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**I. STATEMENT OF THE ISSUES:**

1. Did the police seize the defendant when she was free to leave the scene of two separate, pre-arrest encounters?
2. Did the police lawfully search the defendant's purse, incident to her arrest, when the bag was under her immediate physical control at the time she exited a tavern restroom and immediately taken into custody?
3. Did the State sufficiently prove the defendant's criminal history when (1) the prosecuting authority provided the court a summary of the defendant's prior felony convictions via the plea offer, (2) the defense did not object to the summary as provided by the prosecuting authority, (3) the defense agreed with the State's sentencing recommendation, and (4) the court reviewed the defendant's criminal history before imposing her sentence?
4. Do certain 2008 amendments to the Sentencing Reform Act (SRA) violate the defendant's Fifth and Fourteenth Amendment right to due process and the privilege against self-incrimination?
5. If there was a sentencing error, what is the appropriate remedy?

**II. STATEMENT OF THE CASE:**

On January 28, 2010, approximately 10:45 p.m., Officer Rick Larsen first saw the defendant, Ms. Jessica Young, at the Sequim Safeway. RP (6/3/2010) at 10, 18. Larsen was concerned by Young's behavior inside the store:

[S]he was in the store for several minutes, um, with the same bag, talking on the cell phone. When she made eye

contact with me in the store she immediately stopped with the deer in the headlights look, turned and went straight for the front door. That to me is suspicious because a reasonable person that goes into a store is going to buy something and when they see a police officer not turn around and walk as fast as they can out the door.

RP (6/3/2010) at 22. Larsen followed Young outside, introduced himself, asked where she was going, and explained that her movements in the store puzzled him. RP (6/3/2010) at 18, 50.

Larsen asked if he could see Young's identification. RP (6/3/2010) at 48. When Young told the officer that she did not have any, Larsen asked for her name and date of birth. RP (6/3/2010) at 15, 48-49, 72. The defendant provided her name, but was hesitant to give any further information. RP (6/3/2010) at 15, 49. Larsen explained she was not obligated to provide her birth date and that she was free to leave at any time. RP (6/3/2010) at 15-16, 18, 50-51, 71. Young refused to provide any more information and quickly walked away. RP (6/3/2010) at 50, 58-59.

At the time of the initial contact, Officer Larsen was alone and was approximately 30 feet from his patrol vehicle. RP (6/3/2010) at 50, 58-59. The emergency lights of the officer's vehicle were never activated and he never drew his firearm. RP (6/3/2010) at 50. The officer performed a "local" check for warrants once the defendant had left the Safeway premises. RP (6/3/2010) at 14-15, 18, 51.

When Officer Chris Wright heard over his police radio that Larsen had requested a warrants check after an encounter at the Safeway, he proceeded to Larsen's location to see if his colleague needed assistance.<sup>1</sup> RP (6/3/2010) at 67-68. While Larsen conducted the warrant check, Wright observed that Young had walked behind a closed laundry mat, an area with no outlet. RP (6/3/2010) at 18, 58.

Officers Larsen and Wright drove their patrol cars to the rear of the closed business. RP (6/3/2010) at 18-19. The two police cruisers never activated their emergency lights. RP (6/3/2010) at 59. The officers discovered the defendant attempting to conceal her position by pressing herself against the wall of the laundry mat. RP (6/3/2010) at 59. The defendant was on her cell phone at the time of the second contact. RP (6/3/2010) at 63.

Officer Larsen spoke to the defendant a second time.<sup>2</sup> RP (6/3/2010) at 20, 23, 72. Young told the officers that she felt hassled. RP (6/23/2010) at 76. Larsen explained that he had to contact anyone he observed loitering behind a business after hours. RP (6/23/2010) at 90.

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<sup>1</sup> Ms. Young asserts that Larsen "called for backup." *See* Brief of Appellant at 13. The record does not support this assertion. *See* RP (6/3/2010) at 67-68.

