

No. 39702-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ABDULKHALIF CALHOUN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

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The Honorable Frank E. Cuthbertson (sentencing and resentencing) and
the Honorable James R. Orlando (motion), Judges

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 5

 1. Procedural Facts 5

 2. Facts relevant to appeal 6

D. ARGUMENT 16

 THE STATE’S FAILURE TO MEET ITS BURDEN OF PROOF
 AT THE ORIGINAL SENTENCING IN 2006 PRECLUDED IT
 FROM PRESENTING NEW EVIDENCE TO TRY TO MEET
 THAT BURDEN ON REMAND DESPITE STATUTES
 ENACTED SEVERAL YEARS AFTER THE CRIMES IN THIS
 CASE WERE COMMITTED 16

 1) The state had the burden of proof at the original
 sentencing and failed to meet that burden 16

 2) Under the law in effect at the time of the crimes, the
 prosecution was not permitted a second chance to
 satisfy the burden it had failed to meet when the
 defendant objects at the original sentencing 18

 3) The prosecution was precluded from presenting
 evidence to support its original claims of criminal
 history and from presenting new criminal history
 on remand and counsel was ineffective 21

 4) The 2008 amendments to the relevant statutes
 cannot and do not apply to Calhoun’s case 34

 5) Reversal for resentencing without the additional
 evidence and history is required 41

E. CONCLUSION 43

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) 17, 19, 21, 27, 31-34, 36-38, 40

In re Powell, 117 Wn.2d 175, 814 P.2d 635 (1991) 38

In re Williams, 111 Wash.2d 353, 759 P.2d 436 (1988). 20

Rivard v. State, ___ Wn.2d ___, ___ P.3d ___ (2010 WL 1795624) (May 6, 2010). 19

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007) 27-30

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990). 25

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). 16-21, 23, 27, 31, 32, 34, 36-40

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 25

State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1118 (1999). 35

State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) 19, 27, 36, 37, 39, 40

State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999) 17, 20, 21, 23, 27, 31, 32, 34, 36, 37

State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) 21, 39

State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007) 37, 38

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004) 17

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999) 25

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004). 18

State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994). 16

WASHINGTON COURT OF APPEALS

State v. Crider, 78 Wn. App. 849, 861, 899 P.2d 24 (1995) 24

State v. Jury, 19 Wn. App. 256, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). 25

State v. Kane, 101 Wn. App. 607, 5 P.3d 741 (2000). 18, 36

State v. Larson, 56 Wn. App. 323, 783 P.2d 1093 (1989), review denied, 114 Wn.2d 1015 (1990). 41

State v. McCarthy, 112 Wn. App. 231, 48 P.3d 1014, review denied, 148 Wn.2d 1011 (2002) 19

State v. Smith, 118 Wn. App. 288, 75 P.3d 986 (2003) 37

FEDERAL AND OTHER CASELAW

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). 39

Carnell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) 37

North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) 39

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 25

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, § 22 1, 21, 25

Enrolled HB 2719/Laws of 2008, ch. 231 35

Former RCW 9.94A.525 (2005) 30, 31, 42

Laws of 2008, ch. 231 35-41

RCW 10.01.040 1, 18

RCW 9.94A.345 1, 4, 18

RCW 9.94A.500 37

RCW 9.94A.525 1, 16, 34, 35, 37
RCW 9.94A.530 1, 4, 12, 14, 34, 35, 37
Sixth Amendment 1, 21, 25

A. ASSIGNMENTS OF ERROR

1. The prosecution had the burden of proving the existence and comparability of the out-of-state convictions it alleged were part of Abdul Calhoun's criminal history at the original sentencing and failed to meet that burden.

2. Calhoun's objections were sufficient to put the prosecution on notice that it had to present sufficient evidence to prove its allegations of criminal history, regardless of former counsel's acts.

3. Under the law in effect at the time of the crimes, the prosecution was not entitled to a second chance to meet the burden of proof it failed to meet at the original sentencing and could not add additional criminal history on remand for resentencing.

4. Both former counsel and counsel on remand for resentencing were ineffective and Calhoun's Sixth Amendment and Article I, § 22 rights were violated.

5. Under RCW 9.94A.345 and RCW 10.01.040, 2008 amendments to RCW 9.94A.530 and RCW 9.94A.525 do not and cannot apply in this case, because the crimes occurred three years before the enactment of those amendments.

6. Because the 2008 amendments were specifically enacted in order to overrule decisions of the Supreme Court, the amendments apply prospectively only.

7. Application of the 2008 amendments to Calhoun's case violates the prohibition against ex post facto legislation.

8. Allowing the prosecution a second chance to meet the burden of proof it failed to meet at the original sentencing offends due process and invites prosecutorial vindictiveness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The crimes in this case were committed in 2005 and the original sentencing was in 2006. The case was remanded for resentencing after this Court agreed with Calhoun that two assault charges should have merged with a robbery for the purposes of sentencing.

1. At the original sentencing in 2006, the prosecution claimed that Calhoun had three prior out-of-state convictions which should be included in the offender score. The prosecutor did not, however, present the other state's statutes or any argument that the out-of-state convictions were comparable to Washington felonies, as required. Under the law in effect at the time of the crimes, the prosecution was not allowed a second chance to try to meet its burden of proof for "comparability" if the defendant objected below.

Did the resentencing court err in allowing the prosecution to present additional evidence to meet its burden when Calhoun specifically objected to the offender score at the original hearing?

2. Calhoun and former counsel had a contentious relationship and Calhoun had not only fired counsel on the record but repeatedly raised concerns about counsel's ineffectiveness in representing him. At the original sentencing, counsel admitted he had not done the offender score calculation himself but thought the prosecutor's calculation was likely correct. Calhoun himself objected to the offender score calculation before

the end of the original sentencing hearing and then again, in writing, on a “Stipulation to offender score” which was entered in open court.

Did the resentencing court err in holding that Calhoun’s counsel had somehow “waived” Calhoun’s objections by his acts even though counsel had clearly abandoned his duties to his client by failing to conduct the minimal calculations required to ensure that the score was correct?

3. At the original sentencing, the prosecutor mentioned a Clark county assault which he said was part of Calhoun’s criminal history. The prosecutor admitted that he did not have evidence to prove that prior assault and failed to ask for a continuance to secure that evidence.

Did the resentencing court err in allowing the prosecutor to add into the record evidence regarding the Clark county offense on remand and in including that offense as part of the offender score despite the prosecution’s failure to prove it at the original sentencing?

Further, was former counsel prejudicially ineffective in failing to note that the prosecution’s calculation of the offender score at the original sentencing included 2 points for the Clark county offense even though the prosecution specifically admitted it did not have the evidence to prove that offense?

4. At the original sentencing, the prosecution never alleged a 1998 Oregon drug conviction. That offense was also not included as criminal history in the judgment and sentence, either at the original sentencing or at the resentencing. It appears, however, that the prosecutor’s offender score calculation included this sentence. Under the law in effect at the time of the crimes, the prosecution was not allowed to

add new alleged criminal history on remand for resentencing. Did the resentencing court err in allowing this new evidence?

5. The resentencing court allowed the prosecution to present the new evidence on remand based upon the belief that 2008 amendments to RCW 9.94A.530 applied and authorized that addition. Did the court err in applying the 2008 amendments to Calhoun's case even though the crimes in this case occurred three years before the amendments were enacted?

Does it violate the savings statute and RCW 9.94A.345 to sentence a defendant based upon statutory amendments which occurred three years after the crimes were committed?

