

ORIGINAL

No. 83797-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON WILSON,

Petitioner.

BY RONALD R. CARPENTER
CLEM

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 MAY 14 PM 3:46

SUPPLEMENTAL BRIEF OF PETITIONER

VANESSA M. LEE
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

 1. THE PLAIN LANGUAGE OF THE SENTENCING REFORM ACT REQUIRES THAT A PRIOR MISDEMEANOR CONVICTION BE TREATED AS A MISDEMEANOR..... 4

 a. Having found the prior conviction was a misdemeanor, the Court of Appeals erred in refusing to reverse the sentence 4

 b. RCW 9.94A.525 TA \s ".525" does not permit a court to reclassify a misdemeanor as a felony for purposes of calculating the offender score 5

 2. A SENTENCE BASED ON A MISCALCULATED OFFENDER SCORE LACKS STATUTORY AUTHORITY AND MUST BE REVERSED 8

 a. Inclusion of a misdemeanor in an offender score is a fundamental defect in the resulting sentence..... 8

i. Inclusion of the misdemeanor in the offender score is legal error..... 8

ii. Legal error cannot be waived..... 11

 b. Principles of collateral estoppel and res judicata prohibited the court from converting a prior misdemeanor into a felony . 13

 c. The prior misdemeanor conviction is valid 16

 d. Mr. Wilson is entitled to relief from the unlawful sentence. 17

D. CONCLUSION..... 18

TABLE OF AUTHORITIES

Washington Supreme Court

<u>Dept. of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	6
<u>In re Pers. Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980)	17
<u>In re Pers. Restraint of Clark</u> , __ Wn.2d __, Supreme Ct. No. 81522-4 (April 8, 2010).....	16
<u>In re Pers. Restraint of Gardner</u> , 94 Wn.2d 504, 617 P.2d 1001 (1980)	12
<u>In re Pers. Restraint of Hinton</u> , 152 Wn.2d 853, 100 P.3d 801 (2004)	11
<u>In re Pers. Restraint of Johnson</u> , 131 Wn.2d 558, 933 P.2d 1019 (1997)	8
<u>In re Pers. Restraint of Moore</u> , 116 Wn.2d 30, 803 P.2d 300 (1991)	12
<u>In re Pers. Restraint of Thompson</u> , 141 Wn.2d 712, 10 P.3d 380 (2000)	12
<u>In re Pers. Restraint of West</u> , 154 Wn.2d 204, 110 P.3d 1122 (2005)	11
<u>McNutt v. Delmore</u> , 47 Wn.2d 563, 288 P.2d 848 (1955).....	18
<u>State v. Ammons</u> , 105 Wn.2d 175, 715 P.2d 719 (1986)	15, 17
<u>State v. Bryant</u> , 146 Wn.2d 90, 42 P.3d 1278 (2002).....	15
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003)	7
<u>State v. Dupard</u> , 93 Wn.2d 268, 609 P.2d 961 (1980)	14

<u>State v. Eilts</u> , 94 Wn.2d 489, 617 P.2d 993 (1980)	13
<u>State v. Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	8, 11
<u>State v. Hunsicker</u> , 129 Wn.2d 554, 919 P.2d 79 (1996)	12
<u>State v. Jones</u> , 110 Wn.2d 74, 750 P.2d 620 (1988).....	15, 17
<u>State v. Peele</u> , 75 Wn.2d 28, 448 P.2d 923 (1968)	14
<u>State v. Roberts</u> , 117 Wn.2d 576, 817 P.2d 855 (1991).....	7
<u>State v. Sampson</u> , 82 Wn.2d 663, 513 P.2d 60 (1973)	18

