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COA NO. 69048-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

LOUIS MCGOWEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge
The Honorable Kimberley Prochnau, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in finding appellant competent to stand trial in the absence of observing adequate procedures for determining competency mandated by due process and chapter 10.77 RCW. CP 124-25.

2. The court violated appellant's right to counsel under the Sixth Amendment of the United States Constitution in denying appellant's motion to discharge counsel. CP 37.

3. The court erred in sentencing appellant to life in prison as a persistent offender.

Issues Pertaining to Assignments of Error

1. After finding reason to doubt competency, whether the court violated due process and statutory mandate by proceeding to trial without first holding a formal evidentiary hearing to determine appellant's competency?

2. Whether the court erred in failing to appoint new counsel due to inadequate inquiry into the extent of appellant's conflict with his attorneys and breakdown in communication?

3. Whether the court erred in treating a prior conviction as a "most serious offense" under the "three strikes" law in sentencing

appellant to life without the possibility of parole because that prior conviction was constitutionally invalid on its face?

B. STATEMENT OF THE CASE

The State charged Louis McGowen with three counts of second degree assault and two counts of felony harassment committed against Debra Barraza, alleging these were aggravated domestic violence offenses. CP 41-44. The State also sought deadly weapon enhancements for the felony harassment under count II and the second degree assault under count III. CP 42-43.

On December 2, 2010, defense counsel requested a competency evaluation for McGowen, expressing concern about his ability to rationally assist with his own defense. 1RP[1] 2.[2] Counsel was reluctant to speak freely in open court for fear of violating confidentiality, but described manic and pressured speech, paranoia, lack of eye contact, and a refusal to discuss the case beyond saying "I didn't do it." 1RP 2-3.

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[1] The verbatim report of proceedings is referenced as follows: 1RP - 12/2/10; 2RP - 2/14/11; 3RP - 3/28/11; 4RP - 4/1/11; 5RP - 4/6/11; 6RP - 4/7/11; 7RP - 4/12/11; 8RP - 4/13/11; 9RP - 4/14/11; 10RP - 4/18/11; 11RP - 5/5/11; 12RP - 6/7/11; 13RP - 6/8/11; 14RP - 6/9/11; 15RP - 6/13/11; 16RP - 6/14/11; 17RP - 6/15/11; 18RP - 6/16/11; 19RP - 6/20/11; 20RP - 6/21/11; 21RP - 6/22/11; 22RP - 6/23/11; 23RP - 6/28/11; 24RP - 6/29/11; 25RP - 6/30/11; 26RP - 7/5/11 (initial); 27RP - 7/5/11 (subsequent); 28RP - 7/6/11; 29RP - 7/7/11; 30RP - 7/8/11; 31RP - 9/16/11; 32RP - 9/23/11; 33RP - 5/11/12.

[2] McGowen had two attorneys. 1RP 2.

Counsel further reported that McGowen planned to testify but would not describe what he planned to say. 1RP 3. He refused to go over reports or assess the evidence. 1RP 3. He refused to see a defense psychiatrist. 1RP 3. In connection with a 1997 case, McGowen was diagnosed with a major depressive disorder, a psychotic disorder secondary to opiates, heroin dependence and amnesic disorder secondary to opiates. 1RP 3. Overall, counsel had come to the conclusion that "there are major issues with his inability to work with us." 1RP 4.

The prosecutor deferred to the court and counsel. 1RP 5. The Honorable Palmer Robinson, finding a reason to doubt competency, signed an order for a Western State Hospital (WSH) evaluation. 1RP 5; CP 354-58. Dr. Gagliardi, a WSH psychologist, produced an "abbreviated" written report concluding McGowen was competent. CP 31-36. McGowen was observed during a 24 hour period speaking and interacting normally with select peers and staff. CP 33. He answered questions during the intake mental status examination. CP 33. But he refused to be interviewed for the evaluation. CP 34. The evaluator did not know why McGowen refused to consult with his attorneys. CP 34.