Does application of 2008 amendments to a case in which the crimes occurred three years earlier violate the prohibition against ex post facto legislation where the changes were being applied retroactively, were substantive and resulted in a sentence higher than that which would have been authorized under the law in effect at the time of the crimes?

Does allowing the prosecution a second opportunity to meet a burden of proof it should have met but chose not to violate fundamental principles of due process and invite prosecutorial vindictiveness by allowing an increased sentence on remand after a successful appeal than would otherwise have been authorized?

6. Based upon the criminal history alleged at resentencing and listed on the resentencing judgment and sentence, even if the prosecution was allowed to present new evidence on remand, the offender score should have added up to a "7." Was resentencing counsel ineffective in

failing to object to the use of an "8" offender score?

7. On remand, the only issue was resentencing. New counsel quickly became aware that the prosecution was intending to present new evidence on remand, something which was only permitted under the relevant law if Calhoun failed to object to the offender score calculation at the original sentencing. Was counsel prejudicially ineffective in failing to secure a copy of the original sentencing in order to show Calhoun's objection where that failure led the court to believe, based upon the prosecution's representations, that such an objection had not occurred?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Abdulkhalif Calhoun was charged by amended information with and convicted of first-degree robbery, two counts of second-degree assault and first-degree burglary. CP 7-10, 11-14. On June 2, 2006, the Honorable Judge Frank E. Cuthbertson ordered Calhoun to serve standard-range sentences for each offense, based upon an offender score of 9. CP 17-29; 1RP 1-10.¹ Calhoun appealed and, on January 8, 2008, this Court issued a decision, amended on March 3, 2009, which reversed and remanded for resentencing. CP 30, 36-66.

The resentencing proceedings were held before Judge James R.

¹The verbatim report of proceedings relevant to this case consists of the following:
the transferred transcript from the sentencing proceeding of June 2, 2006, as "1RP;"
the volume containing the proceedings of April 17, 2009, as "2RP;"
the volume containing the chronologically paginated proceedings of May 29, July 1 and 17 and August 13, 2009, as "3RP."

Orlando on April 17, 2009, and before Judge Frank E. Cuthbertson on May 29, July 1 and 17 and August 13, 2009. See 2RP 1; 3RP 1. Judge Cuthbertson imposed new standard-range sentences for the burglary and robbery based upon an offender score of 8. CP 316-26; 3RP 241-43. Calhoun appealed and this pleading follows. See CP 331-340.

2. Facts relevant to appeal

During the trial proceedings, Calhoun had serious issues with his attorneys. See CP 74-77. He discharged his first attorney, against whom he filed a bar complaint. CP 43-44. His second attorney withdrew when Calhoun asked him to sign a contract agreeing to do what Calhoun asked in the case. CP 43-44. His third attorney moved to have him committed for competency evaluation based in part on the difficulties which had occurred with his attorneys, which the attorney said was because of Calhoun's "disruptiveness." CP 43-44, 47. In addition, Calhoun's distrust of his attorney was noted at trial, with Calhoun firing his third counsel on the record and telling the jury that he was firing him for violation of Calhoun's constitutional rights, declaring, "I object to this man representing me. He is a liar. He will not uphold my rights." CP 48.

Indeed, on cross-examination, when the prosecutor asked Calhoun if he agreed with his attorney's statement that on something related to the case, Calhoun said, "I don't agree with nothing that man says because he is not my attorney. He has been lying the whole time trying to keep the whole story from you people." CP 48-49. The judge then ordered the jury out and threatened to have Calhoun fitted with a stun device if he engaged in further outbursts. CP 47-49.

Nevertheless, at the time of sentencing, the court had not appointed new counsel for Calhoun and the same attorney who had represented him at trial appeared. 1RP 1. At sentencing, the prosecutor presented two exhibits to establish Calhoun's criminal history: 1) a certified copy of a document relating to a December 1995 conviction for "delivery of a controlled substance" and 2) another document relating to two offenses from September of 2001, a "delivery of a controlled substance" and a possession offense. 1RP 2; CP 346.² The prosecutor told the court that he also had information indicating that Calhoun had a prior conviction for second-degree assault from 1999 in Clark County, but that he had not gotten a certified copy of the conviction documents for that offense and it was irrelevant because Calhoun's offender score was a "nine" with just the three priors for which the prosecution had evidence. 1RP 3. More specifically, the prosecutor said, the current offenses amounted to six points and the three prior convictions amounted to a total of three points. 1RP 4. As a result, for the robbery count, the prosecutor said, Calhoun had a standard range of 129-171, while the range for the burglary was 87-117 and the range for each of the assaults was 63-84 months. 1RP 3-4.

Although the 1995 and 2001 convictions were from Oregon, the prosecutor presented no Oregon statutes and no argument that the convictions were in any way "comparable" to Washington felonies and

²Although Calhoun has asked for transmission of these exhibits to this Court (see supplemental designation of clerk's papers, 4/27/10), the clerk's office has indicated that the documents are no longer in the Exhibit Room as they were "checked out" by an unknown party in 2008. See Supplemental Index, filed 6/04/10.

thus should be counted in the offender score. 1RP 1-14.

After the prosecutor asked the court to “inquire of the defense as to whether there’s any dispute as to the offender score,” counsel admitted that, while he had seen the prosecution’s exhibits, he had “not made an independent calculation” of the proper offender score but thought the prosecution’s calculation was likely correct. 1RP 4. When the court asked Calhoun if he wanted to say anything before sentencing, Calhoun again raised previous concerns about the attorneys he had been appointed not adequately representing him. 1RP 8-9.

At that point, the court told Calhoun it had been “very fair” and had let him speak and express his opinions in court even when Calhoun had not treated others with respect. 1RP 10. The court then stated its intent to order sentences at the high end of the standard range for each offense, ordering 171 months for the robbery, 84 months each for the assaults, and 117 months for the burglary, served concurrently, for a total of 171 months, based both upon the “seriousness” of the crimes and the criminal history the state had alleged. 1RP 11.

A moment later, Calhoun said, “I would like to say that I object to the points being offered at nine points. I only have four points in my history.” 1RP 11. The court responded, “[w]e’ve already entered an order in that regard.” 1RP 11.

The “Stipulation on Prior Record and Offender Score” filed in open court at that hearing had the written notation on it, “DEFENDANT OBJECTS TO THE CALCULATION OF HIS OFFENDER SCORE.” CP 15-16. The prior convictions listed on that “Stipulation” were listed and

counted as follows:

Assault 2 from Clark County in 1999 as "2"
UPCS/Del from Oregon in 1995 as "1"
UPCS/Del from Oregon in 2001 as "1"
UPCS/Del from Oregon in 2001 at "1."

CP 15-16. The prior convictions thus were counted as "5" total, including the Clark County conviction which the state did not prove at the sentencing, with the other current serious/violent offense counting as "2" and each assault counting as "1." CP 15-16.

The judgment and sentence entered on June 2, 2006, reflected the following prior criminal history:

UPCS-Del/Manf	07/12/95 from Portland, OR.
UPCS-Del/Manf	12/19/00 from Portland, OR.
UPCS	12/19/00 from Portland, OR.

CP 21-29. A listing for the Clark County offense was lined out and the other current offenses were the two assaults, the burglary and the robbery. CP 21-29.

Calhoun filed a notice of appeal shortly thereafter. CP 30. He also made a motion to "modify or correct" the judgment and sentence, arguing CP 347-49. The trial court did not rule on that motion. CP 350.

On appeal, Calhoun argued, *inter alia*, that the trial court erred and violated his rights to be free from double jeopardy because the assault convictions merged with the robbery. CP 42. He also argued that the assaults and robbery were "same criminal conduct." CP 60-62.

