

66918-4

66918-4

NO. 66918-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALLAN PARMELEE,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT PARMELEE'S EIGHT FEDERAL CONVICTIONS FOR ALIEN SMUGGLING OCCURRED ON DIFFERENT DATES AND WERE THEREFORE NOT THE SAME CRIMINAL CONDUCT	7
2. EVEN IF THIS COURT DETERMINES THAT THE STATE DID NOT SUFFICIENTLY PROVE THE EIGHT FEDERAL CONVICTIONS TO BE SEPARATE CRIMINAL CONDUCT, THE STATE IS NOT LIMITED TO THE EXISTING RECORD ON REMAND	13
a. The 2008 Amendments To RCW 9.94A.525 And RCW 9.94A.530 Are Procedural In Nature And Do Not Violate RCW 9.94A.345	13
b. The Legislature Intended The Amendments To Apply To All Resentencing Hearings Regardless Of The Date Of The Offense	17
3. THE COURT PROPERLY DETERMINED THAT PARMELEE'S TWO DECEPTIVE PRACTICES CONVICTIONS WERE COMPARABLE TO A WASHINGTON FELONY	19

4.	THE COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE BASED ON PARMELEE'S MULTIPLE CURRENT OFFENSES AND HIGH OFFENDER SCORE.....	25
a.	No Constitutional Violation Occurred When The Sentencing Court Found Facts Necessary To Support Parmelee's Consecutive Standard Range Sentences	27
b.	History Of The Relevant Aggravating Factors	29
c.	The Sentencing Court Did Not Exceed Its Authority By Imposing Parmelee's Exceptional Consecutive Sentences	32
i.	The sentencing court properly relied on an aggravating factor that existed at the time of Parmelee's offenses.....	32
ii.	Even if the court could not rely on the multiple offense policy/clearly too lenient statutory factor, the sentence was proper because the free crimes aggravator as currently codified in RCW 9.94A.535(2)(c) existed at the time of Parmelee's crimes.....	35
iii.	Because the free crimes aggravator as currently codified in RCW 9.94A.535(2)(c) existed at the time of Parmelee's crimes, there is no ex post facto violation	37
D.	<u>CONCLUSION</u>	40

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Apprendi v. New Jersey, 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 27

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2351, 159 L. Ed. 2d 403 (2004) 2, 3, 5, 7, 26,
27, 29, 30, 31, 33, 36, 38

Landgraf v. USI Film Prods., 511 U.S. 244,
114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) 38

Miller v. Florida, 482 U.S. 423,
107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) 37, 38

Oregon v. Ice, 555 U.S. 160,
129 S. Ct. 711, 172 L. Ed. 2d 517 (2009) 28

Shepard v. United States, 544 U.S. 13,
125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) 21

United States v. Parmelee, 42 F.3d 387
(7th Cir. 1994) 9, 10, 11

Washington v. Recuenco, 548 U.S. 212,
126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) 30

Washington State:

In re Estate of Burns, 131 Wn.2d 104,
928 P.2d 1094 (1997) 18

In re Pers. Restraint of Lavery, 154 Wn.2d 249,
111 P.3d 837 (2005) 20, 21

In re Pers. Restraint of Powell, 117 Wn.2d 175,
814 P.2d 635 (1991) 37

<u>State v. Alvarado</u> , 164 Wn.2d 556, 192 P.3d 345 (2008).....	31, 36
<u>State v. Anderson</u> , 92 Wn. App. 54, 960 P.2d 975 (1998).....	9, 10
<u>State v. Armstrong</u> , 106 Wn.2d 547, 723 P.2d 1111 (1989).....	29
<u>State v. Beals</u> , 100 Wn. App. 189, 97 P.2d 941 (2000).....	20
<u>State v. Belgarde</u> , 119 Wn.2d 711, 837 P.2d 599 (1992).....	17
<u>State v. Bergstrom</u> , 162 Wn.2d 87, 169 P.3d 816 (2007).....	9
<u>State v. Calhoun</u> , 163 Wn. App. 153, 257 P.3d 693 (2011).....	15, 16
<u>State v. Elliott</u> , 114 Wn.2d 6, 785 P.2d 440, <u>cert. denied</u> , 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990).....	9
<u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987).....	30
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	12, 20, 22
<u>State v. Hodgson</u> , 108 Wn.2d 662, 740 P.2d 848 (1987).....	15, 32
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	30, 31
<u>State v. Hylton</u> , 154 Wn. App. 954, 226 P.3d 246, <u>review denied</u> , 169 Wn.2d 1025 (2010).....	38

<u>State v. Lessley</u> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	8
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	20
<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	31, 36, 38, 39
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	15, 17, 32, 33, 34, 37, 38
<u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	8
<u>State v. Releford</u> , 148 Wn. App. 478, 200 P.3d 729, <u>review denied</u> , 166 Wn.2d 1028 (2009).....	21, 23
<u>State v. Schmidt</u> , 100 Wn. App. 297, 996 P.2d 1119 (2000).....	37
<u>State v. Smith</u> , 123 Wn.2d 51, 864 P.2d 1371 (1993).....	30, 31, 39
<u>State v. Stephens</u> , 116 Wn.2d 238, 803 P.2d 319 (1991).....	30, 31, 39
<u>State v. Stewart</u> , 72 Wn. App. 885, 866 P.2d 677 (1994), <u>affirmed</u> , 125 Wn.2d 893 (1995).....	32
<u>State v. Stockmyer</u> , 136 Wn. App. 212, 148 P.3d 1077 (2006).....	9
<u>State v. Thomas</u> , 135 Wn. App. 474, 144 P.3d 1178 (2006), <u>review denied</u> , 161 Wn.2d 1009 (2007).....	21
<u>State v. Vance</u> , 168 Wn.2d 754, 230 P.3d 1055 (2010).....	28, 30

<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	8
---	---

<u>Swak v. Dep't of Labor & Industries</u> , 40 Wn.2d 51, 240 P.2d 560 (1952).....	12
---	----

Other Jurisdictions:

<u>People v. Feldman</u> , 409 Ill. App.3d 1124, 948 N.E.2d 1094 (Ill. Ct. App. 2011).....	23
---	----

<u>People v. Henderson</u> , 95 Ill. App.3d 291, 419 N.E.2d 1262 (Ill. Ct. App. 1981).....	23
---	----

Constitutional Provisions

Federal:

U.S. Const. amend. VI	26, 28, 30
-----------------------------	------------

Washington State:

Const. art. I, § 23.....	37
--------------------------	----

Statutes

Washington State:

Former RCW 9.94A.360.....	8, 16
---------------------------	-------

Former RCW 9.94A.390.....	29
---------------------------	----

Former RCW 9.94A.400.....	8, 27, 28
---------------------------	-----------

Former RCW 9.94A.525.....	8, 16
---------------------------	-------

Former RCW 9.94A.530.....	16
---------------------------	----

Former RCW 9.94A.535.....	29
Former RCW 9A.56.060.....	22
Laws of 1982, ch. 138 § 1	22
Laws of 1996, ch. 199 § 3	8
Laws of 1996, ch. 248 § 1	16
Laws of 1997, ch. 338 § 5	8
Laws of 1997, ch. 52 § 4	29
Laws of 2000, ch. 28 § 12	16
Laws of 2000, ch. 28 § 14	8
Laws of 2001, 2nd sp.s. ch. 12 § 314.....	29
Laws of 2001, ch. 264 § 5	8
Laws of 2005, ch. 68	31
Laws of 2005, ch. 68 § 1	34
Laws of 2007, ch. 205 § 1	34
Laws of 2008, ch. 231 § 1	14
Laws of 2008, ch. 231 § 2-4.....	13
Laws of 2008, ch. 231 § 3	14
Laws of 2008, ch. 231 § 4	15
Laws of 2008, ch. 231 § 5	17, 18
RCW 10.01.040.....	32
RCW 9.94A	33
RCW 9.94A.345	13, 15, 17, 32, 33

RCW 9.94A.400	29
RCW 9.94A.525	5, 13, 14, 18, 19, 31
RCW 9.94A.530	13, 14, 18, 19
RCW 9.94A.535	30, 31, 32, 35, 36, 37, 38, 39, 40
RCW 9.94A.537	14
RCW 9A.56.060	21

Other Jurisdictions:

Former IL Ann. St. 38 § 17-1	22, 23, 24, 25
P.A. 84-897, §1	22

A. ISSUES PRESENTED

1. Did the sentencing court correctly calculate Parmelee's offender score as 13, when it found that his eight federal convictions for alien smuggling were not the same criminal conduct, and that his two Illinois deceptive practices convictions were comparable to a felony in Washington?