Washington Court of Appeals

<u>Burnham v. Dept. of Social and Health Services</u> , 115 Wn.App. 435, 63 P. 3d 816 (2003).....	6
<u>State v. Blakey</u> , 61 Wn.App. 595, 811 P.2d 965 (1991)	14, 15
<u>State v. Collins</u> , 144 Wn.App. 547, 182 P.3d 1016 (2008)	10
<u>State v. Sherwood</u> , 71 Wn.App. 481, 860 P.2d 407 (1993), <u>rev.</u> <u>denied</u> , 123 Wn.2d 1022, 875 P.2d 635 (1994)	14, 15, 16
<u>State v. Wilson</u> , 151 Wn.App. 1044, 2009 WL 2469270, 2 (2009) .3, 4, 5, 8	

Statutes and Rules

RCW 69.50.401.....	4, 6, 14, 17
RCW 69.50.407.....	4, 6, 14
RCW 9.94A.030	7
RCW 9.94A.525	1, 3, 4, 5, 7
RCW 9A.28.020	4, 6, 14, 17

A. INTRODUCTION.

The sentencing court erroneously counted Jason Wilson's prior misdemeanor conviction as a felony in his offender score. When Mr. Wilson brought the error to the court's attention, the court refused to correct it. The Court of Appeals acknowledged the prior conviction was a misdemeanor, but concluded the sentencing court had the authority to score it as a felony. The Court of Appeal's opinion is contrary to RCW 9.94A and violates principles of collateral estoppel.

B. ISSUES PRESENTED FOR REVIEW.

1. The sentencing court has no authority to impose a sentence based on a miscalculated offender score. Did the trial court exceed its authority in treating a prior misdemeanor as a felony in Mr. Wilson's offender score?

2. RCW 9.94A.525 provides the sentencing court shall "[s]core prior convictions for felony anticipatory offenses ... the same as if they were convictions for completed offenses." Does the plain language of this statute refer only to anticipatory offenses which are felonies, and therefore require that any prior anticipatory offense included in an offender score must be a felony?

3. Principles of collateral estoppel and res judicata prevent the re-litigation of matters already determined by formal judgment where the same parties and issues were involved. In 2005, Mr. Wilson entered into a plea bargain with the State, which resulted in the gross misdemeanor conviction at issue here. Years after that conviction was finalized, does the State's attempt to treat that misdemeanor as a felony violate the principles of collateral estoppel and res judicata?

C. STATEMENT OF THE CASE.

Jason Wilson pled guilty to two counts of identity theft in the second degree on November 16, 2007. CP 30-37, 38-42. The trial court found Mr. Wilson's criminal history consisted of seven felonies, including an attempted Violation of the Uniform Controlled Substances Act ("VUCSA") committed in March 2005 in King County. CP 39-40, 45. On December 10, 2007, Mr. Wilson was sentenced to 43 months (the high end of the standard range, with an offender score of eight). CP 46-53.

On January 23, 2008, Mr. Wilson's attorney on a separate matter in King County realized Mr. Wilson's 2005 attempted VUCSA conviction was actually convicted of a gross misdemeanor, not a felony. CP 58-69. Mr. Wilson moved to correct the error in

this case. CP 70-100. On March 17, 2008, the sentencing court ruled Mr. Wilson could withdraw his plea, but denied his motion for resentencing. 3/17/08RP 4-5; CP 55. Mr. Wilson did not withdraw his plea but appealed the ruling and sentence.

The Court of Appeals agreed the 2005 conviction was a gross misdemeanor, but did not find that the error rendered Mr. Wilson's offender score incorrect. State v. Wilson, 151 Wn.App. 1044, 2009 WL 2469270, at 2 (2009). However, the Court of Appeals reasoned that RCW 9.94A.525(4) required the sentencing court to score the gross misdemeanor VUCSA attempt as a felony. Id. at 2. The Court termed the misclassification a mere "clerical error" and refused to reverse the sentence. Id. at 3.

In its answer to Mr. Wilson's petition for review, the State conceded that the Court of Appeals misconstrued RCW 9.94A.525(4), but maintained the sentence should be affirmed because the error is factual rather than legal and Mr. Wilson waived the challenge to his offender score by his plea agreement. State's Answer to Petition for Review (hereafter "Answer") at 2-4.¹ This Court granted review.