<sup>2</sup> Throughout the second contact, Officer Wright stood approximately 5 feet behind Larsen. RP (6/3/2010) at 52, 60.

Wright informed the defendant that she was free to file a complaint with their supervisor. RP (6/23/2010) at 64.

Officer Larsen then asked Young for the last four digits of her social security number because he had not yet confirmed her identity with only her name.<sup>3</sup> RP (6/3/2010) at 21, 23. After Young provided the last four of her social security number, the officers informed her that she could not remain behind the closed business. RP (6/3/2010) at 74. Because she was free to leave, Young, again, walked away from the officers all the while talking on her cell phone. RP (6/23/2010) at 14, 24, 51-52, 60, 74-75.

After Young vacated the premises, the officers conducted a “statewide” warrant check. RP (6/3/2010) at 14, 51. The officers soon learned there was an outstanding arrest warrant for Young. RP (6/3/2010) at 14, 60.

After receiving notice that Young had a warrant, the police located her inside a women’s restroom at the “Mugs and Jugs” tavern. RP (6/3/2010) at 9. The officers opened the door to the restroom, stood at the threshold, and told the defendant that she was under arrest because she had

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<sup>3</sup> Ms. Young claimed Officer Larsen said she had to give him the information requested. RP (6/23/2010) at 73-74.

an outstanding warrant.<sup>4</sup> RP (6/3/2010) at 9-10, 30, 34-36, 57, 64. The officers repeated the command several times.<sup>5</sup> RP (6/3/2010) at 31, 58, 65. From behind a closed stall, the defendant responded, “I’ll be out in a minute[.]” RP (6/3/2010) at 13-14, 34, 57-58.

The officers never entered the restroom. RP (6/3/2010) at 9-10, 57. The defendant exited the restroom under her own power.<sup>6</sup> RP (6/3/2010) at 9-10, 37, 58. When the defendant exited the restroom, she was properly dressed and carrying her purse. RP (6/3/2010) at 9-10, 16, 41-43, 58, 78.

Officer Larsen immediately arrested Young, which she attempted to resist. RP (6/3/2010) at 37, 65-67. Larsen placed the defendant in restraints and advised her of her *Miranda* rights. RP (6/3/2010) at 16-17, 39, 42, 92. Larsen then escorted the defendant outside the tavern, while Wright carried her purse. RP (6/3/2010) at 39, 42, 65. The defendant was never separated from her purse by more than two feet. RP (6/3/2010) at 67.

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<sup>4</sup> According to Ms. Young, Officer Larsen was forceful in his command, ordering her to “come out we know you’re in there, come out or I’ll rip you out by your effing hair.” RP (6/3/2010) at 77. Larsen disputed that he ever threatened to pull the defendant out of the restroom. RP (6/3/2010) at 95.

<sup>5</sup> Officer Wright explained that Larsen made his directive in a casual tone, but as the defendant continued to delay the tone became more of a command. RP (6/3/2010) at 65. Larsen explained that he may have raised his voice, but he never used any profanity or yelled at the defendant. RP (6/3/2010) at 95.

<sup>6</sup> According to Ms. Young, Officer Larsen reached into the stall, grabbed her, and pulled her out of the bathroom. RP (6/3/2010) at 78.

Outside the tavern, the officers searched the purse on the hood of the patrol vehicle. RP (6/3/2010) at 16-17, 40-44, 82. Prior to the search, the police asked if there was any contraband or weapons inside the purse.<sup>7</sup> RP (6/3/2010) at 17, 80-81. The defendant responded there were needles. RP (6/3/2010) at 17, 81-82, 86. The officers searched the bag in the defendant's presence. RP (6/3/2010) at 81-82. The search produced methamphetamine. RP (6/3/2010) at 43; RP (7/21/2010) at 4.