2. Did the sentencing court have authority to impose exceptional consecutive sentences based on the statutory aggravating factor of "multiple offense policy/clearly too lenient" that existed at the time of Parmelee's offenses?

3. Did the sentencing court have authority to impose exceptional consecutive sentences based on "free-crimes?"

B. STATEMENT OF THE CASE

On April 5, 2004, Parmelee was convicted by a jury of two counts of arson in the first degree. CP 35, 548. The two counts were premised on Parmelee's firebombing of two different victims' vehicles, occurring over four years apart. CP 11-12, 13-15. At sentencing on June 3, 2004, the State argued that Parmelee's offender score was 13. CP 558-59. Parmelee disagreed, and argued that his 17 federal convictions constituted the same criminal

conduct and should be scored as a single count. CP 736-37. The court found Parmelee's offender score was 13, and imposed an exceptional sentence of 288 months on each count, to run concurrently.¹ CP 36, 38.

The court based Parmelee's exceptional sentence on multiple aggravating factors, including that the crimes represented a high degree of planning and sophistication, that they reflected "utter disrespect" for the legal system and impacted the community at large, that they were part of a pattern of intimidation and harassment, and that the operation of the multiple offense policy would result in a sentence that was too lenient. CP 41. The court was clear that it would impose the same sentence based on any one of the factors standing alone. Id.

Three weeks after Parmelee was sentenced, the United States Supreme Court decided Blakely v. Washington,² which resulted in changes to Washington's exceptional sentencing scheme. As a result of Blakely, in August 2004, the sentencing court entered a "clarification of grounds" for Parmelee's exceptional sentence, striking three of the four aggravating factors it found to

¹ Parmelee's standard range for each count was 108 to 144 months. CP 36.

² 542 U.S. 296, 124 S. Ct. 2351, 159 L. Ed. 2d 403 (2004).

warrant the sentence above the standard range. CP 606. The court retained its finding relating to criminal history, i.e., "The operation of the multiple offense policy would result in a too lenient sentence." Id.

Although Parmelee filed both a notice of appeal and a personal restraint petition, he abandoned the appeal when he did not pay the required filing fee, and later moved to voluntarily withdraw his personal restraint petition. CP 46, 199-205. In 2008, Parmelee filed an untimely personal restraint petition in the Washington Supreme Court, arguing, among other things, that his exceptional sentence was improper in light of Blakely. CP 656. The State conceded that Parmelee needed to be resentenced for the Blakely error. CP 662. The Court granted the petition "only on the exceptional sentence issue." CP 636.

Parmelee's resentencing was March 30, 2011. CP 548-57. The State asked the Court to impose exceptional *consecutive* standard range sentences, rather than exceptional *concurrent* sentences. CP 641. The State based its request upon the defendant's criminal history, arguing that "a concurrent sentence within the presumptive standard range is too lenient," and that in the absence of a consecutive sentence, one of the first degree

arson convictions would be a "free crime." Id. The prosecutor argued:

To do anything other than to run them consecutively would fly in the face of the purposes of the multiple offense policy, particularly in this case where Mr. Parmelee would receive not only a free crime, but a free violent crime, which is certainly not contemplated by the legislative passing of this standard sentencing range.

RP 25-26.³

As it had originally, the State contended that Parmelee's offender score was 13. CP 637-38; RP 24. The prosecutor argued that the issue of Parmelee's offender score was not before the court, as the case had been remanded on the exceptional sentence issue only. CP 647; RP 24. The trial court asked questions regarding Parmelee's criminal history and heard argument from the parties. RP 27-34. The State argued that Parmelee's 17 federal convictions were based on eight distinct smuggling trips, and thus should be scored as eight points. CP 638; RP 32-33. Parmelee disagreed, and argued that his 17 federal convictions were the same criminal conduct, and should only count as one point. CP 425. He further argued that his two Illinois convictions for deceptive

³ Respondent adopts Parmelee's designation of the verbatim report of proceedings.

practices were not comparable to a felony in Washington. Id. Finally, Parmelee argued that his felony stalking conviction (for which he had previously been found guilty by a jury, but was also pending re-sentencing due to Blakely error) should not count toward his offender score.⁴ Id.

The court found Parmelee's offender score was 13. CP 549; RP 34. The court further determined that given Parmelee's high offender score, consecutive sentences were appropriate; otherwise Parmelee would receive a "free crime." RP 35, 43; CP 555. However, the court imposed 130 months on each count, instead of the State's requested 144 months. CP 551; RP 43. The sentencing court entered findings of fact which stated:

1. The defendant's offender score is conservatively scored at 13,
2. Running the defendant's sentences concurrently on the separate arson offenses would result in the defendant receiving a "free crime" - a violent crime of arson.

CP 555. The court's "Conclusions of Law" read, "The operation of the multiple offence [sic] policy would be clearly too lenient without

⁴ Parmelee was mistaken. See RCW 9.94A.525(1) ("A prior conviction is a conviction which exists before the date of sentencing for the offense which the offender score is being computed.").

imposition of consecutive sentences in this matter." Id. Parmelee appealed. CP 547.

C. ARGUMENT

Parmelee challenges his offender score, arguing that the State failed to prove that his eight federal alien smuggling convictions were separate criminal conduct, and failed to prove the comparability of his two Illinois deceptive practices convictions. According to Parmelee, his offender score was at most a three or a five. Brf. of Appellant at 40.

Parmelee's arguments should be rejected. The State provided the sentencing court with sufficient basis for it to conclude by a preponderance of the evidence that Parmelee's eight federal alien smuggling convictions occurred on different dates, and were therefore not the same criminal conduct. Additionally, the record before the court adequately showed Parmelee's deceptive practices convictions to be comparable to the Washington felony of unlawful issuance of checks or drafts.

Parmelee also claims that the sentencing court lacked authority to base his exceptional sentence on the "multiple offense policy/clearly too lenient" aggravating factor that existed at the time

of his crimes.⁵ He further argues that the sentencing court is precluded from relying on the "free crimes" aggravating factor that was codified post-Blakely, because its application to his offense would violate the prohibition against *ex post facto* legislation.

In essence, he argues that an exceptional sentence based on "free crimes" is prohibited for all offenses occurring prior to the "Blakely-fix" legislation, but which are sentenced or re-sentenced after the "Blakely-fix" legislation. His argument should be rejected as contrary to the law and contrary to clear legislative intent.

1. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT PARMELEE'S EIGHT FEDERAL CONVICTIONS FOR ALIEN SMUGGLING OCCURRED ON DIFFERENT DATES AND WERE THEREFORE NOT THE SAME CRIMINAL CONDUCT.

When determining Parmelee's offender score, the sentencing court scored his eight federal convictions for alien smuggling as separate criminal conduct. The court did not abuse its discretion because sufficient evidence was presented at the sentencing hearing that the offenses occurred on separate dates.

⁵ Although Parmelee addresses the exceptional sentence issue first, the State has discussed the arguments in the reverse order; the court's basis for the exceptional sentence was an offender score in excess of nine.

Although Parmelee's arsons were committed on February 14, 1998, and March 31, 2002,⁶ the analysis regarding "same criminal conduct" has not changed. Offenses that are considered the same criminal conduct are scored as one offense. Former RCW 9.94A.360(5)(a)(i)⁷ and Former RCW 9.94A.525(5)(a)(i).⁸ "Same criminal conduct" refers to two or more crimes requiring the same criminal intent, committed at the same time and place, and involving the same victim. Former RCW 9.94A.400(1)(a)⁹; State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The definition of "same criminal conduct" is to be construed narrowly so that most crimes are not considered the same criminal conduct. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). If any one of the three elements is missing, the offenses are not the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

In the absence of a misapplication of the law, the sentencing court's decision of whether prior offenses involve the same criminal conduct is entitled to deference and will not be reversed unless

⁶ CP 548.