The prosecution did not cross-appeal. In its response brief, it argued that this Court should decline to address any sentencing issues other than the issue of the merger. See CP60-62. This Court's opinion, as

modified on reconsideration, affirmed the first-degree robbery and first-degree burglary convictions, reversed both second-degree assault convictions and remanded for resentencing. CP 36-66.

On remand, after some preliminary hearings, the prosecutor filed a resentencing memo in which it admitted that the two assaults had to merge with the robbery for sentencing. CP 114-17. The memo declared the prosecutor's intent to prove the following prior convictions for sentencing: 1) the 1995 possession with intent from Oregon, 2) the 2001 unlawful possession with intent and 2001 unlawful possession crimes from Oregon and 3) the 1999 assault from Clark County the prosecution had failed to present evidence of at the first hearing. CP 114-17. The prosecutor argued that, based upon those prior convictions, Calhoun had an offender score of "8" and was facing standard ranges as follows: 108-144 months on the robbery and 77-102 months on the burglary, to run concurrently. CP 114-17. In the scoring sheets included in the prosecutor's briefing, he calculated the points as "2" for the Clark County assault, 4 for the other prior nonviolent felonies and 2 for the current violent felony. CP 115-16. He did not explain why there were 4 prior nonviolent offenses listed when he was citing only the one 1995 crime and two 2001 crimes. CP 115-16.

Nowhere in the prosecutor's pleading was there any acknowledgment that it was presenting new evidence for the first time on remand for resentencing, nor did the prosecutor make any claims that it was entitled to another chance to meet its burden of proving the prior convictions despite its failure to prove them at the original sentencing. CP 114-17.

At the hearing held the same day that the memo was filed, counsel objected to the court considering any of the exhibits the prosecution wanted to present on prior convictions which had not been presented at the initial sentencing. 3RP 2-3. A discussion ensued in which counsel noted that Calhoun had not stipulated to the offender score at the original sentencing. 3RP 3. The prosecutor agreed that Calhoun “did contest his offender score last time” but thought that the prosecution was presenting “exactly the same evidence” at the current hearing. 3RP 3. Counsel disputed this, noting that the only prior convictions relied on at the previous sentencing were the 1995 Oregon drug possession and the two 2001 Oregon convictions for possession and possession with intent but the 1999 Clark county conviction had apparently not been relied on and there had been no evidence to prove the Oregon offenses were “comparable” to Washington felonies. 3RP 5-7.

At that point, the prosecutor objected that he had not known there would be objections at this hearing and asked the court to set the matter over and order the defense to “put their position in writing.” 3RP 5-7. Calhoun himself addressed the court, stating that he did not believe the prosecutor had presented sufficient evidence at the first sentencing to prove several of the prior convictions from Oregon and had failed to do the required “comparability” analysis. 3RP 8. The court decided to adjourn. 3RP 13.

Prior to the next hearing, Calhoun filed a pro se “Motion for Estoppel to Hold the Plaintiff to the Record as it Existed at the First Original Sentencing,” in which he argued that the prosecution was

precluded from presenting new evidence on remand for resentencing after Calhoun had specifically objected to the offender score calculation at the first sentencing. CP 118-131. Counsel filed a similar sentencing memorandum. CP 132-39.

When the parties next appeared on July 1, 2009, the prosecution again proffered the same exhibits it had tried to enter at the previous resentencing hearing, adding “some additional certified” of indictments for the Oregon convictions as well as “petitions and statements on plea of guilty” for those convictions. 3RP 15-17. According to the prosecutor, it was proper to admit the new evidence because defense counsel had effectively “conceded” the offender score at the original hearing by saying “I have not made an independent calculation, but I believe that counsel is correct in his calculation of the offender score.” 3RP 18. The prosecutor told the court “that was the only exchange insofar as the offender score calculation” at the original sentencing, failing to mention the later exchange when Calhoun had himself objected to the offender score. 3RP 18. The prosecutor also discounted Calhoun’s written objection to the offender score on the “Stipulation” document, claiming that objection was inconsistent with “what happened at the actual sentencing hearing when Mr. Schoenberger [trial counsel] conceded the offender score calculation.” 3RP 18.

Instead of telling the court about Calhoun’s oral objection, the prosecutor told the court that Calhoun “was present, *raised no objection of his own[.]*” 3RP 18 (emphasis added).

In the alternative, the prosecutor argued that a statute, RCW

9.94A.530, provided the state with the opportunity to present and the court to consider criminal history evidence not previously presented. 3RP 19.

Taking the second issue first, counsel objected that the language upon which the prosecution was relying from that statute had been added in 2008, years after the crimes in this case. 3RP 21. He argued that application of those amendments retrospectively to Calhoun would violate the prohibition against *ex post facto* laws. 3RP 21. Regarding whether prior counsel had the authority to concede the offender score calculation when Calhoun himself had indicated an objection, counsel reminded the court that Calhoun and his attorney were “barely on speaking terms during the course of this trial.” 3RP 21.

When the court asked if Calhoun had objected on the record at the prior sentencing, counsel admitted he did not have the transcript from that hearing and could not answer that question. 3RP 23. The prosecutor then told the court that Calhoun had not made any such objection. 3RP 23.

At that point, the court asked about the effect of the written objection on the “Stipulation” and why that had not meant the state was required to prove the prior convictions and their comparability in 2006. 3RP 24. Counsel argued that it did and the prosecutor again relied on the belief that Calhoun had raised no objection, so that the law allowed presentation of the missing evidence on remand. 3RP 24.

Because the court needed some time to look at the issues, it ordered another recess. 3RP 26.

On July 14, 2009, the prosecutor filed a supplemental resentencing motion which was more than 130 pages long and included Oregon statutes

and multiple documents attached as appendices, relating to criminal history the prosecutor claimed Calhoun and his codefendant had. CP 140-272. Counsel filed a supplemental sentencing memorandum, arguing that application of the 2008 amendments to Calhoun was improper. CP 273-76.

When the parties next appeared on July 17, 2009, the prosecutor again claimed that Calhoun “did not contest the offender score at the original sentencing” and that it was therefore proper for the state to bring in the new evidence on remand. 3RP 34. The prosecutor also argued that it was permitted to present the additional evidence under RCW 9.94A.530. 3RP 34. Counsel again objected. 3RP 34-35.

In ruling that the state would be allowed to present additional evidence, the court first ruled that the 2008 amendments to RCW 9.94A.530 applied to Calhoun’s case. 3RP 37. The court also declared that there was no violation of the prohibition against *ex post facto* legislation in applying statutory changes made three years after Calhoun’s crime, finding that the changes did not enhance punishment or create any disability on Calhoun. 3RP 37. The court also said that there had been no objection raised to the offender score calculation at the original sentencing and that Calhoun’s objection had only occurred after the sentence had been imposed. 3RP 38-39. It appears from the record that the court was referring to the written objection on the Stipulation, although it was not completely clear. 3RP 38-39.

At that point, counsel argued that Calhoun’s attorney did not have the authority to override Calhoun’s objection to the offender score, noting that the sentencing court had obviously been aware of that objection

because of the “Stipulation” document it had before it, containing that objection. 3RP 40. The resentencing court refused to reconsider its ruling and ruled that the prosecution would be allowed to present the new evidence. 3RP 40-42.