The State charged Young with unlawful possession of a controlled substance. CP 17. Prior to trial, the State filed its plea offer with the Superior Court. CP Supp. This document summarized the defendant's criminal history and determined that her offender score was a three (3). CP Supp. The deputy prosecuting attorney based his offender score calculation on three 2009 convictions for Theft in the Second Degree, Forgery, and Criminal Impersonation in the First Degree;<sup>8,9</sup> and a 2005 conviction for Possession of a Controlled Substance. CP 7; CP Supp.

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<sup>7</sup> Officer Larsen explained when an individual is arrested pursuant to an outstanding warrant protocol requires that law enforcement to search the individual and the property under their control to make sure there is no contraband or weapons being transported to the jail. RP (6/3/2010) at 44-47.

<sup>8</sup> The deputy prosecutor assigned one point to both the Second Degree Theft and Forgery convictions because they constituted same criminal conduct. *See* CP 7; CP Supp.

<sup>9</sup> At a 3.6 hearing, Young admitted she committed two previous crimes of dishonesty: theft, and forgery, but she could not remember criminal impersonation. RP (6/3/2010) at 86-86.

After a stipulated bench trial, the trial court found, beyond a reasonable doubt, that Young had possessed methamphetamine. RP (7/21/2010) at 7-8; CP 22. The trial court scheduled a sentencing proceeding for August 11, 2010. RP (7/21/2010) at 10. The trial court noted the defendant was facing a confinement term of 6 to 18 months, which was consistent with an offender score of three. RP (7/21/2010) at 8. The defense agreed with this assessment. RP (7/21/2010) at 8. The State informed the trial court that its original plea offer was in the court file, and pursuant to the offer it would recommend a residential Drug Offender Sentencing Alternative (DOSA). RP (7/21/2010) at 10. The trial court said it would review the matter at the subsequent sentencing proceeding. RP (7/21/2010) at 10.

At sentencing, the State recommended the same sentence that it offered the defendant during the plea negotiations. RP (8/11/2010) at 4; CP Supp. The defense agreed that the State's recommendation was appropriate. RP (8/11/2010) at 4-5. The trial court reviewed the defendant's criminal history, and imposed the agreed recommendation: 7 months confinement, converting 30 days to community service work. CP 8-9; RP (8/11/2010) at 5. The defense never disputed the State's offender score calculation.

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### III. ARGUMENT:

#### A. THE PRE-ARREST ENCOUNTERS BETWEEN LAW ENFORCEMENT AND THE DEFENDANT WERE CONSTITUTIONAL.

Ms. Young alleges law enforcement unlawfully seized her prior to her arrest. *See* Brief of Appellant at 12-15. According to Young, her unlawful detention provided the police with the information that led to the discovery of her outstanding warrant. *See* Brief of Appellant at 12-15. Thus, she argues the physical evidence obtained incident to her arrest must be suppressed as “fruit of the poisonous tree.” *See* Brief of Appellant at 12-15. This argument is without merit because Young was always free to terminate the encounters and walk away.

Whether law enforcement seized an individual is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). A trial court’s resolution of the differing accounts surrounding an individual’s encounter with police are entitled to great deference, but the ultimate determination of whether the facts constitute a seizure is one of law and reviewed de novo. *Id.*

Article I, section 7<sup>10</sup> of the Washington Constitution protects against unwarranted intrusions into the private affairs of individuals.

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<sup>10</sup> Article I, section 7 provides: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

*Harrington*, 167 Wn.2d at 663. This section provides greater protection against unwarranted searches and seizures than the Fourth Amendment to the United States Constitution. *Id.*

However, Article I, section 7 does not forbid “social contacts” between police and citizens: “[a] police officer’s conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.” *Harrington*, 167 Wn.2d at 665 (quoting *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998)). In fact, “[e]ffective law enforcement techniques not only require passive police observation, but also necessitate interaction with citizens on the street.” *Id.*

A seizure occurs when “considering all the circumstances, an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority.” *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). The standard is purely objective, which requires that courts look at the actions of law enforcement. *Harrington*, 167 Wn.2d at 663.