⁷ Laws of 1997, ch. 338 § 5 (eff. July 1, 1997).

⁸ Laws of 2001, ch. 264 § 5 (eff. July 1, 2001).

⁹ Laws of 1996, ch. 199 § 3 (eff. June 6, 1996); Laws of 2000, ch. 28 § 14 (eff. July 1, 2001).

there was a clear abuse of discretion. State v. Stockmyer, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006) (citing State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990)); State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998).

When a defendant disputes that prior convictions should be counted separately, the State must prove by a preponderance of the evidence that the convictions are not the same criminal conduct. State v. Bergstrom, 162 Wn.2d 87, 93, 96-97, 169 P.3d 816 (2007). If a defendant disputes material facts relating to criminal history, the court must either not consider the facts or hold an evidentiary hearing. Id. at 97.

Here, Parmelee objected to scoring his federal convictions as more than one point. CP 427-29. In response, the sentencing court held an evidentiary hearing. It allowed both parties to submit briefing. CP 425-30, 637-39. It reviewed documentary evidence, including the federal judgment itself, and United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994), the Seventh Circuit's published decision relating to the conviction at issue. CP 637-39, 721-26; RP 32-34. Finally, the court heard argument from the parties at the sentencing hearing. RP 27-34. Although Parmelee

claims that the court failed to hold an evidentiary hearing to resolve the question of same criminal conduct, he provides no authority that something additional was required.

The State met its burden of proving that the eight counts of alien smuggling were not the same criminal conduct, and the court did not abuse its discretion. Abuse of discretion is the appropriate standard when the record is sufficient to support a finding either way as to the three elements that constitute "same criminal conduct." Anderson, 92 Wn. App. at 62. Here, in order to meet its burden, the State only needed to show by a preponderance of the evidence that any one of three elements (same intent, same time and place, or same victim) was missing.

There is substantial evidence in the record establishing that Parmelee's eight convictions for alien smuggling¹⁰ arose from conduct that occurred on eight separate dates. United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994); CP 721-26. Parmelee pled guilty to all 17 counts in the indictment; he did not have a trial. CP 722; U.S. v. Parmelee, 42 F.3d at 389. The facts relating to

¹⁰ Parmelee was also convicted of one count of conspiracy and eight counts of transporting illegal aliens, which the State agreed should not score separately from the alien smuggling counts. CP 638; RP 29.

Parmelee's eight convictions are outlined at length in the published opinion in the case, including:

[T]he investigation revealed **eight instances between February 12, and April 21, 1991**, in which illegal Polish aliens were smuggled into this country. **On each occasion**, the aliens, who were carrying luggage, were driven by car in prearranged rides to Grimsby Airpark. There, the aliens were met by pilot Allan Parmelee, who flew them to DuPage Airport where they arrived late at night.

U.S. v. Parmelee, 42 F.3d at 389 [emphasis added]. Additionally, footnote 4 of the concurring/dissenting opinion stated that "eight smuggling trips formed the basis of the indictment" and went on to list eight discrete dates: February 12, 1991, March 13, 1991, March 19, 1991, March 25, 1991, March 26, 1991, April 10, 1991, April 15, 1991 and April 21, 1991. U.S. v. Parmelee, 42 F.3d at 397, n. 4 (Coffey, J. concurring/dissenting).

The published federal opinion leaves no room for doubt that Parmelee's eight convictions for alien smuggling were based on eight different trips occurring on eight different days. It states that the last trip occurred on April 21, 1991. Id. This is consistent with Parmelee's federal judgment, which states that the date the offenses were *concluded* was April 21, 1991. CP 722.

A careful reading of the record reveals that Parmelee did not dispute any particular facts contained in the published opinion, rather he simply objected to the court's reliance on the opinion when making its determination. RP 31-34. There is no reason to presume that the facts as stated in the opinion are inaccurate. Indeed, courts routinely rely on the facts of a case as stated in the opinion; without doing so, it could never determine whether the law as stated in the opinion had any applicability to the cases before it.

Parmelee cites to no persuasive authority that the sentencing court could not rely on a federal circuit court published opinion when making its finding that his prior crimes occurred on different dates. He relies on Swak v. Dep't of Labor & Industries, 40 Wn.2d 51, 54, 240 P.2d 560 (1952). Brf. of Appellant at 34. But Swak has no applicability in the context of determining a defendant's offender score. Indeed, sentencing courts are authorized to consider records from other judicial proceedings, including plea statements, judgment and sentences, transcripts and other court records. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Undisputed facts contained in a federal published opinion should be treated no differently.

In sum, substantial facts existed in the record to sufficiently conclude that Parmelee's eight alien smuggling convictions occurred on eight separate occasions. Thus, it was not an abuse of discretion for the court to find that they counted separately toward Parmelee's offender score.

2. EVEN IF THIS COURT DETERMINES THAT THE STATE DID NOT SUFFICIENTLY PROVE THE EIGHT FEDERAL CONVICTIONS TO BE SEPARATE CRIMINAL CONDUCT, THE STATE IS NOT LIMITED TO THE EXISTING RECORD ON REMAND.

Even if this Court were to hold that the State insufficiently established Parmelee's eight alien smuggling convictions to be separate criminal conduct, the State would not be limited to the existing record on remand.

- a. The 2008 Amendments To RCW 9.94A.525 And RCW 9.94A.530 Are Procedural In Nature.

In 2008, the legislature reenacted and amended RCW 9.94A.525 and amended RCW 9.94A.530. See Laws of 2008, ch. 231 § 2-4. The express intent of the legislation was to "ensure that offenders receive accurate sentences that are based on their actual, complete criminal history . . . whether imposed at

sentencing or upon resentencing." Laws of 2008, ch. 231 § 1. In relevant part, RCW 9.94A.525 was amended:

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. (Accordingly) Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Laws of 2008, ch. 231 § 3. The relevant amendment to RCW 9.94A.530(2) states:

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. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On 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.

RCW 9.94A.345's "timing" rule, that crimes are punished under the laws in effect at the time of a crime's commission, applies only to substantive changes in the law, not procedural ones. State v. Hodgson, 108 Wn.2d 662, 669-70, 740 P.2d 848 (1987); State v. Pillatos, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007).

The 2008 amendments are procedural in nature. State v. Calhoun, 163 Wn. App. 153, 164, 257 P.3d 693 (2011).

Substantive amendments change the elements of a crime, the severity of the punishment, or what evidence can be used to prove it. Id. (citing Hodgson, 108 Wn. App. at 669). Because procedural changes do not alter the consequences of the crime, they do not deny a defendant notice. See Pillatos, 159 Wn.2d at 470 (procedural amendments to exceptional sentencing scheme did not violate principles of fair notice because defendants already had fair warning).

When Parmelee committed his crimes in 1998 and 2002, he had sufficient notice that any sentence imposed would be based

upon his criminal history. See Former RCW 9.94A.360, Former RCW 9.94A.525, and Former RCW 9.94A.530(1).¹¹

The 2008 amendments do not increase the severity of Parmelee's punishment, as his criminal history could have been used to increase his offender score in the same manner both before and after the 2008 legislation.

The type of evidence used to prove a defendant's criminal history did not change as a result of the 2008 legislation, and the amendments did not allow the State to offer documents that would have been inadmissible at the prior sentencing. Calhoun, 163 Wn. App. at 164-65. Thus, the 2008 amendments are procedural in nature; they merely clarify the procedures courts must follow at resentencing hearings to ensure criminal defendants receive accurate sentences.

In Parmelee's case, the law in effect at the time of his crimes, and the law in effect when he was resentenced called for his sentencing range to be determined based upon his criminal history and his offender score. The 2008 procedural changes allowing the parties to present all relevant evidence regarding

¹¹ Laws of 1996, ch. 248 § 1 (eff. June 6, 1996); Laws of 2000, ch. 28 § 12 (eff. July 1, 2001).

criminal history at resentencing did not substantively change the "law in effect" when the defendant committed his crimes.