At the subsequent sentencing, counsel for Calhoun objected not only to the new evidence but also to the exhibits of the Oregon statutes and the comparability analysis the state was now arguing for the first time. 3RP 43. The prosecutor argued that the offender score should be an “8,” based on the exhibits, which the court described as follows: 1) documents relating to the 2001 Oregon convictions for possession and delivery charges, 2) documents relating to the 1995 Oregon drug conviction, 3) documents relating to the Clark County second-degree assault in 1999, and 4) documents indicating a 1998 Oregon drug conviction for delivery. 3RP 44-46; CP 351. The exhibits were all admitted over defense objection and the court ruled on comparability of the Oregon convictions, as well as ruling that the state was allowed to present the new evidence of comparability at resentencing. 3RP 45-46.

The prosecutor also attached other documents relevant to these priors to the state’s supplemental brief, because the prosecutor feared the exhibits he had previously presented were not legally sufficient to prove the prior convictions. 3RP 47. Included in those attachments were Oregon statutes. CP 140-272. After a short recess, the prosecutor said he needed to get new copies of certain documents because he did not have certified copies. 3RP 48. The court granted that request over defense objection. 3RP 48.

On August 13, 2009, the parties again appeared and the prosecutor presented certified copies of the exhibits previously detailed. 3RP 55. By that point, counsel finally had the transcript from the original sentencing and was able to tell the court that it showed that Calhoun had specifically objected, orally, on the record at the original sentencing. 3RP 57. The court did not further reconsider its previous ruling, even after Calhoun himself told the court he had objected both in writing and orally at the original sentencing and argued that the state's failure to prove "comparability" at the original sentencing meant it should not get a chance to do so now. 3RP 57-63.

In resentencing Calhoun, the court used the prosecutor's proposed offender score of "8." 3RP 64. The judgment and sentence reflects that the court relied on the following prior and current criminal history:

UPCS/Del	1995	Oregon
Assault 2	1999	Clark County
UPCS/Del	2001	Oregon
UPCS	2001	Oregon
Rob 1	2005	current/WA
Burg 1	2005	current/WA

CP 320-26.

D. ARGUMENT

THE STATE'S FAILURE TO MEET ITS BURDEN OF PROOF AT THE ORIGINAL SENTENCING IN 2006 PRECLUDED IT FROM PRESENTING NEW EVIDENCE TO TRY TO MEET THAT BURDEN ON REMAND DESPITE STATUTES ENACTED SEVERAL YEARS AFTER THE CRIMES IN THIS CASE WERE COMMITTED

- 1) The state had the burden of proof at the original sentencing and failed to meet that burden

To properly sentence a defendant, the court is required to calculate

his offender score based upon his prior convictions and the seriousness level of the current offense. See State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). When prior convictions include some from out-of-state, those prior convictions cannot be included in the offender score calculation unless the prosecution proves that the offense is “comparable” to a Washington state felony. RCW 9.94A.525(3); State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999).

It is the state’s burden to prove, by a preponderance of the evidence, the existence of all of the defendant’s prior convictions and both the existence and comparability of any such convictions which are from out-of-state. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999); Ford, 137 Wn.2d at 482-83. The only exception is if the defendant explicitly stipulates to the comparability of his prior convictions, in which case the sentencing court may rely on that stipulation as sufficient to support a finding of comparability. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005). Absent such stipulation or sufficient evidence to prove the existence and comparability of a prior out-of-state conviction, “the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score.” Ford, 137 Wn.2d at 480-81.

In this case, at the first sentencing hearing, the prosecution relied on three out-of-state convictions: the 1995 possession from Oregon and the 2001 possession and delivery charges, also from Oregon. CP 17-29; 1RP 1-14. Yet the prosecutor did not present any evidence of or even argument

about the comparability of those offenses to any Washington felony. 1RP 1-14.

Further, Calhoun did not stipulate to the comparability or existence of those prior convictions. “Stipulation” for these purposes does not occur unless the defendant makes an “affirmative acknowledgment” that the out-of-state convictions are comparable. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Even if a defendant fails to object below, that does not amount to “stipulation,” nor is it a “waiver” of the issue. Ross, 152 Wn.2d at 230. Here, both orally and in writing, Calhoun objected to the offender score used by the state. See CP 15-16; 1RP 11-12.

Thus, because the prosecutor failed to present any evidence of “comparability” of the 1995 and 2001 prior convictions from Oregon and because Calhoun did not make any explicit stipulation regarding those offenses, the prosecutor failed to meet his burden of proof to support reliance on those priors at the original sentencing and it was clearly error for those convictions to be included in the offender score. See e.g., Ford, 137 Wn.2d at 480.

- 2) Under the law in effect at the time of the crimes, the prosecution was not permitted a second chance to satisfy the burden it had failed to meet when the defendant objects at the original sentencing

In this state, a defendant is sentenced based upon the law in effect at the time the crimes for which he is being sentenced were committed. See State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Indeed, RCW 9.94A.345 specifically mandates that “[a]ny sentence imposed” under the SRA “shall be determined in accordance with the law in effect

when the current offense was committed.” See State v. Kane, 101 Wn. App. 607, 5 P.3d 741 (2000). This is true even if the law at the time of the crime is less favorable to the defendant than more recent law. 101 Wn. App. at 613-17.

Washington’s “savings” statute, RCW 10.01.040, reflects this rule, which is a departure from common law. See Kane, 101 Wn. App. at 612. In relevant part, that statute provides that:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amending or repealing act.

RCW 10.01.040. The statute applies not just when the Legislature repeals an existing statute but any time there are statutory amendments, so that amendments to criminal statutes presumptively do not apply to cases where the crime was committed prior to the amendment, absent clear contrary legislative intent. See Rivard v. State, ___ Wn.2d ___, ___ P.3d ___ (2010 WL 1795624) (May 6, 2010). Further, the savings statute applies even when amendments to criminal statutes are “remedial,” if they affect the punishment for a criminal case. See State v. McCarthy, 112 Wn. App. 231, 48 P.3d 1014, review denied, 148 Wn.2d 1011 (2002) (amendments to “tripling” sentencing statute, even if remedial, apply only prospectively).

As a result, any inquiry about whether Calhoun was properly resentenced must start with an examination of the law in effect at the time of the crimes. According to the state, the crimes were committed July 11, 2005. CP 1-5. At that time, the law was that, when the prosecution failed to meet its burden of proof at the original sentencing, the result depended

upon whether there was an objection by the defense. See Cadwallader, 155 Wn.2d at 878; State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002); Ford, 137 Wn.2d at 485. If the state failed to meet its burden at the original sentencing but the defendant did not object, on remand for resentencing the prosecution was allowed another opportunity to meet its burden of proving the classification and existence of the disputed convictions. See Ford, 137 Wn.2d at 485-86. The reasoning behind this rule is that, where the defendant does not object, the trial court is not put “on notice as to any apparent defects” in the state’s proof. Ford, 137 Wn.2d at 485-86. It is appropriate, the Supreme Court held, to allow the prosecution another chance to make its case because this will serve as a “proper disincentive to criminal defendants” to “purposefully fail to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case.” Ford, 137 Wn.2d at 485-86.

Notably, the Supreme Court has made it clear that the prosecutor’s burden of proof does *not* depend upon an objection by the defense. McCorkle, 137 Wn.2d at 496. “Objection to unsupported argument regarding classification is not required to put the State to its [burden of] proof,” the Court held, because “[u]nder the SRA, the State’s burden is mandatory.” Id. Instead, the Court has held, “[t]he SRA [Sentencing Reform Act] expressly places this burden on the State because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’ ” Ford, 137 Wn.2d at 480, quoting, In re Williams, 111

Wash.2d 353, 357, 759 P.2d 436 (1988).