On February 14, 2011, the prosecutor represented that defense counsel had told him that they would ask the court to read the WSH report. 2RP 2. The prosecutor asked the court to conduct a colloquy with

McGowen and determine competency. 2RP 2. The Honorable Ronald Kessler asked defense counsel "So you're doing a contested hearing based upon the report alone, is that what's happening?" 2RP 3. Defense counsel described continuing difficulties with assessing McGowen, concluding "his profound depression is making him really unable to rationally assist counsel in his defense, and we certainly can't agree that -- sign off on an Order agreeing that he is competent given those circumstances." 2RP 4. Counsel reiterated that McGowen did not respond to counsel and refused to speak with the WSH evaluator or Dr. McClung, the defense evaluator. 2RP 3.

Judge Kessler asked McGowen to tell him what he was charged with. 2RP 4. McGowen said he did not know. 2RP 4. Judge Kessler asked McGowen to tell him who his lawyers were and whether he ever had a lawyer before, but received no response. 2RP 4.

The prosecutor opined McGowen's behavior was willful. 2RP 4. Defense counsel responded that, according to Dr. McClung, depression can so immobilize a person that he becomes incompetent and unable to participate in his defense. 2RP 5. Counsel maintained "we don't really have any expert evaluation from either the State or from our very own expert" and expressed discomfort about going to trial "with somebody that seems so profoundly depressed he's unable to help us." 2RP 5.

Judge Kessler stated he read the report prepared by Dr. Gagliardi and "[b]ased upon that report, arguments of counsel, and the Court's colloquy with Mr. McClung [sic], in particular, based upon the statement contained on page three of the report, 'He was capable of normal conversations with select peers and staff, but he refused to cooperate with clinical evaluators; he interacted normally with peers and some staff,' while the Court understands the Defense is hamstrung, the Court believes that the hamstrung is a result of willfulness, not incompetency, and finds the Defendant is competent to stand trial and will left [sic] the stay." 2RP 5. Judge Kessler entered written findings and conclusion to that effect. CP 38-39.

Counsel asked McGowen if he still wanted them to be his lawyers. 2Rp 5. McGowen said no and maintained "God is my lawyer from now on. I don't know no lawyer." 2RP 5-6. Counsel told the court that he believed McGowen was making a pro se motion to discharge counsel. 2RP 6. McGowen affirmed "That's right." 2RP 6. The following exchange occurred:

> The Court: All right. Well, the Court cannot, if Mr. McClung won't even tell me what he's charged with --
> Ms. McCoy: Mr. McGowen.
> The Court: Mr. McGowen, I'm sorry, won't even tell me what he's charged with --
> Mr. McGowen: I don't know what I'm charged with.
> The Court: All right. Well, I don't believe that and --

> Mr. McGowen: Yeah, well, I don't understand. I don't know what I'm charged with; and that's the truth.
> The Court: Do you understand the maximum penalty for the crimes you're charged with is 10 years in jail?
> Mr. McGowen: No, I don't understand that either.
> The Court: Yeah, okay. Well, I don't find a knowing, voluntary and intelligent waiver of counsel. Having found the Defendant is acting willfully, I don't --
> Mr. McGowen: That's not the problem. I'm not saying that I'm incompetent. I'm very competent. I'm ready to go to trial and I know that the people that's representing me don't have my best interest. So I'm not incompetent; that's not the problem. I understand very well what's going on. I don't want these people representing me. God is my representative.
> The Court: All right. I don't find that -- I still don't find that this is a knowing, voluntary and intelligent waiver of counsel.

2RP 6-7.

The court entered a written order "denying defendant's motion to proceed pro se," which stated "the defendant would not or could not tell the court his charges or maximum penalty, therefore the court does not find knowing, intelligent, voluntary waiver of right to counsel." CP 37.

On April 1, 2011 at a hearing presided over by the Honorable Theresa Doyle, defense counsel put on the record that McGowen had not communicated with counsel for many months. 4RP 7-8. McGowen, who was in court that day, sat at a 90 degree angle staring out the window. 4RP 8. Counsel still had competency concerns but had no new information to make another motion for a competency evaluation. 4RP 8-

9. Counsel wanted to give McGowen an opportunity to request new counsel or proceed pro se. 4RP 8. The court asked McGowen if he wanted to address the court. 4RP 9. McGowen did not respond, and continued to look out the window with his back to defense counsel. 4RP 9.