Therefore, application of the 2008 procedural amendments does not violate either the letter or purpose of RCW 9.94A.345.

b. The Legislature Intended The Amendments To Apply To All Resentencing Hearings Regardless Of The Date Of The Offense.

Parmelee's argument that the Laws of 2008, ch. 231 § 5 prohibits expansion of the record on remand is also incorrect.

If a statutory amendment concerns procedural changes, this Court must look at legislative intent to determine whether the statute may be applied prospectively or retroactively. A statute operates retroactively if the triggering event for its application occurred before the effective date of the statute. Pillatos, 159 Wn.2d at 471; State v. Belgarde, 119 Wn.2d 711, 722, 837 P.2d 599 (1992). "A statute is not retroactive merely because it applies to conduct that predated its effective date." Pillatos, 159 Wn.2d at 471. The statute must attach new legal consequences to events completed before its enactment in order to operate in a retroactive fashion. Id. Conversely, a statute operates prospectively when the triggering event occurs after enactment. Pillatos, 159 Wn.2d at 471

(citing In re Estate of Burns, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997)).

In the unlikely event this Court determines that the sentencing court could not rely on a federal published opinion, the 2008 amendments would properly apply to Parmelee. RCW 9.94A.530 (which allows consideration of criminal history not previously presented) became effective June 12, 2008. By its plain language, the "triggering event" for its application is a sentencing or resentencing hearing. As the triggering event for RCW 9.94A.530's application (a resentencing) would occur after the statute's effective date, the statute's application to Parmelee's case would be prospective and proper.¹²

RCW 9.94A.525 directs that "prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing." The legislature specifically expressed its intention that this amendment would apply to "all sentencings and resentencings commenced before, on, or after the effective date," of June 12, 2008. Laws of 2008, ch. 231 § 5. By the plain language of this section, the triggering event for RCW

¹² In fact, Parmelee argued at his March 30, 2011 resentencing that the 2008 amendments applied to that hearing. RP 27.

9.94A.525's application *could* occur prior to the June 12, 2008 effective date. While this might lead to a retroactive application of the statute, thereby requiring further inquiry into the appropriateness of its application, it would be irrelevant to this case. As discussed above, the triggering event for these two statutes, should this Court decide remand is necessary, would be after the effective date of the amendments. Thus, any application of RCW 9.94A.525 and RCW 9.94A.530 to Parmelee's case would be prospective and not improper.

3. THE COURT PROPERLY DETERMINED THAT PARMELEE'S TWO DECEPTIVE PRACTICES CONVICTIONS WERE COMPARABLE TO A WASHINGTON FELONY.

Parmelee argues that the State did not prove that his two prior Illinois convictions for deceptive practices were comparable to a Washington felony. Although the State argued at sentencing that Parmelee's crimes were comparable to theft and forgery in Washington, the court did not make a clear finding as to which crime it was finding the Illinois convictions comparable to. See RP 28-29, 34. The classification of an out-of-state conviction is reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d

941 (2000). Because the record contains sufficient evidence that Parmelee's 1990 Illinois convictions were comparable to the Washington felony of unlawful issuance of checks or drafts, the court's determination of comparability was correct, and remand is not required. The convictions were properly included in Parmelee's offender score.

When conducting a comparability analysis to determine whether an out-of-state conviction should be included in the offender score, the sentencing court first compares the elements of the out-of-state offense with the elements of the potentially comparable Washington offense. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The applicable statutes are those in existence at the time the offenses were committed. Morley, 134 Wn.2d at 606.

When the elements of the foreign conviction are different or broader than the Washington crime, a factual determination whether the defendant's conduct would have violated the comparable Washington offense is necessary. Ford, 137 Wn.2d at 479. The sentencing court may rely on facts underlying the out-of-state conviction when they were proved beyond a

reasonable doubt, or admitted by the defendant. Lavery, 154 Wn.2d at 258; State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009 (2007); State v. Releford, 148 Wn. App. 478, 488, 200 P.3d 729, review denied, 166 Wn.2d 1028 (2009); Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

When the prior conviction is the result of a guilty plea, the sentencing court may consider the out-of-state charging document as evidence of the defendant's conduct, so long as "the elements of the crime remain the focus of the analysis." Thomas, 135 Wn. App. at 485. The out-of-state law that existed at the time of the plea is considered in order to determine what facts the defendant admitted as a part of his plea. Releford, 148 Wn. App. at 489.

In his sentencing memorandum, Parmelee contended that the Illinois deceptive practices convictions were "most closely comparable" to the Washington crime of unlawful issuance of checks or drafts. CP 427. In that regard, Parmelee was correct. However, he went on to cite to the current elements of the Washington statute, RCW 9A.56.060, which are materially different

than when he committed the Illinois crimes in 1989. Compare
Former RCW 9A.56.060.¹³

On September 4, 1990, Parmelee was sentenced for two counts of "deceptive practices." CP 704-05. Parmelee's guilty pleas were pursuant to the indictment. CP 704-05.

A review of Former IL Ann. St. 38 § 17-1(B)(d)¹⁴ discloses that the Illinois crime of deceptive practices was broader than Washington's unlawful issuance of checks or drafts statute. Thus a factual analysis of Parmelee's conduct is required to determine comparability. Ford, 137 Wn.2d at 479.

The relevant portions of the two statutes reveal the following. In Washington in 1989, a person committed the felony crime of unlawful issuance of checks or drafts if he: (1) with intent to defraud, (2) delivered to another person a check, (3) knowing at the time of such delivery that he has not sufficient funds or credit to meet said check in full. Former RCW 9A.56.060(1). If the amount of the check exceeded \$250, the crime was a Class C felony. Former RCW 9A.56.060(4).

¹³ Laws of 1982, ch. 138 § 1 (eff. April 1, 1982). For the court's convenience, a copy is attached as Appendix A to Respondent's Brief.

¹⁴ P.A. 84-897, §1, eff. Sept. 23, 1985 (IL). A copy is attached as Appendix B to Respondent's Brief.

The Illinois crime required: (1) with intent to defraud, and (2) with intent to obtain control over the property of another, (3) the defendant delivered a check, (4) knowing that it would not be paid. Former IL Ann. St. 38 § 17-1(B)(d). Like Washington, the value determined whether one was guilty of a felony or a misdemeanor (over \$150 was a felony). Former IL Ann. St. 38 § 17-1(B).

Because Parmelee pled guilty to the prior convictions, Illinois law informs the question of what facts Parmelee admitted as part of his plea. Releford, 148 Wn. App. at 489. "A plea of guilty "constitutes an admission of every fact alleged in an indictment," as long as each fact admitted is "an ingredient of the offense charged."” People v. Feldman, 409 Ill. App.3d 1124, 1128, 948 N.E.2d 1094 (Ill. Ct. App. 2011) (citing People v. Henderson, 95 Ill. App.3d 291, 296, 419 N.E.2d 1262 (Ill. Ct. App. 1981)).

Count one of the indictment alleged that Parmelee, on March 29, 1989,

[W]ith intent to defraud and the intent to obtain control over certain property of Advanced Receiver Research, a corporation doing business as Advanced Receiver Research, being electronic equipment knowingly delivered a certain bank check, dated March 26, 1989, drawn on First Illinois Bank of LaGrange, payable to Advanced Receiver in the amount of \$492.00, and signed as maker Jonathan Marx, knowing said check would not be paid by the

depository, in violation of Illinois Revised Statutes, 1987, as amended, Chapter 38, Section 17-1B(d).

CP 700. Count two of the indictment alleged that Parmelee, on March 29, 1989:

With intent to defraud and the intent to obtain control over property of Remote Systems, Incorporated, a corporation doing business as Remote Systems, Incorporated, being a radar detector, knowingly delivered a certain bank check, dated March 26, 1989, drawn on First Illinois Bank of LaGrange, payable to Remote Systems in the amount of \$739.75, and signed as maker Johnathon Marx, knowing said check would not be paid by the depository, in violation of Illinois Revised Statutes, 1987, as amended, Chapter 38, Section 17-1B(d).