The relevant question is whether a reasonable person in the individual’s position would feel he or she was being detained. *Harrington*, 167 Wn.2d at 663. An encounter between law enforcement and a citizen is

consensual if a reasonable person under the circumstances would feel that he/she was free to walk away. *Id.* (citing *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

The Washington Supreme Court has embraced a nonexclusive list of police actions that may turn a consensual encounter into a seizure: the threatening presence of several police officers, the display of a weapon by an officer, the physical touching of the citizen, or the officer's use of language or tone of voice to indicate that compliance with the officer's request is mandatory. *Harrington*, 167 Wn.2d at 664 (quoting *Young*, 135 Wn.2d at 512). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Young*, 135 Wn.2d at 512 (quoting *Mendenhall*, 446 U.S. at 554-55).

In *State v. Harrington*, the Washington Supreme Court addressed the question of when a "social contact" between police and a citizen matures into a seizure. 167 Wn.2d at 664-65. The high court held that when a police officer engages a citizen in conversation in a public place, the officer's request for identification does not convert the encounter into a seizure. *Id.* at 665. Additionally, the Court found a second officer's arrival on the scene did not create a seizure, but rather was only one-step

in a series of additional, progressive actions that made the encounter (in that case) a seizure. *Id.* at 666.

Ms. Young bears the burden of proving a seizure occurred in violation of article I, section 7. *Harrington*, 167 Wn.2d at 664. However, she fails in this endeavor because she was free to terminate the encounter and walk away after each of the challenged pre-arrest contacts.

(1) The encounter at the Sequim Safeway.

Analyzing the first contact under a purely objective standard, a reasonable person would not believe Officer Larsen had restricted Young's freedom of movement. As with the initial contact in *Harrington*, 167 Wn.2d at 665, Larsen initiated a contact in a public space, approached the defendant on foot, his patrol vehicle was several feet away, and he did not block the defendant's egress. RP (6/3/2010) at 10, 18, 50. Most importantly, Larsen informed Young that she was free to leave, and the defendant left the scene without providing certain information that the officer requested. RP (6/3/2010) at 15-16, 18, 50-51, 58-59, 71. There was no seizure. *See Harrington*, 167 Wn.2d at 665.

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(2) The encounter behind the closed laundry mat.

The facts surrounding the second encounter do not support Young's claim that she was unlawfully seized. While the presence of a second police officer might support Young's claim, this fact is insufficient to convert the contact into an unlawful seizure. *See Harrington*, 167 Wn.2d at 666-70.

In *Harrington*, the police contact only matured into a seizure because a second officer responded to the scene, and the primary officer (1) repeatedly ordered the defendant to keep his hands visible, and (2) conducted a safety frisk. Here, no such progressive intrusion exists. 167 Wn.2d at 666-70. The officers contacted the defendant without activating their emergency lights. RP (6/3/2010) at 59. The officers simply told the defendant that she could not remain behind a business after hours. RP (6/3/2010) at 74, 90. The officers did not block her egress, nor did they demand that she terminate her phone call. RP (6/3/2010) at 14, 24, 51-52, 60, 74-75. When the defendant expressed her displeasure with the second contact, the officers responded appropriately and explained she could file a complaint. RP (6/3/2010) at 64, 90. Finally, the defendant was free to leave. RP (6/3/2010) at 14, 24, 51-52, 60, 74-75.

Again, applying an objective standard, a reasonable person would not conclude the officers restricted Young's freedom of movement.

Because Young was always free to leave and terminate her contact with law enforcement at both the Safeway and behind the closed laundry mat, the pre-arrest encounters between the defendant and the police were consensual and do not constitute a seizure. This Court should affirm.