¹ "In order that an anticipatory offense be included in the offender score it must be a felony." Answer at 4.

D. ARGUMENT.

1. THE PLAIN LANGUAGE OF THE SENTENCING REFORM ACT REQUIRES THAT A PRIOR MISDEMEANOR CONVICTION BE TREATED AS A MISDEMEANOR.

a. Having found the prior conviction was a misdemeanor, the Court of Appeals erred in failing to reverse the sentence. The Court of Appeals correctly recognized the 2005 attempted VUCSA was misclassified as a felony. Wilson, 2009 WL 2469270 at 2. The judgment and sentence for that offense shows that Mr. Wilson was charged, convicted, and sentenced under RCW 69.50.401(d) (classifying possession of methamphetamine as a class C felony) and RCW 9A.28.020 (d) (classifying attempt to commit a class C felony as a gross misdemeanor). CP 63-65.² The Court of Appeals agreed Mr. Wilson was actually convicted of a gross misdemeanor in 2005 and remanded for correction of the “clerical error” on the judgment of the current offense – but not for resentencing. Wilson, 2009 WL 2469270 at 2-3.

The Court of Appeals ruled that the misclassified prior conviction did not result in an incorrect offender score based only on its misinterpretation of RCW 9.94A.525(4) (requiring the court to

² Although this offense could have been charged under RCW 69.50.407 (classifying VUCSA attempt as a class C felony), the prosecutor legitimately charged Mr. Wilson under RCW 69.50.401(d) and 9A.28.020.

"[s]core prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses"). Wilson, 2009 WL 2469270 at 2. The State concedes this statute does not apply to Mr. Wilson's prior conviction for misdemeanor attempted VUCSA because "'felony' modifies the phrase 'anticipatory offenses' meaning anticipatory offenses that are felonies," and the Court of Appeals' interpretation of the statute would render the word "felony" unnecessary. Answer at 2-3.

This defect was far more serious than a mere "clerical error." The consequence of the misclassified conviction was an additional point in Mr. Wilson's offender score, resulting in an offender score of eight and increasing his standard range by [] months. CP 46-53. The Court of Appeals ruling is based on an erroneous interpretation of RCW 9.94A.525(4).

b. RCW 9.94A.525 does not permit a court to reclassify a misdemeanor as a felony for purposes of calculating the offender score. RCW 9.94A.525(4) provides that the sentencing court shall "[s]core prior convictions for felony anticipatory offenses ... the same as if they were convictions for completed offenses." The Court of Appeals interpreted this to

mean Mr. Wilson's prior misdemeanor conviction, as an attempt to commit a felony, should be scored as a felony.

As a general principle of statutory construction, words in a statute are given their plain and ordinary meaning unless a contrary intent is evidenced in the statute. Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The reviewing court applies accepted principles of grammar to determine the meaning of a statute. Burnham v. Dept. of Social and Health Services, 115 Wn.App. 435, 443, 63 P. 3d 816 (2003).

By its plain language, the statute addresses the sentencing consequences for "felony anticipatory offenses," not anticipatory offenses of felonies. Put another way, "felony" modifies "anticipatory offense," not the offense which is anticipated. In the instant case, a VUCSA attempt charged under RCW 69.50.407 could be a "felony anticipatory offense" because that section classifies the anticipatory offense as a class C felony. But as the State concedes, an attempt to commit VUCSA possession under RCW 69.50.401(d) and RCW 9A.28.020(d) is not a "felony anticipatory offense" – it is an offense which anticipates (or attempts) a felony, and is classified as a gross misdemeanor.

Answer at . RCW 9.94A.525(4) does not apply to a gross misdemeanor anticipatory offense.

The Sentencing Reform Act (SRA) authorizes courts to include misdemeanors in an offender score in very rare instances, but always explicitly. For example, if the current offense is felony driving while under the influence or a felony traffic offense, "serious traffic offenses," some of which are misdemeanors, "shall be included in the offender score." RCW 9.94A.525(2)(e), (11), RCW 9.94A.030(44). The Legislature has not directed that misdemeanors under 9.94A.28.020 be included in offender scores, and so such authority exists.