On April 6, 2011, at a hearing presided over by the Honorable Kimberley Prochnau, McGowen was dressed in his red jail uniform. 5RP 11. The judge told him that he needed to change into civilian clothes once the jury came in and asked if there was anything he wanted to say about that. 5RP 11-12. The judge noted for the record that McGowen faced away toward the wall. 5RP 12. The judge said it would be to his benefit to look interested in front of the jury. 5RP 12.

Defense counsel went through the history of competency concerns but had no change to report that would trigger a new request for a competency evaluation. 5RP 12-14. McGowen had not spoken in court since Judge Kessler's hearing on February 14, 2011. 5RP 14. Counsel had never had a client that did not talk to her and did not know where he was coming from in terms of whether he had a motion to represent himself or discharge counsel. 5RP 14. The judge asked McGowen about that, but he did not respond and did not turn his head towards the judge. 5RP 15.

The prosecutor represented that he had listened to McGowen's jail calls and he was capable of having a lucid conversation. 5RP 15-16.

From this, the prosecutor concluded McGowen was able to speak but chose not to. 5RP 15. The judge warned McGowen that his behavior was a dangerous strategy if in fact it was a strategy. 5RP 16-17.

On April 13, 2011, the court deemed McGowen to have waived his right to wear street clothes but that he could change his mind and wear them at any point in the future. 8RP 2-3. Before prospective jurors were brought into the courtroom for voir dire, a record was made that McGowen wore earplugs. 8RP 7-9. He faced the wall, not looking at the judge. 8RP 9. At the court's direction, an officer directed McGowen to remove the earplugs, but McGowen said no. 8RP 9-10. The court said it was his choice not to hear the proceedings. 8RP 11.

McGowen continued to wear earplugs on the second day of voir dire, shaking his head no when asked by court officer if he wanted to take them out. 9RP 2. Defense counsel again raised a potential competency issue. 9RP 3-4. Counsel put on the record that on the previous day McGowen sat staring at the wall "seeming almost in a catatonic state as we're trying to select the jury." 9RP 4. McGowen had not communicated with counsel for months. 9RP 3-4.

The prosecutor opined there was no new information warranting further inquiry into competency, again referencing the jail calls during which McGowen carried on lucid conversations. 9RP 4-7. Defense

counsel reiterated that she was puzzled by McGowen's behavior and believed she had to raise the competency issue given the question of whether he was in "such a profound depression that he is willing, for want of a better word, essentially to commit suicide by not participating in the case that has such grave consequences." 9RP 7.

Judge Prochnau deferred on the matter until she had an opportunity to listen to the jail calls. 9RP 7-9. Later that day, when the jail calls were offered, defense counsel noted competency can ebb and flow and that the stress of trial may affect competency. 9RP 53-54. Counsel equated the significance of the jail calls with the perfunctory WSH evaluation that had been done earlier, which relied on the lack of psychotic behavior as McGowen moved about the floor as the basis to find competency. 9RP 54. Counsel was frustrated that McGowen was not giving any direction on whether he wanted his two attorneys to represent him. 9RP 54-55.

During voir dire, several prospective jurors commented on McGowen's withdrawn and seemingly indifferent demeanor. 9RP 57-62. Later on during voir dire, McGowen disrupted the proceedings with a religious-themed outburst about God, the devil and the blood of the lamb. 9RP 67-70. McGowen was removed from the courtroom. 9RP 69-71.

McGowen returned to court after a recess, at which point the judge admonished McGowen about his behavior. 9RP 72. McGowen said he

did not care and that he was going to be sent to prison for the rest of his life. 9RP 72-73. The judge said she had listened to the jail calls and he appeared capable of having a normal conversation. 9RP 73. She ordered his removal from the courtroom after he did not respond to her request that he behave himself. 9RP 73-74. Defense counsel objected and raised the competency issue again. 9RP 74-78.

The prosecutor believed McGowen's behavior was intentional rather than the product of mental illness, referencing the jail calls and how he interacted with people in the jail. 9RP 78-80. Defense counsel contended McGowen's competency problems stemming from a pre-existing mental problem flared up in the courtroom because of the heightened stress involved in that environment. 9RP 80-82.