B. THE SEARCH OF THE DEFENDANT'S PURSE WAS  
LAWFUL.

Ms. Young argues that the search of her purse incident to her arrest was unlawful. *See* Brief of Appellant at 15-16. In support of her argument, she relies on *State v. Buelna Valdez*. *See* Brief of Appellant at 15-16. However, *Buelna Valdez* does not control because it only pertains to a search of an individual's private vehicle. Because the present search did not involve a vehicle, but rather the defendant's person and the items under her physical control at the time of arrest, the search was lawful.

A warrantless search is presumed unreasonable except in a few established and well-delineated exceptions. *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992) (citing *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)). A search incident to arrest is an exception to the warrant requirement. *Smith*, 119 Wn.2d at 678 (citing *U.S. v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)); *State v. Johnson*, 155 Wn. App. 270, 282, 229 P.3d 824 (2010). Such a search may include those items that are immediately associated

with the person. *Smith*, 119 Wn.2d at 677-78; *Johnson*, 155 Wn. App. at 282.

A search incident to arrest is valid under the Fourth Amendment (1) if the object searched was within the arrestee's control when he or she was arrested, and (2) if the events occurring after the arrest, but before the search, did not render the search unreasonable. *Smith*, 119 Wn.2d at 681-82; *Johnson*, 155 Wn. App. at 282.

The first question is whether the purse was within Young's control when Officer Larsen arrested her. "An arrestee does not have to be in actual physical possession of an object for that object to be within his control for search incident to arrest purposes." *Smith*, 119 Wn.2d at 681. Rather an object is "within the control of an arrestee as long as the object was within the arrestee's reach immediately prior to, or at the moment of, the arrest." *Id.*

Here, Young exited the restroom with her purse. RP (6/3/2010) at 39, 41-42, 58, 78. Officers Larsen and Wright immediately placed her under arrest. Thus, she was in actual physical possession of the purse. For search incident to arrest purposes this first prong is satisfied.

The second question is whether events occurring after the arrest, but before the search, made the search unreasonable. The fact that Young was handcuffed when the search occurred does not make the search

unreasonable. *See Smith*, 119 Wn.2d at 682. The focus of the present inquiry must place an emphasis on officer safety.

First, when the officers contacted Young outside the restroom, she resisted their efforts to place her under arrest. RP (6/3/2010) at 66-67. Officer Larsen immediately handcuffed the defendant. RP (6/3/2010) at 16-17, 65. This action was reasonable to ensure the officers safety. *Smith*, 119 Wn.2d at 682.

Second, the officers promptly escorted Young out of the tavern to ensure they had control over the scene. RP (6/3/2010) at 39-40. Any brief delay that resulted between the arrest and subsequent search – approximately a minute – was reasonable under the circumstances. RP (6/3/2010) at 16. *See also Smith* 119 Wn.2d at 683-84 (allowing 17 minutes between arrest and search).

Finally, the police cannot be expected to transport a purse/bag with contents unknown to the officers. Such a requirement would impose a grave risk to officer safety (e.g. transporting a bag with sharps that could stick the officer and transfer a contagious disease). Here, the officers were aware the defendant had an outstanding drug warrant. RP (6/3/2010) at 14. Larsen testified he was concerned Young might have been under the influence of drugs at the time of her arrest. RP (6/3/2010) at 89. He also explained that he was not able to abandon Young's purse at the tavern or

outside in the parking lot. RP (6/3/2010) at 39-40, 42. Young told the officers that her belongings contained needles. RP (6/3/2010) at 17, 81. The surrounding circumstances demonstrate that the resulting search was reasonable. *See Smith*, 119 Wn.2d at 681-84 (search of defendant's fanny pack that fell from the defendant at time of arrest was reasonable); *Johnson*, 155 Wn. App. at 282 (trial court did not err when it denied a motion to suppress methamphetamine discovered in the defendant's purse that was under her control at time of arrest). This Court should affirm.