An unambiguous statute is applied by its plain terms, without further elaboration. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). RCW 9.94A.525 is not ambiguous, but susceptible to only one meaning: it refers to anticipatory offenses which are felonies. However, even if the statute is ambiguous, under the rule of lenity, it must be interpreted in the manner more favorable to the criminal defendant. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Therefore the statute must be read to treat the attempted VUCSA conviction as a gross misdemeanor, as it was imposed, and exclude it from the offender score.

2. A SENTENCE BASED ON A MISCALCULATED
OFFENDER SCORE LACKS STATUTORY
AUTHORITY AND MUST BE REVERSED.

a. Inclusion of a misdemeanor in an offender score is a fundamental defect in the resulting sentence. It is well-established that a sentence imposed without statutory authority cannot stand. State v. Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). A sentence based on a miscalculated offender score is “a fundamental defect that inherently results in a miscarriage of justice.” Id. at 869 (quoting In re Personal Restraint of Johnson, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997)).

i. Inclusion of the misdemeanor in the offender score is legal error. The Court of Appeals correctly noted a legal error would entitle Mr. Wilson to re-sentencing, but incorrectly found this was not legal error. Wilson, 2009 WL 2469270 at 3 n.3 (citing Goodwin, 146 Wn.2d 861). Goodwin is directly on point. There, as in this case, the guilty plea stated that the defendant agreed to the prosecutor’s statement of criminal history, but juvenile offenses were erroneously included in the offender score. Holding the defendant’s plea agreement did not waive his challenge to the “fundamentally defective” sentence, this Court clarified its prior holdings:

[W]e hold that in general a defendant cannot waive a challenge to a miscalculated offender score. There are limitations on this holding. While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

Id. at 874 (emphasis added). The Court held the erroneous inclusion of juvenile priors, was a “fundamental defect” resulting in “a complete miscarriage of justice.” Id. at 876. The error was legal and therefore not waived and reversal was required. Id.

Here, there is no factual dispute whatsoever. All agree that the 2005 conviction was imposed as a misdemeanor, not a felony. Wilson, 2009 WL 2469270 at 2; Answer at 2-4. There was no opportunity for judicial discretion; the legislature, not the courts, determines the classification of criminal offenses. Therefore, the defect can only be a legal error, and was not waived.

The State argues the error must be factual because the Judgment and Sentence for the current offense is facially valid in that “it would appear to any lawyer in the State to be correct, because Attempted Possession of a Controlled Substances is a felony in the State of Washington.” Answer at 5. This is incorrect. As discussed above, an attempted VUCSA may be a felony or it

may be a misdemeanor, and as the State has conceded, it was a misdemeanor in this case. The State's assumption is not warranted. The State continues, "[o]nly by introduction of facts pertaining to plea negotiation could an attorney conclude[] that this conviction was in fact a misdemeanor." Answer at 5. This is also incorrect. Mr. Wilson's challenge does not depend on facts pertaining to plea negotiation, but refers to the face of the 2005 Judgment and Sentence to establish that it was a misdemeanor – a fact which was possible when it was listed simply as an attempted VUCSA, without classification. This does not convert a legal error into a factual one.

The State has relied on one Court of Appeals case for this point, State v. Collins, 144 Wn.App. 547, 182 P.3d 1016 (2008). In Collins, the defendant pled guilty based on an offender score which included out-of-state convictions, and then at sentencing demanded that the State prove the comparability of those convictions. Comparability is necessarily a factual, as well as a legal question, and requires looking into the defendant's conduct in the foreign conviction. Id. at 554-55. Here, the facts of the 2005 offense are completely irrelevant. All that matters is whether it was a

misdemeanor, a purely legal question. Because it was, the sentencing court could not include it in the offender score.