CP 701.

When looking to count one of the indictment for facts that are "ingredients of the charged offenses," it is clear that Parmelee, with intent to defraud and intent to obtain control over property of another, knowingly delivered a check for \$492.00, knowing that the check would not be paid. CP 700.

Therefore, facts contained in the indictment, that were admitted by Parmelee as part of his plea adequately establish that Parmelee's conduct was comparable to the felony of unlawful issuance of checks or drafts in Washington. The extraneous element of "intent to obtain property" is not required in Washington,

and is therefore irrelevant to the analysis. The amount of the check relates to an element of the offense, as it determined whether Parmelee would be guilty and sentenced for a felony or a misdemeanor. Former IL Ann. St. 38 § 17-1(B). Additionally, the judgment and sentence ordered Parmelee to pay restitution in the amount of \$492.00. CP 704. Clearly, the value of the check was admitted and proven.

The same analysis holds for count two of the indictment, with the difference that the amount of the check was \$739.75. CP 701, 705.

A review of the record before the sentencing court shows that the Illinois convictions were properly included in Parmelee's offender score. The court did not err when it calculated Parmelee's offender score as "13."

4. THE COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE BASED ON PARMELEE'S MULTIPLE CURRENT OFFENSES AND HIGH OFFENDER SCORE.

Parmelee argues that the court had no statutory authority to base his exceptional consecutive sentences on the "multiple offense policy/clearly too lenient" aggravating factor that existed at

the time of his offenses. He further argues that the court could not rely on the current statutory "free crimes" aggravator either, as its application to Parmelee's crimes would constitute an *ex post facto* violation. Parmelee's arguments must be rejected.

Felony sentences are determined in accordance with the substantive law in effect at the time a crime is committed. Because no Sixth Amendment concern is raised by the court's finding of facts to support exceptional consecutive sentences, and because the court properly based Parmelee's exceptional sentence on an aggravating factor that existed at the time of his crimes, his sentence must be affirmed.

Finally, even if the court improperly based Parmelee's exceptional sentence on the former "multiple offense policy/clearly too lenient" factor, a finding pursuant to the current "free crimes" statutory aggravator does not violate the prohibition against *ex post facto* legislation, as that aggravating factor was in existence in the caselaw at the time of Parmelee's crimes.

In essence, Parmelee argues that an exceptional sentence based on "free crimes" would always be improper for defendants who committed their crimes prior to the Blakely-fix legislation, but who are required to be resentenced after it. Because Parmelee's

argument ignores that the "free crimes" aggravating factor existed before Blakely was decided, he is wrong. Here, the record shows that the sentencing court made sufficient factual findings to support the "free crimes" aggravator, and Parmelee's exceptional sentence should be affirmed.

- a. No Constitutional Violation Occurred When The Sentencing Court Found Facts Necessary To Support Parmelee's Consecutive Standard Range Sentences.

In June of 2004, just three weeks after Parmelee was originally sentenced, our highest court removed any doubt that facts used to increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 542 U.S. at 301 (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Sentences for multiple current offenses are presumptively concurrent. Former RCW 9.94A.400(1)(a). However, when defendants with high offender scores commit multiple current offenses, that presumption will often result in a sentence that does

not reflect the deserved punishment. State v. Vance, 168 Wn.2d 754, 760, 230 P.3d 1055 (2010).

When a sentencing judge finds facts necessary to impose *consecutive* standard range sentences for discrete crimes, no Sixth Amendment violation occurs. Oregon v. Ice, 555 U.S. 160, 168, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009); Vance, 168 Wn.2d at 762-63.

Here, Parmelee received a standard range sentence of 130 months on each of his two counts of first degree arson. CP 548-51. The exceptional nature of his sentence was the court's determination that the sentences would run consecutively to one another, rather than the presumptively concurrent requirement of Former RCW 9.94A.400(1)(a). The court based the exceptional consecutive sentences solely on Parmelee's criminal history and the fact that he had committed two separate current offenses. CP 555.

Because Ice and Vance are clear that a sentencing judge is authorized to make findings necessary to support consecutive sentences for discrete crimes, Parmelee's sentence does not violate the Sixth Amendment. For the reasons outlined below, the

court also had the authority to base his exceptional sentence on the fact of his criminal history.

b. History Of The Relevant Aggravating Factors.

Prior to Blakely, the list of aggravating factors set forth in the exceptional sentence statute was explicitly non-exclusive. Former RCW 9.94A.390;¹⁵ Former RCW 9.94A.535;¹⁶ State v. Armstrong, 106 Wn.2d 547, 549, 723 P.2d 1111 (1989). At the time that Parmelee committed his crimes,¹⁷ one of the "illustrative" statutory aggravating factors supporting an exceptional sentence was, "The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter" Former RCW 9.94A.390(2)(i); Former RCW 9.94A.535(2)(i).

For the presumptive sentence to be "clearly too lenient," there must be "some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be

¹⁵ Laws of 1997, ch. 52 § 4 (eff. July 27, 1997).

¹⁶ Laws of 2001, 2nd sp.s. ch. 12 § 314 (eff. Sept. 1, 2001).

¹⁷ Parmelee's crimes occurred in 1998 and 2002. CP 548.

accounted for in determining the presumptive sentencing range."

State v. Fisher, 108 Wn.2d 419, 428, 739 P.2d 683, 688 (1987).

In a case where a defendant has committed multiple current offenses and has a high offender score, the presumptive sentencing range essentially allows some of the defendant's conduct to go unpunished. This "free crimes" situation was held to automatically satisfy the "clearly too lenient" portion of the statutory aggravating factor found in Former RCW 9.94A.535(2)(i). State v. Stephens, 116 Wn.2d 238, 243, 803 P.2d 319 (1991) overruled in part by State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Smith, 123 Wn.2d 51, 56, 864 P.2d 1371, 1373 (1993) overruled in part by State v. Hughes, 154 Wn.2d 118.

After Blakely, Hughes determined that compliance with the Sixth Amendment required the factual finding of "clearly too lenient" be made by a jury.¹⁸ However, if the statutory aggravating factor at issue in Hughes had merely required a "free crime" finding, it would not have violated Blakely. See State v. Alvarado, 164 Wn.2d 556,

¹⁸ Except, as noted above, there is no Sixth Amendment violation when as here, the court makes factual findings necessary to impose *consecutive* sentences. State v. Vance, 168 Wn.2d at 762-63.

567, 192 P.3d 345 (2008) (the current criminal history aggravator found in RCW 9.94A.535(2)(c) was designed to codify the "free crimes" aggravator without the need for additional fact-finding as to "clearly too lenient").

Hughes did not hold that a trial court could not rely upon a "free crimes" aggravating factor when imposing an exceptional sentence. As recently clarified in Mutch, the relevant caselaw and statutory authority both prior to Blakely, and after the Blakely-fix legislation, "clearly indicate that trial courts are permitted to impose exceptional sentences based on prior convictions." State v. Mutch, 171 Wn.2d 646, 657-58, 254 P.3d 803 (2011). Hughes overruled Smith and Stephens only to the extent that the *statutory* aggravating factor in Former RCW 9.94A.535(2)(i) required the factual finding of "clearly too lenient" to be made by a jury, rather than the court. State v. Hughes, 154 Wn.2d at 140.

In 2005, the legislature codified the "free crimes" aggravator in RCW 9.94A.525(2)(c).¹⁹

¹⁹ Laws of 2005, ch. 68 (eff. April 15, 2005).

- c. The Sentencing Court Did Not Exceed Its Authority By Imposing Parmelee's Exceptional Consecutive Sentences.
 - i. The sentencing court properly relied on an aggravating factor that existed at the time of Parmelee's offenses.

Absent clear legislative intent to the contrary, felony sentences are determined under the law as it existed when the current crime was committed. RCW 10.01.040; RCW 9.94A.345. This rule applies to substantive changes in the law, rather than procedural ones. Hodgson, 108 Wn.2d at 669-70; State v. Pillatos, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007).