If, however, the defense objects below, the prosecution is “held to the existing record” on remand. Ford, 137 Wn.2d at 485-86. The theory is that prosecution has had the opportunity to meet its burden of proof and has failed to do so despite objection, so it should not be allowed another opportunity to do that which it could not or chose not to do at the original sentencing. Id. Because the state does not “meet its burden through bare assertions, unsupported by evidence,” it should be prepared to prove its case regarding criminal history at the original sentencing. Id. It would “send the wrong message” to the prosecution, courts and criminal defendants to allow the prosecution a second chance to do what it failed to do to satisfy its burden of proof. Id. In addition, it would offend concepts of due process and the fundamental fairness underlying our criminal justice system to allow the state to be given a second chance to try to meet its burden when it failed to make such an effort to begin with, at the original sentencing. See, e.g., State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009) (due process mandates that the court’s decision in sentencing is based upon some evidence beyond mere allegation).

Thus, under the law in effect at the time of the crimes in this case as set forth in Ford, McCorkle, Cadwallader and their progeny, the prosecution was not allowed a second chance to meet the burden it failed to meet the first time around when the defendant objected below.

- 3) The prosecution was precluded from presenting evidence to support its original claims of criminal history and from presenting new criminal history on remand and counsel was ineffective

In ruling that the prosecution could present additional evidence on remand, the resentencing court relied, *inter alia*, on the belief that Calhoun had not sufficiently objected at the original sentencing. See 3RP 38-39. The court was led to this belief based upon both the representations of the prosecutor and counsel's failure to secure the relevant record, prior to argument. But those representations were wrong, because Calhoun objected at the original sentencing. And counsel's failure was ineffective assistance which deprived Calhoun of his Article 1, § 22 and Sixth Amendment rights.

First, Calhoun objected at the original sentencing, in two ways. He objected before the end of sentencing when he told the court "I would like to say that I object to the points being offered at nine points. I only have four points in my history." 1RP 11. In addition, he made a written objection on the "Stipulation" regarding the offender score, declaring "DEFENDANT OBJECTS TO THE CALCULATION OF HIS OFFENDER SCORE." CP 15-16.

Thus, Calhoun specifically objected, not once but twice, to the offender score used at the original sentencing. Yet the prosecutor repeatedly told the resentencing court to the contrary, that Calhoun had *not* objected. After admitting at the first resentencing hearing that Calhoun "did contest his offender score last time," the prosecutor then changed this claim at the next hearing, declaring that counsel had effectively "conceded" the offender score and further, that counsel's declaration that he had "not made an independent calculation" but "believe[d]" that the prosecution's calculation was correct was the *only* discussion at the

original sentencing about the offender score. 3RP 3, 15-18.

Indeed, the prosecution used this “fact” to argue that the written objection contained on the “Stipulation” document was somehow of no moment, because it did not accurately reflect what had “actually” happened at the sentencing hearing when trial counsel had, the prosecutor claimed, “conceded the offender score calculation” on Calhoun’s behalf. 3RP 18. Further, the prosecutor specifically told the resentencing court that Calhoun “was present, *raised no objection of his own.*” 3RP 18 (emphasis added).

But these claims were patently untrue. There *was* another exchange about the offender score - Calhoun’s exchange with the court when he objected that the offender score was wrong and should be a “4.” 1RP 11-12. And contrary to the prosecutor’s declaration, Calhoun *did* raise an objection of his own, not only on the written “Stipulation” but at sentencing. 1RP 11-12; CP 15-16. The prosecutor’s claims to the contrary are so clearly rebutted by the record that it is difficult to conceive that they were not deliberate attempts to mislead the court. And they are particularly significant because the question of whether Calhoun had objected was pivotal to whether the prosecutor would be allowed to present the evidence the state had failed to present at the original sentencing under Ford, McCorkle and their progeny i.e., evidence to prove that the Oregon convictions were “comparable” and thus should be included in Calhoun’s offender score.

Notably, the effect of these misrepresentations could have been mitigated if counsel had simply procured a copy of the original sentencing

transcript. Had he done so, he would have been able to specifically rebut the prosecutor's incorrect claims about whether Calhoun had personally objected. In fact, when the court asked about whether Calhoun had made a speaking objection at the original sentencing, counsel specifically admitted that he *could not answer that question because he did not have the relevant transcript*. 3RP 23. And after that question, the prosecutor was free to again tell the court - wrongly - that Calhoun had not made any objection. 3RP 23, 24. The prosecutor made use of this freedom not once but several times. 3RP 23, 24.

Thus, without the transcript of the original sentencing, counsel was completely unable to prove the prosecutor's false claims wrong, leaving counsel with only arguments about whether prior counsel could "bind" his client with a concession when Calhoun and former counsel were barely on speaking terms. 3RP 21.

Further, resentencing counsel not only failed to secure the transcript in the months after remand, prior to the original resentencing hearing, but again between that hearing and the second hearing, and again between the second hearing and the third. 3RP 34.

Thus, because counsel had failed to secure the original sentencing transcript, he could not present the evidence to the resentencing court that Calhoun *had* objected, even when, at the third hearing, the prosecutor again told the court the falsehood that Calhoun "did not contest the offender score at the original sentencing." 3RP 34. And Calhoun's "failure" to object below was part of the court's decision, although the court also said Calhoun objected after the sentence had been imposed,

apparently referring to the written objection on the “Stipulation.” 3RP 38-39.

It was only on August 13, 2009, *after* the court had ruled on the issue, allowing the state to present the new evidence and ruling on comparability, and after a continuance of about a month to allow the state to get certified copies, that counsel finally had the transcript. 2RP 23, 57. By then, however, it was too late. The court had already ruled, at the previous hearing, that the prosecution would be allowed to present the new evidence on remand, and had also ruled on and admitted that evidence. 3RP 39-43, 45, 52-57. Counsel was thus in the weak position of asking for reconsideration of a completed decision, rather than presenting his argument prior to the decision being made. See, e.g., State v. Crider, 78 Wn. App. 849, 861, 899 P.2d 24 (1995) (giving a defendant the opportunity to allocute only after the court’s decision was issued was insufficient because, once the decision was made, “the defendant is arguing from a disadvantaged position”).

Counsel’s failure to secure a copy of the crucial transcript in time to use it at the resentencing hearings was ineffective assistance. Both the Sixth Amendment and Article 1, § 22 protect the right to effective assistance of counsel at all critical stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Even considering a strong presumption of effectiveness, counsel will be deemed

ineffective when his performance falls below an objective standard of reasonableness and that performance prejudiced the defendant. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Counsel may be deemed ineffective if he fails to prepare adequately to represent his client or fails to make adequate investigations into the matters of defense which may be raised on his client's behalf. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Reversal and remand is required for such failures if there is a reasonable probability that, but for counsel's defective performance, the outcome would have been different. See Bowerman, 115 Wn.2d at 808.

Here, the sole reason for the proceedings for which counsel was appointed was resentencing. And it was clear from the very first hearing that one of the crucial questions before the court was going to be what, exactly, had happened and been said at the original sentencing. Indeed, counsel's entire argument was that the prosecutor could not present and the court could not consider anything other than what was presented at the original sentencing. 3RP 1-4. Further, at the first hearing on resentencing, the prosecutor disputed whether he was presenting anything new or was simply repeating what had been done at the original sentencing. 3RP 3.

Thus, it was absolutely clear from very early in the proceedings that counsel needed the record of the original sentencing in order to adequately represent his client. Yet more than a month went by between the initial few hearings and the next hearing, during which time counsel neither got the transcript during that time nor asked for it or for additional time to

secure it in order to ensure that he was able to make a proper record before the court.