In determining whether an error is factual or legal, the central question is not whether the prosecuting attorney or sentencing court made the error in good faith or reasonably relied on it, as the State seems to imply. The question is whether

the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

Goodwin, 146 Wn.2d 874. This defect involves the legal matter of crime classification, but no factual dispute and no trial court discretion. It is legal error.

ii. Legal error cannot be waived. This Court "has consistently rejected arguments that a defendant must be held to the consequences of a plea agreement to an excessive sentence." Goodwin, 146 Wn.2d at 870. See also In re Pers. Restraint of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005) ("the invited error doctrine does not apply where a sentence is outside the authority of the sentencing court"); In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004) ("an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law and thus cannot waive

such a challenge”); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) (“the actual sentence imposed pursuant to a plea bargain must be statutorily authorized”); State v. Hunsicker, 129 Wn.2d 554, 561, 919 P.2d 79 (1996) (“an agreement to restitution imposed in excess of statutory authority does not bind the defendant or constitute a waiver” to the unauthorized subject); In re Personal Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980) (“a plea bargaining agreement cannot exceed the statutory authority given to the courts”).

In Moore, the defendant pled guilty to two counts of first degree murder and stipulated to aggravating and mitigating circumstances as to one count, mistakenly believing the court would be required to sentence him to life without the possibility of parole, as it in fact did. In re Personal Restraint of Moore, 116 Wn.2d 30, 32, 803 P.2d 300 (1991). Moore did not appeal his conviction or sentence, but in a personal restraint petition argued the sentence lacked statutory authority. Id. This Court agreed, holding the maximum penalty for a guilty plea on first degree murder is life with the possibility of parole. Id. at 35. The State argued, as it does here, that Moore was bound by the plea bargain.

Id. at 38. This Court rejected that contention noting that did not “challenge[e] any of his factual stipulation... Rather, he challenges whether the actual sentence he received was statutorily authorized given those facts.” Id. The Court concluded he could not waive that challenge because

the actual sentence imposed pursuant to a plea bargain must be statutorily authorized; a defendant cannot agree to be punished more than the Legislature has allowed for. Since the sentence to which petitioner agreed and which he received exceeded the authority vested in the trial judge by the Legislature, we cannot allow it to stand.

Id. at 38-39 (citing State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980)).

The Sentencing Reform Act does not authorize the counting of gross misdemeanors in a defendant’s offender score. Therefore, the legal error in this case led to a sentence that was not authorized by the statute. Reversal is required.

c. Principles of collateral estoppel and res judicata prohibited the court from converting a prior misdemeanor into a felony. Collateral estoppel bars relitigation of a particular issue or determinate fact “to prevent relitigation of determined causes, curtail multiplicity of actions, prevent harassment in the courts,

inconvenience to the litigants and judicial economy.” State v. Dupard, 93 Wn.2d 268, 272, 609 P.2d 961 (1980).

In a case involving a nearly identical scenario, collateral estoppel principles precluded the State from raising the same arguments it raises here. State v. Sherwood, 71 Wn.App. 481, 860 P.2d 407 (1993), rev. denied, 123 Wn.2d 1022, 875 P.2d 635 (1994). There, the defendant’s offender score included two prior convictions for attempted possession of cocaine. Id. at 486. As here, both were charged as gross misdemeanors under RCW 69.50.401(d) and 9A.28.020(d), although they could have been charged as class C felonies under RCW 69.50.407. Id. at 486-87. Sherwood argued that as gross misdemeanors, these prior convictions could not be included in his offender score. Id.

The Court of Appeals agreed, holding:

We conclude that the State is not entitled to reopen the earlier judgments and sentences because they became final when they were not appealed... [T]he need for judicial finality is recognized by the principles of res judicata and collateral estoppel subject, however, to certain exceptions which do not apply here. Res judicata and collateral estoppel apply in criminal cases and bar relitigation of issues actually determined by a former verdict and judgment.

Id. (citing State v. Blakey, 61 Wn.App. 595, 811 P.2d 965 (1991); State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968)).