Substantive amendments change the elements of a crime, the severity of the punishment, or what evidence can be used to prove it. Hodgson, 108 Wn. App. at 669. An aggravating factor is appropriately characterized as substantive, as it is specifically used to increase punishment. RCW 9.94A.535; see State v. Stewart, 72 Wn. App. 885, 894, 866 P.2d 677 (1994), affirmed, 125 Wn.2d 893 (1995) (use of a sexual motivation finding pursuant to a statute, not enacted at the time of the crime, to justify an exceptional sentence "made the punishment more burdensome.").

Here, the statutory factor relied on by the sentencing court, that "the operation of the multiple offense policy would result in a

sentence clearly too lenient" without imposition of consecutive sentences, was a *substantive* portion of the law at the time of Parmelee's offenses. Pursuant to RCW 9.94A.345, the court had the statutory authority to base the exceptional sentence on that factor.

Parmelee argues that the "Blakely-fix" legislation and State v. Pillatos support his claim that the court had no authority to impose an exceptional sentence based on the "multiple offense policy/clearly too lenient" statutory factor. However, neither the legislative amendments nor Pillatos support his argument.

The 2005 legislative amendments to the exceptional sentencing provisions were designed to address the *procedural* requirements of Blakely regarding jury findings:

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington* . . . The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. . . . The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, **without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently**

available statutory or common law aggravating circumstances. . . .

Laws of 2005, ch. 68 § 1 [emphasis added].

Like the 2005 legislation, the 2007 amendment was meant to ensure that the trial court had the necessary authority to empanel juries in order to impose exceptional sentences based on aggravating factors that would need to be found by a jury. Laws of 2007, ch. 205 § 1 (eff. April 27, 2007).

In 2007, Pillatos decided the applicability of the 2005 legislation within the context of the State's request for empanelment of juries to decide aggravating facts. Its conclusion that the 2005 amendments applied to some offenses which had occurred prior to the effective date of the statute applied solely to the procedures used to find aggravating facts. State v. Pillatos, 159 Wn.2d at 465. The Court specifically noted that it was not confronted with, nor did it decide, whether the substantive portions of 9.94A.535 applied to conduct occurring prior to the effective date of the legislation. Id. at 478.

In fact, Parmelee himself argues that retroactive application of the substantive portions of the 2005 legislation, specifically the aggravating factor found in RCW 9.94A.535(2)(c), would violate

principles against *ex post facto* legislation. Brf. Appellant at 21-27.

He cannot have it both ways.

Because felony sentences are based upon the substantive law in effect at the time of an offense, the sentencing court properly relied on a statutory aggravating factor that existed at the time of Parmelee's crimes. The exceptional sentence should be affirmed.

- ii. Even if the court could not rely on the "multiple offense policy/clearly too lenient" statutory factor, the sentence was proper because the "free crimes" aggravator as currently codified in RCW 9.94A.535(2)(c) existed at the time of Parmelee's crimes.

Even if the court was not allowed to base Parmelee's exceptional sentence on the former "multiple offense policy/clearly too lenient" aggravating factor, it properly determined that due to Parmelee's multiple current offenses and his high offender score, the presumptive sentence range (concurrent sentences) would result in one of the current offenses going unpunished. Because the court had the authority to impose an exceptional sentence on that basis at the time Parmelee committed his offenses, the exceptional sentence did not exceed the court's authority.

As outlined above in section 4, b, based on the law when Parmelee's crimes occurred, the court could have imposed an exceptional sentence if the defendant's criminal history was such that he would receive a "free crime;" in other words, if one or more current offenses would go unpunished under a standard range sentence. State v. Mutch, 171 Wn.2d at 656-58.

The Blakely-fix legislation of 2005 codified this "free crimes" aggravating factor into RCW 9.94A.535(2)(c). State v. Alvarado, 164 Wn.2d 567. Therefore, when passing the 2005 amendments to RCW 9.94A.535, the legislature did not "create" the sentencing court's ability to impose an exceptional sentence based upon current offenses going unpunished; it already existed.

The court specifically found that Parmelee's "offender score is conservatively scored at 13," and "[r]unning the defendant's sentences concurrently on the separate arson offenses would result in the defendant receiving a "free crime" - a violent crime of arson." CP 555. The sentence imposed in this case was clearly based on the fact that Parmelee had two current offenses and a high offender score, resulting in one of the arsons going unpunished. CP 555; see also RP 35 (court explaining, "Well, the concept of a free crime means that the offender score only goes up to nine . . . [a]nd if you

have four points more than nine, than [sic] essentially . . . there is a free crime"). The sentence was proper.

- iii. Because the "free crimes" aggravator as currently codified in RCW 9.94A.535(2)(c) existed at the time of Parmelee's crimes, there is no *ex post facto* violation.

Parmelee argues that applying the statutory aggravating factor of RCW 9.94A.535(2)(c) to his crimes would violate the prohibition against *ex post facto* legislation. However, his argument ignores the fact that at the time of his offenses, the current "free crimes" statutory aggravating factor existed in the caselaw. Because the 2005 amendments merely codified existing law, there was no *ex post facto* violation.

The legislature cannot enact a law that increases the punishment for a crime already committed. Wash. Const. art. I, § 23. The purpose of the *ex post facto* clause is to ensure that legislative acts give fair warning of their effect. State v. Schmidt, 100 Wn. App. 297, 299, 996 P.2d 1119 (2000); Pillatos, 159 Wn.2d at 476.

A law violates the *ex post facto* clause if it is (1) substantive rather than merely procedural, (2) if it is retrospective, and (3) if it

disadvantages the defendant. In re Pers. Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991); Miller v. Florida, 482 U.S. 423, 430, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).

A statute is not retrospective just because it may apply to conduct predating it. State v. Hylton, 154 Wn. App. 954, 956, 226 P.3d 246, review denied, 169 Wn.2d 1025 (2010) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 269, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). It is retrospective only if it "changes the legal consequences of acts completed before its effective date." Miller v. Florida, 482 U.S. at 430.

As noted above, long before the 2005 amendments, a sentencing court had the authority to impose an exceptional sentence based on "free crimes." State v. Mutch, 171 Wn.2d at 658. Therefore, enactment of RCW 9.94A.535(2)(c) did not affect the consequences for any underlying crime or aggravating factor. When Parmelee committed his crimes, he was on notice that due to his high offender score, and multiple crimes, he was subject to an exceptional sentence.

Nor did the law "disadvantage" Parmelee. To "disadvantage" a defendant in the context of an act that is already a crime, the statute must alter the standard of existing punishment.

Pillatos, 159 Wn.2d at 476. The Blakely-fix legislation that codified the "free crimes" aggravator of RCW 9.94A.535(2)(c) did not disadvantage Parmelee, as it did not increase the level of punishment. As outlined above, the aggravating factor of multiple current offenses and defendant's high offender score resulting in some of the current offenses going unpunished has been recognized by Washington courts since at least 1991. See Mutch, 171 Wn.2d at 657 (citing Stephens, 116 Wn.2d at 243-44, and Smith, 123 Wn.2d at 56). RCW 9.94A.535(2)(c) merely codified the existing caselaw; it did not alter the nature or parameters of the aggravating factor itself.

Focusing solely on the old statutory factor of "multiple offense policy/clearly too lenient," Parmelee's argument is that it is now "easier" for the court to find a criminal history aggravator. This argument ignores that the "free crimes" aggravator, as currently codified, was in existence in the caselaw prior to the 2005 amendment, and nothing prohibited a court from basing an exceptional sentence on that factor at the time of Parmelee's offenses. Moreover, Parmelee also ignores the intended effect of the 2005 amendments--to codify existing aggravating factors.

In sum, the codification of the "free crimes" aggravator in RCW 9.94A.535(2)(c) did not "substantially disadvantage" Parmelee. Both prior to and after its adoption, state law made him subject to an exceptional sentence based on the sole fact that his high offender score might result in other current offenses going unpunished. Parmelee has not demonstrated that he faced a presumptively higher sentencing range or that he is otherwise aggrieved by a reliance on RCW 9.94A.535(c)(2). There is no *ex post facto* violation.