*State v. Buelna Valdez* does not control because it pertains only to warrantless searches of a vehicle incident to a defendant's arrest. *See Johnson*, 155 Wn. App. at 281 (holding *Arizona v. Gant* and its progeny only apply to warrantless searches of vehicles incident to arrest). When a defendant is restrained and safely secured inside a patrol vehicle, there is little risk that he/she can access the vehicle to obtain a weapon or destroy/conceal evidence. However, the risk posed to officer safety is not alleviated when a police officer must transport an arrestee's personal property with contents unknown to the officer. The resulting search was reasonable to ensure the officers. This Court should follow the precedent outlined in *Smith* and *Johnson*.

Furthermore, a warrant is generally necessary when the officers conduct a search with the expectation to discover evidence of guilt. The

search in the present case was not performed in order to obtain evidence, but to protect the officers' safety. This Court should hold that the search was reasonable and lawful. This Court should affirm the conviction for possession of a controlled substance.

C. THE DEFENDANT RECEIVED DUE PROCESS THROUGHOUT THE SENTENCING PROCEEDING.

For the first time on appeal, Ms. Young claims the State failed to establish her prior criminal history and offender score. *See* Brief of Appellant at 16-18. According to Young, this violated her right to due process. Additionally, Young argues certain 2008 amendments to the Sentencing Reform Act (SRA), which address the prima facie evidence requirement to prove the existence and validity of a defendant's prior criminal history, are unconstitutional. *See* Brief of Appellant at 16-18. These arguments are without merit.

A criminal defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). This court reviews a trial court's calculation of an offender score de novo. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004), *remanded*, 154 Wn.2d 1031, 119 P.3d 852 (2005).

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(1) The State satisfied its burden at sentencing.

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). “A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500(1). The failure to object to the criminal history summarized by the State constitutes an acknowledgment. RCW 9.94A.530(2). In the absence of an objection the State’s prima facie evidence is sufficient.

In this case, the State made a plea offer to Ms. Young. CP Supp. This offer, which was filed with the court, outlined the criminal history and offender score that supported the sentencing recommendation. CP Supp. Despite the fact that Young refused the offer, the State recommended the same sentence and referred the Court to its previously filed offer. RP (7/21/2010) at 8, 10; RP (8/11/2010) at 3-4; CP Supp. The defense agreed the recommendation was appropriate and never contested the State’s calculation of the offender score. RP (8/11/2010) at 4-5. The trial court noted the defendant’s criminal history as summarized by the State in the plea offer. RP (8/11/2010) at 5. This Court should find that the State’s summary, and the fact that the defendant agreed with the

sentencing recommendation, is sufficient to establish that Young had an offender score of three. There is no due process violation.

(2) The 2008 Amendments to the Sentencing Reform Act (SRA) are constitutional.

Ms. Young argues the 2008 amendments to the SRA, which allow the State to provide prima facie evidence of a defendant's criminal history by a providing a summary that is not objected to by the defense, violates her Fifth and Fourteenth Amendment rights to due process and the privilege against self incrimination. This argument fails.

A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007) (quoting *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005) *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). This Court reviews de novo challenges to the constitutionality of legislation. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 389, 143 P.3d 776 (2006). An analysis of this issue must begin with the premise that “ ‘it is the function of the legislature, not of the judiciary to alter the sentencing process.’ ” *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (quoting *State v. Monday*, 85 Wn.2d 906, 540 P.2d 416 (1975) (rejecting challenges to

the SRA violate the separation of powers doctrine, due process clause, and the privilege against self-incrimination)).

A defendant cannot argue the constitutionality of a statute unless he/she has been adversely affected by the provisions he/she claims are unconstitutional. *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). A litigant does not have standing to challenge a statute on constitutional grounds unless that litigant has suffered actual damage or injury under the statute. *Kandorianian by Peach v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992).

First, Young cannot show that she has been adversely affected or suffered actual damage or injury at sentencing based on the 2008 amendments. She does not dispute that she committed the summarized offenses, nor that her attorney agreed that the State's sentencing recommendation, based upon an offender score of three, was appropriate. This Court should reject the defendant's argument.