As in the instant case, Sherwood's prior convictions were prosecuted in different counties from the current offense. The Court found that because the prosecutor in each county represented the same State, collateral estoppel applied. Sherwood, 71 Wn.App. at 488. This Court has since affirmed this principle in clear terms, holding, "the prosecuting authorities of sister counties within the same sovereign are in privity for collateral estoppel purposes." State v. Bryant, 146 Wn.2d 90, 99, 42 P.3d 1278 (2002). Therefore, "consistent with prior opinions barring the defendant from reopening prior convictions for reclassification under the SRA," the Court in Sherwood vacated the sentences and remanded for resentencing. 71 Wn.App. at 488-89 (citing State v. Jones, 110 Wn.2d 74, 77-79, 750 P.2d 620 (1988); State v. Ammons, 105 Wn.2d 175, 187-89, 713 P.2d 719, 718 P.2d 796 (1986); Blakey, 61 Wn.App. at 599).

Here, as in Sherwood, the attempted VUCSA is not subject to appellate review. The judgment and sentence clearly states Mr. Wilson was charged with and convicted of a gross misdemeanor, requiring the conclusion that he and the State entered into that plea with the understanding that he was pleading to a gross misdemeanor. CP 63. That conviction is final and cannot now be

reviewed or changed. Converting a finalized gross misdemeanor conviction into a felony for purposes of offender score calculation amounts to relitigation of a previously determined issue, which is clearly prohibited by collateral estoppel and res judicata principles. Id. at 488.

d. The prior misdemeanor conviction is valid.

Although the State now concedes the 2005 conviction is a gross misdemeanor, it has previously argued the 2005 matter should have been charged and convicted as a felony under RCW 69.50, and therefore was properly counted as a felony. First, this is incorrect because the practice of charging attempted VUCSA under the general attempt statute is valid and has already been upheld. See, e.g. Sherwood, supra.

Secondly, the judgment and sentence for the 2005 conviction is valid on its face; the State cannot challenge it now. A judgment and sentence is facially valid unless, "without further elaboration, [it] evidences error." In re Personal Restraint of Clark, ___ Wn.2d ___, Supreme Ct. No. 81522-4, Slip op. at 5 (April 8, 2010). Mr. Wilson does not allege that his rights were violated by the 2005 conviction. On its face, the judgment and sentence is consistent and correct; the heading indicates a non-felony

conviction, which comports with the filing statutes, RCW 69.50.401(d) and 9A.08.020(d). CP 63.

In the alternative, if the 2005 conviction is facially invalid, it should not have been considered by the sentencing court at all. This Court has repeatedly held a “sentencing judge may not include in criminal history a prior conviction ‘which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face.’” Jones, 110 Wn.2d at 77 (quoting Ammons, 105 Wn.2d at 187).

In short, the State cannot have it both ways. Either the 2005 conviction is valid as a misdemeanor (and should not have been treated as a felony), or else it is invalid (and should not have been included in the offender score). There is no mechanism or rule of law by which the State can retroactively convert a misdemeanor into a felony.

e. Mr. Wilson is entitled to relief from the unlawful sentence. “When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence when the error is discovered.” In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (emphasis in original, quoting McNutt v. Delmore, 47 Wn.2d

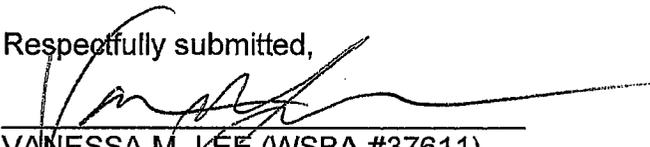
563, 565, 288 P.2d 848 (1955), overruled in part by State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973)). The error having been discovered, the only proper remedy is resentencing with a corrected offender score of seven.

D. CONCLUSION

For the foregoing reasons, Mr. Wilson respectfully requests this Court vacate and remand his sentence.

DATED this 14th day of May, 2010.

Respectfully submitted,



VANESSA M. LEE (WSBA #37611)
Washington Appellate Project
Attorneys for Appellant