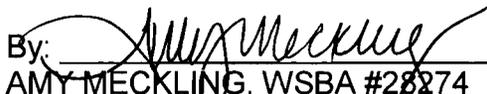
D. CONCLUSION

For all of the above reasons, Parmelee's exceptional consecutive sentences should be affirmed.

DATED this 14 day of March, 2012.

Respectfully submitted,

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APPENDIX A

West's RCWA 9A.56.060
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 9A. WASHINGTON CRIMINAL CODE
(SEE ALSO CRIMES AND PUNISHMENTS, TITLE 9 RCWA)
CHAPTER 9A.56—THEFT AND ROBBERY

9A.56.060. Unlawful issuance of checks or drafts

(1) Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or other depository, to meet said check or draft, in full upon its presentation, shall be guilty of unlawful issuance of bank check. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or other depository for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud.

(2) Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft on a bank or other depository for the payment of money and who issues a stop-payment order directing the bank or depository on which the check is drawn not to honor said check, and who fails to make payment of money in the amount of the check or draft or otherwise arrange a settlement agreed upon by the holder of the check within twenty days of issuing said check or draft shall be guilty of unlawful issuance of a bank check.

(3) When any series of transactions which constitute unlawful issuance of a bank check would, when considered separately, constitute unlawful issuance of a bank check in an amount of two hundred fifty dollars or less because of value, and the series of transactions are a part of a common scheme or plan, the transactions may be aggregated in one count and the sum of the value of all of the transactions shall be the value considered in determining whether the unlawful issuance of a bank check is to be punished as a class C felony or a gross misdemeanor.

(4) Unlawful issuance of a bank check in an amount greater than two hundred fifty dollars is a class C felony.

(5) Unlawful issuance of a bank check in an amount of two hundred fifty dollars or less is a gross misdemeanor and shall be punished as follows:

(a) The court shall order the defendant to make full restitution;

(b) The defendant need not be imprisoned, but the court shall impose a minimum fine of five hundred dollars. Of the fine imposed, at least fifty dollars shall not be suspended or deferred. Upon conviction for a second offense within any twelve-month period, the court may suspend or defer only that portion of the fine which is in excess of five hundred dollars.

Enacted by Laws 1975, 1st Ex.Sess., ch. 260, § 9A.56.060. Amended by Laws 1979, Ex.Sess., ch. 244, § 14, eff. July 1, 1979; Laws 1982, ch. 138, § 1.

HISTORICAL NOTES

1988 Main Volume Historical Notes

Laws 1979, Ex.Sess., ch. 244, § 14, inserted subsecs. (2) and (3); and renumbered former subsecs. (2) and (3) as (4) and (5).

Laws 1982, ch. 138, § 1, near the end of subsec. (2), substituted "twenty days" for "thirty days"; at the end of the introductory paragraph of subsec. (5), added "and shall be punished as follows:"; and added subsecs. (5)(a) and (5)(b).

Effective date—Laws 1979, Ex.Sess., ch. 244: See § 9A.44.902.

Source:

Laws 1909, ch. 249, § 353.

Laws 1915, ch. 156, § 1.

9A.56.060. Unlawful issuance of checks or drafts, West's RCWA 9A.56.060

RRS §§ 2601-2, 2605.

Former §§ 9.54.050, 9.54.090.

Laws 1955, ch. 97, § 1.

Laws 1975, 1st Ex.Sess., ch. 61, § 2.

REFERENCES

CROSS REFERENCES

1988 Main Volume Cross References

Checks, see ch. 30.16.

Commercial paper, see §§ 62A.3-501 to 62A.3-511.

Maintenance by state treasurer of accounts in amount less than all warrants outstanding not a violation of § 9A.56.060(1), see § 43.08.135.

LIBRARY REFERENCES

1988 Main Volume Library References

Larceny ~~§~~ 12.

C.J.S. Larceny § 4 et seq.

Jury instructions,

Credit for unlawful issuance of bank checks, definition, see Wash.Prac. vol. 11, WPIC 79.10.

Unlawful issuance of bank check, felony, definition, see Wash.Prac. vol. 11, WPIC 73.01.

Unlawful issuance of bank check, felony, elements, see Wash.Prac. vol. 11, WPIC 73.02.

Unlawful issuance of bank check, gross misdemeanor, definition, see Wash.Prac. vol. 11, WPIC 73.03.

Unlawful issuance of bank check, gross misdemeanor, elements, see Wash.Prac. vol. 11, WPIC 73.04.

Unlawful issuance of bank check, presumption of intent, see Wash.Prac. vol. 11, WPIC 73.10.

ANNOTATIONS

NOTES OF DECISIONS

Check 2 enter p
Computer records 6 enter p
Controlling section 1 enter p
Defenses 5 enter p
Indictment and information 4 enter p
Nature and elements of offense 3 enter p
Other checks 7 enter p
Sufficiency of evidence 8 enter p

1. Controlling section

A person who obtained money in excess of \$25 by knowingly drawing a check on insufficient funds was chargeable with grand larceny rather than under the bad check statute. *State v. Wilder* (1974) 12 Wash.App. 296, 529 P.2d 1109.

Crime of uttering forged check and crime of drawing check on bank in which drawer has not sufficient funds to meet it are separate and distinct crimes. *State v. Weir* (1922) 118 Wash. 493, 203 P. 953.

2. Check

APPENDIX B

S.H.A. ch. 38 ¶ 17-1
SMITH-HURD ILLINOIS ANNOTATED STATUTES
CHAPTER 38. CRIMINAL LAW AND PROCEDURE
DIVISION I. CRIMINAL CODE OF 1961
TITLE III. SPECIFIC OFFENSES
PART C. OFFENSES DIRECTED AGAINST PROPERTY
ARTICLE 17. DECEPTION

17-1. Deceptive practices

Crim. Code § 17 - 1

§ 17-1. Deceptive practices. (A) As used in this Section:

- (i) A financial institution means any bank, savings and loan association, credit union, or other depository of money, or medium of savings and collective investment.
 - (ii) An account holder is any person, having a checking account or savings account in a financial institution.
 - (iii) To act with the "intent to defraud" means to act wilfully, and with the specific intent to deceive or cheat, for the purpose of causing financial loss to another, or to bring some financial gain to oneself. It is not necessary to establish that any person was actually defrauded or deceived.
- (B) General Deception

A person commits a deceptive practice when, with intent to defraud:

- (a) He causes another, by deception or threat to execute a document disposing of property or a document by which a pecuniary obligation is incurred, or
- (b) Being an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent, or
- (c) He knowingly makes or directs another to make a false or deceptive statement addressed to the public for the purpose of promoting the sale of property or services, or
- (d) With intent to obtain control over property or to pay for property, labor or services of another, or in satisfaction of an obligation for payment of tax under the Retailers' Occupation Tax Act ^{1PP} or any other tax due to the State of Illinois, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository. Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart, is prima facie evidence that the offender knows that it will not be paid by the depository, and that he has the intent to defraud.
- (e) He issues or delivers a check or other order upon a real or fictitious depository in an amount exceeding \$150 in payment of an amount owed on any credit transaction for property, labor or services, or in payment of the entire amount owed on any credit transaction for property, labor or services, knowing that it will not be paid by the depository, and thereafter fails to provide funds or credit with the depository in the face amount of the check or order within seven days of receiving actual notice from the depository or payee of the dishonor of the check or order.

Sentence.

A person convicted of deceptive practice under paragraphs (a) through (e) of this subsection (B), except as otherwise provided by this Section, is guilty of a Class A misdemeanor.

A person convicted of a deceptive practice in violation of paragraph (d) a second or subsequent time shall be guilty of a Class 4 felony.

A person convicted of deceptive practices in violation of paragraph (d), when the value of the property so obtained, in a single transaction, or in separate transactions within a 90 day period, exceeds \$150, shall be guilty of a Class 4 felony. In the case

17-1. Deceptive practices, S.H.A. ch. 38 ¶ 17-1

of a prosecution for separate transactions totaling more than \$150 within a 90 day period, such separate transactions shall be alleged in a single charge and provided in a single prosecution.