These failures cannot be deemed, objectively, “reasonable.” It cannot be “reasonable” to completely fail to be prepared to present crucial evidence relevant to the only issue for which you represent a client. Nor could there be any legitimate tactical reason to be so unprepared. And certainly the court would have granted any request by counsel to secure a copy of the transcript, given that what happened at the original sentencing was so critical to the issues before the court on remand.

Further, counsel’s failure obviously prejudiced his client. The court was so concerned about whether Calhoun had objected at the original sentencing that it specifically asked about it. 3RP 23. This is because the failure to object was crucial to whether the state was allowed to present new evidence on remand, at least under Ford, McCorkle and Cadwallader. Had counsel secured a copy of the transcript prior to the resentencing hearing, he could have proven to the court that Calhoun had, in fact, objected at the original sentencing, prior to the end of that hearing. This would have likely tipped the balance in Calhoun’s favor, because without the oral objection the only objection appeared to have been on the “Stipulation,” made after the sentencing hearing was complete, rather than both during the sentencing and in the Stipulation. And further, the evidence of the oral objection would have rebutted the prosecutor’s claim that the written objection was akin to a scrivener’s error and did not accurately reflect what happened at the original sentencing.

As the Supreme Court held in Lopez, the question is whether the

objection is raised at the sentencing hearing, not whether it was raised *early* in the sentencing hearing. Lopez, 147 Wn.2d at 518.

Because Calhoun objected at the original sentencing, the prosecution was precluded from presenting additional evidence on remand to prove the criminal history it had previously alleged was “comparable” to Washington felonies and should be counted in the offender score. Further, counsel was prejudicially ineffective in failing to secure the crucial transcript of the original sentencing in order to adequately represent his client at resentencing.

In response, the prosecution may attempt to argue, as it did below, that Calhoun’s objections at the original sentencing were somehow irrelevant because of counsel’s conduct. Any such argument should be soundly rejected. State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007), is instructive. In Bergstrom, counsel filed a presentence report using the same offender score as that used by the prosecution. At two sentencing hearings, neither counsel nor the defendant objected to the offender score or standard range presented by the prosecution. 162 Wn.2d at 96-97. At a second hearing, the court had made a ruling regarding the sentence and the defense again was mute. 162 Wn.2d at 96-97. It was only at a third hearing, convened for the sole purpose of discussing Bergstrom’s eligibility for electronic home monitoring, that an objection was finally raised by Bergstrom pro se. 162 Wn.2d at 96-97.

Under those circumstances, a bare majority of five members of the Court held, the state was not put on notice that it needed to prove the offender score allegations. 162 Wn.2d at 96-97. It was “reasonable,” the

majority held, for the state to rely on counsel's apparent agreement with the score, given the lack of objection until the last minute. 162 Wn.2d at 96-97.

Four members of the Court disagreed. Bergstrom, 162 Wn.2d at 98 (Alexander, C.J., dissenting), 101 (Chambers, J., Johnson, J., and Sanders, J., concurring in dissent). Bergstrom "unquestionably" made a sufficient objection and the state should not be allowed another opportunity to meet the burden it had neglected to previously meet, they would have held. The objections Bergstrom made gave the court and prosecutor sufficient "notice" that proof was required, the justices said. 162 Wn.2d at 98-99. Further, Bergstrom's wishes regarding representation were paramount and should be honored, those four justices would have held. 162 Wn.2d at 99.

The fact that Bergstrom was so closely divided is significant in this case because here, unlike in Bergstrom, there were two objections at the time of the significant sentencing hearing. The majority's decision in Bergstrom depends upon the fact that Bergstrom's objections were not raised until days after the significant hearing, unlike here. Further, in Bergstrom, the only writing was counsel's agreement with the score, while here the "Stipulation" made Calhoun's objections clear. In addition here, unlike in Bergstrom, the defendant had specifically *fired* counsel and had repeatedly complained to the court of counsel's ineffectiveness and failure to act on Calhoun's behalf.

Indeed, here, counsel's own words indicate that counsel had effectively abandoned his duties to his client, so that the prosecution could not reasonably have relied on counsel's acts at sentencing to relieve the

state of its burden of proof. Counsel specifically admitted that he *had not done the calculations himself* to determine if the state had the correct offender score. 1RP 4. But that is the minimum counsel representing someone at a sentencing should do. Otherwise, how can counsel know if there has been a mistake in the calculation by the state which would result in the wrong sentence?

In fact, had counsel performed that basic, fundamental task, he would have seen that the offender score of 9 advanced by the prosecution at that original sentencing hearing was *wrong*. The “Stipulation” document in which Calhoun indicated his objection to the offender score calculated the “9” the court used at the original sentencing by *including* the Clark County assault, adding 2 points for it. CP 15-16. The offender score thus calculated by the state was based upon 2 points for the Clark county assault, a point for the 1995 Oregon drug offense, a point each for each of the two 2001 Oregon drug offenses, a point for each of the two current assaults and two points for the other current offense (of the burglary and robbery), for a total of 9. But the prosecution admitted at the original sentencing that it did not have the evidence to prove the Clark county offense. 1RP 3. And the prosecutor did not ask for a continuance to secure that evidence, choosing instead to go forward without that proof. 1RP 3. Without the Clark county offense, the correct offender score at the original sentencing, including the assaults which this Court later ruled should merge with the robbery, would have been a 7, not the 9 which was used by the court. See former RCW 9.94A.525 (2005) (offender score calculation statute).

Given the contentious relationship between counsel and his client - about which the prosecutor was abundantly aware - and given that counsel himself admitted to having effectively abandoned his duty to his client by failing to do the calculations himself, it is patently obvious that counsel had ceased to act on his client's behalf. It would be unreasonable under the circumstances for the state to rely on counsel as acting on Calhoun's behalf.

Had the Supreme Court been presented with the facts in this case instead of the facts it had in Bergstrom, it is clear that a majority would have found the objections raised by Calhoun to be sufficient, because 1) there was a specific written objection at the time of sentencing, 2) there was no presentence report signed by defense counsel agreeing with the state's offender score as in Bergstrom, 3) Calhoun's oral objection also occurred at the crucial hearing, albeit after the court indicated its intent to enter a particular sentence, and 4) counsel's contentious relationship with Calhoun and his admission that he had not even performed the minimal work required to represent his client at sentencing by conducting an independent calculation of the offender score made it clear that counsel had ceased to represent Calhoun in anything but name.

Because Calhoun objected, under Ford, McCorkle, Cadwallader and their progeny - the law in effect at the time of the crimes - the state was not entitled to a second "bite at the apple" to try to prove its claims regarding Calhoun's criminal history.

Finally, even if Calhoun had stayed mute, the state would still be precluded under the law in effect at the time of the crimes from *adding* to

the criminal history on remand, as it seemed to try to do here. At the first sentencing, the prosecution relied on the 1995 Oregon drug conviction and the two 2001 Oregon drug convictions, in addition to the other current offenses. CP 15-16; 1RP 1-14. The only other conviction alleged was the Clark county assault, which the state chose not to prove. 1RP 3.

