminal history was correct and only the length of his sentence was incorrect which warranted resentencing, redetermination of that correct and valid portion of Amos' judgment and sentence is barred by collateral estoppel. *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992). The application of collateral estoppel in a criminal case is a two step operation: the first is to determine what issues were raised and resolved by the former judgment, and second is to determine whether the issues raised and resolved in the former judgment are identical to those sought to be barred in the subsequent action.

Amos' subsequent offense and conviction should not have been used in the correction of the length of his sentence at his resentencing.

e. **Breach of the Plea Agreement**

The State's use of Amos' subsequent offense and conviction in the calculation of his offender score at resentencing breaches the plea agreement reached between Amos and the State because the terms and consequences of the plea agreement [understood by Amos] only provided the use of his criminal history and any additional convictions that should occur between pleading guilty and date of sentencing. CP 13, 28.

The terms of a plea agreement are defined by what the defendant reasonably understood them to be when he or she entered the plea.²² *State v. Cosner*, 85 Wn.2d 45, 51-52, 530 P.2d 317 (1975); *United States v. Quan*, 789 F.2d 711, 713 (9th Cir. 1986)(The reviewing court looks to what the defendant reasonably understands when entering the plea to determine whether the plea agreement has been broken).

Amos and the State *never* agreed to the use of any subsequent convictions that would occur after he was *sentenced* in the calculation of his offender score if he was ever resentenced on the plea agreement.

²² "In considering the consequences of my guilty plea, I understand that:...(b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes *prior convictions* and juvenile adjudications....(c) ... my criminal history is as follows: Burglary Second Degree – two counts, Malicious Mischief Second Degree, and Possession of Stolen Property Second Degree – all as juvenile.... *If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.* (d) *If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase.*" CP 13, 28.

Plea agreements are regarded and interpreted as contracts. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). Court should strictly apply contract principles to plea agreement because due process guarantees overlap. *State v. Wheeler*, 95 Wn.2d 799, 803, 613 P.2d 376 (1981). *Landford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991)(due process clause requires that defendants have notice of the possible sentence).

Amos gave up his constitutional rights to a jury trial; confront witnesses; confront one's accuser; remain silent; be convicted beyond a reasonable doubt; and to appeal a finding of guilt after a trial. *State v. Tourtellotte*, 88 Wn.2d 579, 583, 564 P.2d 799 (1977). Given this consideration of the most devastating waiver possible under the constitution renders the agreement enforceable.

Amos wishes to enforce his plea agreement with the State and be resentenced under the terms of his original plea agreement which does not include the use of his subsequent offense and conviction in the calculation of his offender score.²³

If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question.

Tourtellotte at 584.

²³ Amos has a choice of being resentenced under his original plea consistent with the plea agreement. *In re Palodichuk*, 22 Wn.App. 107, 113, 589 P.2d 269 (1978). *State v. Schaupp*, 111 Wn.2d 34, 38, 757 P.2d 970 (1988)(Those principles operate to bind the court, as well, once the plea agreements has been validly accepted).

IV. CONCLUSION

For the foregoing reasons Amos' convictions for both Robbery 1st Degree and Assault Second Degree should merge for double jeopardy purposes based on *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) and the court should not have used Amos' subsequent offense and conviction in the calculation of his offender score when resentenced.

This Court should vacate and dismiss Amos' Assault Second Degree conviction as it merges for double jeopardy purposes. *In re Butler*, 24 Wn.App. 175, 599 P.2d 1311 (1975). Remand for resentencing without the use of Amos' subsequent offense and conviction in the calculation of his offender score.