(C) Deception on a Bank or Other Financial Institution False Statements

1) Any person who, with the intent to defraud, makes or causes to be made, any false statement in writing in order to obtain an account with a bank or other financial institution, or to obtain credit from a bank or other financial institution, knowing such writing to be false, and with the intent that it be relied upon, is guilty of a Class A misdemeanor.

For purposes of this subsection (C), a false statement shall mean any false statement representing identity, address, or employment, or the identity, address or employment of any person, firm or corporation.

Possession of Stolen or Fraudulently Obtained Checks

2) Any person who possesses, with the intent to defraud, any check or order for the payment of money, upon a real or fictitious account, without the consent of the account holder, or the issuing financial institution, is guilty of a Class A misdemeanor.

Any person who, within any 12 month period, violates this Section with respect to 3 or more checks or orders for the payment of money at the same time or consecutively, each the property of a different account holder or financial institution, is guilty of a Class 4 felony.

3) Possession of Implements of Check Fraud. Any person who possesses, with the intent to defraud, and without the authority of the account holder or financial institution any check imprinter, signature imprinter, or "certified" stamp is guilty of a Class A misdemeanor.

A person who within any 12 month period violates this subsection (C) as to possession of 3 or more such devices at the same time or consecutively, is guilty of a Class 4 felony.

Possession of Identification Card

4) Any person, who with the intent to defraud, possesses any check guarantee card or key card or identification card for cash dispensing machines without the authority of the account holder or financial institution, is guilty of a Class A misdemeanor.

A person who, within any 12 month period, violates this Section at the same time or consecutively with respect to 3 or more cards, each the property of different account holders, is guilty of a class 4 felony.

A person convicted under this Section, when the value of property so obtained, in a single transaction, or in separate transactions within any 90 day period, exceeds \$150 shall be guilty of a Class 4 felony.

1977 Main Volume Credit(s)

Laws 1961, p. 1983, § 17-1, eff. Jan. 1, 1962. Amended by Laws 1965, p. 962, § 1, eff. July 1, 1965; Laws 1967, p. 3610, § 1, eff. Sept. 5, 1967; P.A. 77-2638, § 1, eff. Jan. 1, 1973; P.A. 78-777, § 21, eff. Oct. 1, 1973.

1989 Pocket Part Credit(s)

Amended by P.A. 80-1143, § 1, eff. July 1, 1978; P.A. 82-563, § 1, eff. Jan. 1, 1982; P.A. 82-1009, § 1, eff. Sept. 17, 1982; P.A. 84-897, § 1, eff. Sept. 23, 1985.

¹PP Chapter 120, ¶ 440 et seq.

HISTORICAL NOTE

1989 Pocket Part Historical Note

P.A. 82-563, in subd. (B)(d), in the second sentence, inserted "or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart".

P.A. 82-1009 incorporated the amendment by P.A. 82-563 and, in addition, in subd. (B)(d), in the first sentence, inserted "or in satisfaction of an obligation for payment of tax under the Retailers' Occupation Tax Act or any other tax due to the State of Illinois".

17-1. Deceptive practices, S.H.A. ch. 38 ¶ 17-1

Section 10 of P.A. 82-1009 approved Sept. 17, 1982, provided:

“This Act takes effect upon its becoming a law.”

P.A. 84-897 added subd. (B)(e); and in subd. (B) the first paragraph following the heading “Sentence”, substituted “(e)” for “(d)”.

Section 2 of P.A. 84-897, approved Sept. 23, 1985, provided:

“This Act takes effect upon its becoming a law.”

1977 Main Volume Historical Note

The 1965 amendment inserted subsec. (e); “Credit Card” and the paragraph following; and “Cancelled or Revoked Credit Card” and the paragraph following.

Prior to the 1965 amendment the penalty paragraph read:

“Penalty.

“A person convicted of deceptive practices shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.”

In 1967 “with intent to defraud” was inserted in the introductory phrase.

Prior to being rewritten in 1967, subsec. (e) read:

“(e) He obtains, or attempts to obtain, property, labor or services by the use of a credit card which he knows he has no authority to use. The use of a counterfeit, fictitious, falsified, altered, lost, stolen, wrongfully appropriated, expired, cancelled or revoked credit card is prima facie evidence that the user knows he has no authority to use such card.”

The 1967 amendment also inserted subsecs. (f) through (j) relating to credit cards, “Cardholder” and the paragraph following.

In the penalty paragraph, the 1967 amendment substituted, in the first sentence, the words “under subsections (a) through (j)” for “Subsections (a) through (d), or under Subsection (e)”; inserted, in the second sentence, the words “or subsection (b)” and added a concluding sentence relating to second convictions.

The amendment by P.A. 77-2638 was necessary to conform penalties under this section with the Unified Code of Corrections, see § 1001-1-1 et seq. of this chapter.

P.A. 78-777 deleted all references to credit cards. See, now, ch. 121/, § 601 et seq.

Prior Laws:

R.L.1827, p. 153, § 140.

R.L.1833, p. 204, § 142.

R.S.1845, p. 178, § 152.

Laws 1857, p. 103, § 2.

Laws 1867, p. 88, § 1.

R.S.1874, p. 348, div. 1, §§ 97, 98, 116a.

Laws 1879, p. 113, §§ 1, 4.

Laws 1903, p. 156, § 1.

Laws 1917, p. 344, § 1.

Laws 1917, p. 345, § 1.

17-1. Deceptive practices, S.H.A. ch. 38 ¶ 17-1

Laws 1917, p. 347, § 1.
Laws 1917, p. 348, § 1.
Laws 1917, p. 352, §§ 1, 2.
Laws 1919, p. 435, § 1.
Laws 1931, p. 447, § 1.
Laws 1937, p. 479, § 1.
Ill.Rev.Stat.1961, ch. 38, §§ 61, 64, 254 to 256, 289 to 291.

For the text of provisions repealed by the Criminal Code of 1961, see Ill.Rev.Stat.1961.

REFERENCES

CROSS REFERENCES

1989 Pocket Part Cross References

Payment of hotel operators' occupation tax, see ch. 120, ¶ 481b.38.
Payment of income tax, see ch. 120, ¶ 13-1302.
Payment of retailers occupation tax, see ch. 120, ¶ 452.
Payment of service occupation tax, see ch. 120, ¶ 439.115.
Payment of service use tax, see ch. 120, ¶ 439.45.
Payment of use tax, see ch. 120, ¶ 439.14.

1977 Main Volume Cross References

Credit card defined, see ch. 121/, § 381.
Forgery, see § 17-3 of this chapter.
Form of charge, see § 111-3 of this chapter.
Labor or services or use of property, theft, see § 16-3 of this chapter,
Natural persons prohibited from receiving deposits, see ch. 16/, § 146.
Place of trial, see § 1-6 to this chapter.
Telecommunication service, fraudulent obtaining, see ch. 134, § 15c.
Theft, see § 16-1 of this chapter.

LAW REVIEW COMMENTARIES

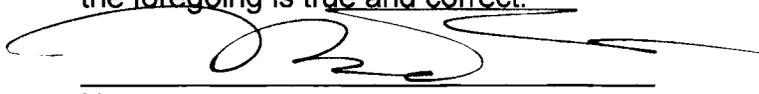
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Claims against closed banks in Illinois, George L. Siegel, 1935, 29 Ill.L.Rev. 891.
Fraudulent installment sales. G. J. Alexander, 1960, 41 Chicago Bar Rec. 285.
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Legislative politics and the criminal law. 1969, 64 N.W.L.Rev. 277.
Liability of bank as trustee for participation in breach of trust. 1930, 24 Ill.L.Rev. 607.
Procedure in cases where fraud is suspected. Harold L. Hoffman, 1953, 35 Chicago Bar Rec. 127.
Validity of indemnity contracts by several banks against loss in assuming liability of failing bank. 1936, 15 Chicago-Kent L.Rev. 52.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ALLAN PARMELEE, Cause No. 66918-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

08/14/12

Date