On remand, however, it appears the prosecution may have relied on another prior conviction not previously even mentioned - a 1998 Oregon drug offense for which it submitted documents in the new exhibits. See CP 140-272. This offense, which was not cited by the prosecution in its pleadings or listed in the judgment and sentence, is the only way to explain the "8" offender score advanced by the state below. For first-degree burglary and first-degree robbery, the relevant formula contained in the 2005 statutes applicable to Mr. Calhoun's case was that each prior or current non-violent drug felony counted as a "1" towards the offender score, while all prior and current violent/serious felony, such as burglary, robbery and assault, counts as "2." Former RCW 9.94A.525 (2005). For the burglary, the robbery thus counted as "2," as did the burglary when the score for the robbery was determined. The prior criminal history the prosecution set forth in the judgment and sentence was as follows:

UPCS/Del	1995	Oregon
Assault 2	1999	Clark County
UPCS/Del	2001	Oregon
UPCS	2001	Oregon

CP 320-26. As a serious/violent offense, the assault from Clark County would add another "2" points, if it was indeed properly part of the sentence. Former RCW 9.94A.525 (2005). The drug offenses, as non-

violent felonies, would each count as “1,” unless the 2001 convictions were properly counted as “1” together. Thus, even assuming that the new evidence was properly considered and the 2001 convictions were not the same criminal conduct, the addition of 2 (assault) +2 (other current offense) +1 (1995 drug) +1 (2001 drug delivery) +1 (2001 drug) does not equal “8” - it equals “7.” Only if the 1998 drug offense is counted is there a total of “8” i.e., four nonviolent felonies each counted as one, the other current offense counting as 2 and the assault counting as 2.

Nothing in Ford, McCorkle or similar cases authorizes the prosecution to raise *new* criminal history for the first time on resentencing. Indeed, Cadwallader specifically holds to the contrary. In Cadwallader, the defendant was ordered to serve a persistent offender sentence of life without the possibility of parole. 155 Wn.2d at 870. Shortly thereafter, a decision was issued which indicated that one of Cadwallader’s strike crimes “washed out” and could not be used in criminal history, based on the history set forth by the prosecution at sentencing. 155 Wn.2d at 871. Cadwallader filed a personal restraint petition and the state countered by filing a motion for resentencing in trial court, alleging for the first time several out-of-state convictions it said interrupted the “wash out” period. 155 Wn.2d at 871-72. Although the state first claimed it had only just become aware of this history, the discovery it had given the defense at the original trial included information about that history, thus belying the state’s claims. 155 Wn.2d at 872-73. On appeal, the court of appeals held that it was proper for the prosecution to be allowed to add this history because the defendant had not objected to the criminal history used at the

first hearing so the state could present “additional evidence” on remand. 155 Wn.2d at 874.

The Supreme Court disagreed. 155 Wn.2d at 875-76. Because the state never even alleged the out-of-state convictions at the original sentencing, the Court held, the state could not present evidence to prove those convictions or rely on them at the resentencing, regardless whether the defendant had not objected to the criminal history at the original proceeding. 115 Wn.2d at 876. Put simply, Cadwallader’s failure to object to the criminal history at the original sentencing, which had included the offense he now argued washed out, did not authorize the state to suddenly add new criminal history on remand. Id. This was so despite the state’s claim that it had not had any reason to allege the out-of-state history at the original sentencing. Id.

Thus, under Cadwallader, the prosecution could not allege and rely on the 1998 Oregon drug conviction which it did not allege at the first hearing. Indeed, because that conviction was not included in the list of prior convictions in the judgment and sentence or cited in the state’s pleadings below, it was not properly included in the offender score, even if it had been previously alleged and proved.

Because Calhoun objected to the criminal history calculation at the original sentencing under Ford, McCorkle, Lopez and their progeny, the prosecution was not entitled to submit evidence on remand to try to satisfy its burden of proving comparability for the out-of-state convictions. Further, under Cadwallader, the 1998 conviction could not have been included in the offender score, or alleged and proved below. This Court

should so hold.

iv. The 2008 amendments to the relevant statutes cannot and do not apply to Calhoun's case

In holding that the prosecution was entitled to present evidence on remand, the resentencing court also relied on statutory amendments which occurred three years after the crimes. This reliance was in error, however, because those amendments do not and cannot apply.

The relevant amendments were enacted in 2008, as part of chapter 231 of the Laws of 2008. The amendments were, in relevant part, in section (2) of the chapter, an amendment making a “criminal history summary” prima facie evidence of the existence and validity of convictions it listed; in section (3), amendments to RCW 9.94A.525 including one to subsection (21) which said that prior convictions “not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence,” and in section (4), in addition to another change, the language relevant to this case was added to RCW 9.94A.530(2), providing that “[o]n 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.

The only statutory changes cited below were the changes to RCW 9.94A.530, contained in section (4) of the bill. 3RP 1-68. But both that section and section (3) (the changes to RCW 9.94A.525) appear at first glance to provide authority for new evidence to be admitted by the state on

remand for resentencing. Upon closer inspection, however, they do not, at least in this case.

In general, it is presumed that statutes apply prospectively, which means that they apply only to offenses committed on or after the effective date of the statute. See State v. Humphrey, 139 Wn.2d 53, 55, 983 P.2d 1118 (1999). Here, in enacting the chapter, the Legislature specifically chose to make only sections (2) and (3) applicable to “all sentencings and resentencings commenced before, on, or after the effective date of sections 1 through 4 of this act.” Laws of 2008, ch. 231, § 5. The effective date of sections 1-4 was June 12, 2008. See Enrolled HB 2719/Laws of 2008, ch. 231. Thus, the amendments to former RCW 9.94A.525(21) (2008) (now RCW 9.94A.525(22) after some 2010 changes not relevant to this case) are explicitly applicable to resentencings commenced after June 12, 2008. In contrast, the changes to RCW 9.94A.530(2) were explicitly *not* made applicable to such resentencings.

There is therefore ambiguity about when the amendments are intended to apply. Regardless of that ambiguity, however, the statutory changes cannot be applied to Calhoun’s case. First, applying the “savings” statute and RCW 9.94A.535 Calhoun was entitled to be sentenced under the law in effect at the time of the crimes, as embodied by Ford, McCorkle, Lopez, Cadwallader and their progeny.

Kane, supra, is instructive. In Kane, the defendant was sentenced after amendments to a sentencing statute but committed his crime prior to the enactment of the amendments. 101 Wn. App. at 617. The trial court’s decision to apply the amendments to the defendant was overturned,

because, even though the changes would have been beneficial to the defendant, the Legislature had not indicated a clear intent to apply the amendments to cases already pending. 101 Wn. App. at 618. Further, the Kane Court found, there was nothing “fundamentally unfair” in sentencing according to the law in effect at the time the crimes were committed, given that the defendant was presumed to be aware of that law. Kane, 101 Wn. App. at 618. In addition, the Court held, the savings statute is a fundamental part of the legislative landscape so that the Legislature is entitled to assume that courts will apply and enforce it and give prospective application only to criminal and penal statutes that do not clearly express contrary intent. 101 Wn. App. at 617-18.

Just as in Kane, here there is nothing “fundamentally unfair” in applying the law as it was at the time of the crimes and holding the state to the record it made - or failed to make - at the original sentencing. Certainly the state was aware at that time that it shouldered the burden of proof and that it would not be allowed to ignore that burden at sentencing and “fix” the problems with its case on remand.

Second, the statutory changes cannot apply because they were enacted in order to effectively overturn the Supreme Court’s decisions. Statutory amendments which are enacted for such a purpose must be applied prospectively only, in order to prevent the Legislature from effectively intruding into the decisions of the courts and “overruling” them by Legislative fiat. See State v. Smith, 118 Wn. App. 288, 75 P.3d 986 (2003). Here, in enacting the changes to RCW 9.94A.525 and RCW 9.94A.530 in 2008, the Legislature specifically stated that it was doing so

in response to the Supreme Court's decisions, declaring, "[g]iven the Supreme Court's decisions in *In re Cadwallader*, 155 Wn.2d 867 (2005); *State v. Lopez*, 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472 (1999); and *State v. McCorkle*, 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing." Laws of 2008, ch. 231 § 1. As a result, the amendments cannot apply retroactively without allowing the Legislature to set itself up as effectively a "super court," overruling opinions it apparently did not like not just for the future but for those who were already entitled to their benefits.