Second, the Washington legislature amended the SRA "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. In order to accomplish this important objective, the legislature amended RCW 9.94A.500(1) to read:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.

Laws of 2008, ch. 231, § 2. The legislature also amended RCW 9.94A.530(2):

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports *and not objecting to criminal history presented at the time of sentencing.*

Laws of 2008, ch. 231, § 4 (new language emphasized).

The amendments do not shift the burden of proving a criminal history to the defendant. In *State v. Ammons*, 105 Wn.2d 175, 184, 713 P.2d 719, 718 P.2d 796 (1986), the Supreme Court considered whether former RCW 9.94A.370 (1984), *recodified as* RCW 9.94A.530, which allowed the trial court to use information contained in the presentence report that the defendant did not object to when determining the sentence, violated a defendant's privilege against self-incrimination. There, the high court held:

[Former] RCW 9.94A.370 does not compel a defendant to provide any information. The Defendant has the right to know of and object to adverse facts in the presentence

reports. If he contests any facts, an evidentiary hearing must be held before they are used.

*Ammons*, 105 Wn.2d at 185, 718 P.2d 796. Similarly, Young has the right to know of, and object to, adverse facts in the criminal history summary, and “[w]here the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2).

A defendant’s right to due process is violated when he/she is sentenced based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record. *See Ford*, 137 Wn.2d at 481. However, a criminal history summary from the prosecuting authority constitutes prima facie evidence of Young’s prior convictions. *See RCW 9.94A.500(1)*. By amending the SRA so a prosecutor’s criminal history summary may constitute prima facie evidence, the legislature has signified that a criminal history summary is not a bare assertion lacking a minimum indicia of reliability. The 2008 amendments to the SRA do not violate the defendant’s due process rights.

Finally, the 2008 amendments do not violate Young’s privilege against self-incrimination. The “[u]se of information regarding a defendant’s conduct, including statements about crimes already punished, does not violate the Fifth Amendment. ... Statements about past offenses

already punished cannot incriminate [the defendant] as to those offenses, nor increase his punishment for those offenses.” *State v. Strauss*, 93 Wn. App. 691, 700, 969 P.2d 529 (1999). The 2008 amendments do not require Young to produce evidence that would incriminate herself or subject her to additional penalties. They only ask Young to object to the State’s summary or accept the compilation and resulting calculation.

Here, the trial court sentenced the defendant in compliance with the SRA. The State’s summary of Young’s criminal history, which was provided to the defense and the court in its plea offer, was prima facie evidence of the defendant’s prior convictions and established that she had an offender score of three. RCW 9.94A.500(1). Young acknowledged the summary was correct when she agreed that the State’s recommended sentence, which was based in part on an offender score of three, was appropriate. RCW 9.94A.530(2). This Court should reject Young’s argument that the 2008 amendments are unconstitutional.

(3) If there was an error, the appropriate remedy is to allow the State to prove the criminal history upon remand.

Ms. Young argues that the appropriate remedy is to remand with instructions to the trial court to impose a sentence consistent with an offender score of zero (0). *See* Brief of appellant at 18. Assuming, without conceding, that the State failed to adequately establish Young’s criminal

history, the appropriate remedy is to remand for a new sentencing hearing and afford the State an opportunity to introduce the requisite documentation to establish an offender score of three.

When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the prior convictions, then the prosecution is held to the record as it existed at the sentencing hearing. *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009). However, where there is no objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence upon re-sentencing. *Id.*

In this case, there was no specific objection to the State's calculation regarding Young's offender score. In fact the parties agreed upon the recommended sentence that was based upon an offender score of three. The sentencing court never had an opportunity to resolve any alleged dispute. Thus, if there was an error, this Court should remand with a full opportunity for the State to prove Young's criminal histories at resentencing.

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**IV. CONCLUSION:**

Based upon the arguments above, the State respectfully requests that this Court affirm Ms. Young's conviction for possession of methamphetamine and the resulting sentence.

DATED this April 29, 2011.

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