Finally, the statutory changes cannot be applied without running afoul of the prohibitions against ex post facto legislation and the fundamental principles of due process. Under both the state and federal constitutions, laws will violate the prohibition against ex post facto legislation if, *inter alia*, they increase punishment for acts which occurred prior to their enactment or alter the legal rules of evidence. See, *Carnell v. Texas*, 529 U.S. 513, 539, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). Changes to the law violate the prohibition against ex post facto legislation when they are substantive, retrospective and disadvantage the person affected. *In re Powell*, 117 Wn.2d 175, 814 P.2d 635 (1991). A law is substantive rather than procedural when it effects change in the evidence which can be admitted, and retrospective when it applies to conduct committed prior to

its enactment. See Pillatos, 159 Wn.2d at 476. And a law disadvantages a person affected when it increases the punishment they could have received prior to its enactment, under the law then in effect. Id.

There can be no question these amendments to the statutes are substantive and disadvantage persons such as Calhoun by increasing the punishment they could have received prior to their enactment by allowing the state the chance to present evidence it could not have presented prior to the 2008 amendments. The law under Ford et al. was that the prosecution could not have presented evidence on remand to support its prior claims of criminal history, so that the Oregon convictions could not have been counted against Calhoun. And prior to the statute's enactment, the prosecution could not have *added* new history to increase the offender score on remand, because the law as set forth in Cadwallader prohibited it. The amendments are also retrospective, because they apply to conduct which occurred fully three years prior to their enactment and increase the punishment Calhoun could have received on resentencing for those 2005 acts. Applying the 2008 amendments to Calhoun's case thus violates the state and federal prohibitions against ex post facto legislation.

In addition, the amendments also offend basic notions of fundamental fairness and other concepts of due process which underlie our criminal justice system. The requirement that the prosecution meet its burden or be precluded from trying to again on remand if there is an objection stems from the due process mandate that the sentence imposed upon a defendant must be based upon sufficient evidence in order to comport with due process. Mendoza, 165 Wn.2d at 928. Further, the

Lopez Court held that it was not somehow “punishment” to preclude the state from a second chance to meet its burden of proof if the defendant objects. 147 Wn.2d at 523. It is and remains the state’s burden to prove the prior convictions, the Court held. Lopez, 147 Wn.2d at 523. To allow the state a second chance under those circumstances would send the “wrong message” to prosecutors about meeting their burden in the first place. Id.; Ford, 137 Wn.2d at 485. This is because “[i]t is the obligation of the state, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.” Mendoza, 165 Wn.2d at 928.

There is a second due process consideration at issue here as well - that of prosecutorial vindictiveness. A presumption of such vindictiveness arises in situations where governmental action detrimental to the defendant has been taken after the exercise of a constitutional right and there is reasonable likelihood that action could be grounded in vindictiveness. See North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). It is a due process violation “of the most basic sort” to punish a defendant for doing that which he has the right to do, including exercising a right to appeal. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). In the context of sentencing after a successful appeal, “[d]ue process of law” mandates that “vindictiveness against a defendant for having successfully” appealed shall play no part in the sentence he receives. Pearce, 395 U.S. at 725. It also mandates that apprehension of such vindictiveness not be allowed to chill the defendant’s exercise of his rights. See id.

Although Ford, Lopez, Cadwallader and their progeny do not explicitly discuss the concept of prosecutorial vindictiveness, they are grounded in the same due process which also underlies the need to ensure that vindictiveness does not play a part in resentencing after a successful appeal. And “vindictiveness” is not meant to imply corruption on the part of the prosecutor but rather that the prosecutor is a human being whose frustration at the defendant for successfully appealing and thus requiring the state to expend resources may naturally induce the prosecutor to take a more hard-line position against the defendant on remand as a result.

Further, although the concept of vindictiveness has been applied mostly in the context of a defendant receiving a greater sentence on remand, the same concept applies where, as here, the prosecutor’s actions on remand increase the sentence from what it would have been without those actions. Regardless whether the statutory changes *permit* the prosecutor to add more criminal history, the prosecutor’s decision to do so in this case, after a successful appeal, smacks of vindictiveness against the Calhoun for that appeal.

Notably, in enacting these amendments, the Legislature was specifically focused on one constitutional question only: whether they would violate double jeopardy. In the bill, the Legislature declared, “[t]hese amendments are consistent with the United States [S]upreme [C]ourt holding in *Monge v. California*, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack.” Laws of 2008, ch. 231 § 1. It is absolutely true that a defendant who appeals a sentence has no legitimate expectation of finality in that

sentence “protected by the double jeopardy clause.” See, e.g., State v. Larson, 56 Wn. App. 323, 328-29, 783 P.2d 1093 (1989), review denied, 114 Wn.2d 1015 (1990). By filing an appeal, the defendant has asked for the judgment and sentence to be changed and thus has no expectation that it will not. See, id.

But double jeopardy is not the issue where, as here, the defendant’s sentence is increased on remand from what it should properly have been, based upon evidence the state could have but chose not to present at the original sentencing. The Legislature’s concern should more properly have been about the due process implications of allowing the prosecutor to effectively increase the criminal history claims on remand not because of a new discovery regarding that history but simply to punish the defendant for a successful appeal. And it should have been concerned about how the application of the statute to people such as Calhoun would violate the prohibition against ex post facto legislation.

The 2008 amendments cannot and do not apply to this case and this Court should so hold.

v. Reversal for resentencing without the additional evidence and history is required

As noted above, the prosecution’s offender score of “8” is not supported by the criminal history set forth in the judgment and sentence. Instead, with that history of 1) the 1995 Oregon drug conviction (1 point), 2) the two 2001 Oregon drug convictions (2 points), 3) the Clark county assault (2 points) and 4) the current offense of either burglary or robbery (2 points counted against each other), the total offender score would be only 7,

not 8. See former RCW 9.94A.525 (2005). By failing to include the 1998 offense as part of the criminal history in the judgment and sentence or even the prosecution's pleadings, the prosecutor failed to support the proposed offender score of "8." Resentencing would therefore be required even if this Court found that it was proper for the court to rely on the new evidence of comparability submitted for the first time on remand, as well as the new evidence to support the Clark county offense, not previously proved.

It is Calhoun's position that the court could not rely on the new evidence and that the 1998 offense, not mentioned in the first sentencing and not cited as criminal history in the second, could not have been counted. Based upon the criminal history the prosecution set forth in the judgment and sentence, even if there were no other problems with the prosecution presenting and the court relying on new evidence at the resentencing, reversal would still be required with instructions to resentence Mr. Calhoun based upon the offender score of "7."

E. CONCLUSION

Because the 2008 amendments to the relevant sentencing statutes do not apply to this case, and because Calhoun sufficiently objected at the original sentencing, this Court should reverse and remand with instructions to resentence Mr. Calhoun within the standard range based upon the offender score of 2, the proper offender score, calculated by excluding the Oregon convictions previously alleged but not proved comparable and the Clark county conviction not previously proved, as well as the 1998 Oregon conviction not previously alleged, but counting the other current offense, a serious violent, as 2. In addition, because counsel was ineffective at the resentencing, new counsel should be appointed.

DATED this 10th day of June, 2010.

Respectfully submitted,

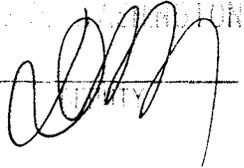


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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Abdul Calhoun, DOC 785278, Coyote Ridge Corr. Center,
P.O. Box 769, Connell, WA. 99326-0769.

DATED this 10th day of July, 2010.



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