The judge said she would revisit the competency matter at a later time. 9RP 82. The judge again asked McGowen if he would behave himself, but he did not remove his earplugs and did not answer. 9RP 83-84. The prosecutor asked for a renewed competency determination before proceeding further. 9RP 86-92. Defense counsel renewed a request for another competency evaluation. 9RP 89. Following a recess, McGowen refused to return to the courtroom. 9RP 92-94. When defense counsel visited him in his jail cell, he kept a shirt over his head and was non-communicative except to answer no when asked if he wanted to come to

the courtroom. 9RP 94. The judge decided to release the jury panel. 9RP 98-100.

On April 18, 2011, McGowen refused to come to court. 10RP 2-3. Defense counsel continued to express major concerns about competency and requested an opportunity to disclose some troubling things at an in camera hearing. 10RP 3. Counsel believed McGowen's refusal to come to court was a further manifestation of his incompetency. 10RP 6. She pointed out McGowen could not waive his right to be present if he was incompetent. 10RP 8.

Later that day, the judge allowed defense counsel to disclose information regarding competency concerns in camera. 10RP 15-16, 19-26. Following the in camera hearing, the jail calls were addressed again, with the prosecutor reiterating that they showed McGowen was capable of normal communication. 10RP 27-30. Defense counsel responded McGowen was capable of having normal interaction, but was not able to do so in stressful situations like coming to court. 10RP 30. Counsel believed there was an issue of competency both as to capacity to understand the nature of the proceeding and the ability to rationally assist counsel. 10RP 32-33. Counsel noted that McGowen, who was present in court, was currently siting at a 90 degree angle not communicating with counsel. 10RP 32-33. A jail officer testified for purpose of addressing

the competency issue that he had interacted with McGowen on a limited basis and McGowen did not exhibit a problem with comprehension or communication during those times. 10RP 37-43

Following this testimony, the prosecutor argued McGowen's behavior was tactical. 10RP 51-52. Defense counsel requested a competency evaluation under chapter 10.77 RCW. 10RP 53-56. The judge reviewed the evidence before her and, giving weight to defense counsel's opinion, ordered another competency evaluation. 10RP 56-57; CP 119-23.

The same WSH doctor who did the previous evaluation completed a second evaluation in which he again concluded McGowen was competent. CP 126-32; 12RP 2. Again, the WSH examination did not include a personal interview or updated testing of McGowen because he refused to participate. CP 128-29.

The competency issue was addressed in court on June 7, 2011. 12RP 2-8. Defense counsel said she still had very serious concerns about McGowen's competency. 12RP 3. McGowen would not speak to the defense expert or to the WSH evaluator. 12RP 4. The defense did not have an expert report to counter the WSH report, but counsel still had a concern about competency. 12RP 4. The prosecutor maintained there was

no showing that McGowen was incompetent. 12RP 4-6. McGowen, who was present in court, said he was "very competent." 12RP 6.

Judge Prochnau ruled McGowen was competent, noting (1) WSH had twice found McGowen to be competent; (2) there was evidence of incompetency in terms of not talking to his attorneys, use of ear plugs, and facing the wall, and the outburst during voir dire; (3) the outburst indicated he understood the nature of the charges against him insofar as he knew the was charged with assault, he understood his defense to be the complaining witness's bias and untrustworthiness, and he was aware the penalty was life without parole if convicted; (4) the jail calls show he was capable of communicating with others; (5) his outbursts appear to be purposeful. 12RP 6-8; CP 124-25.

McGowen later replied no to the judge's question of whether he wished to dress in street clothes. 12RP 50. In response to the judge's question of whether he would further disrupt proceedings, he said he would not. 12RP 50-52. The judge said if there were further disruption, McGowen would have the option of observing the proceedings in an alternate viewing location. 12RP 50-52. The judge noted McGowen was presently engaging with his attorneys in court. 12RP 53.

On June 8, 2011, shortly before a panel of prospective jurors was brought into the courtroom, the judge noted McGowen had fashioned

earplugs out of paper and had his head on his arms as though asleep on the table. 13RP 21. McGowen did not respond when the judge urged him to look like he was paying attention. 13RP 21. A prospective juror commented that McGowen looked guilty by the way he was just lying there and showing no respect. 13RP 133-35.

McGowen continued to wear paper earplugs and keep his head down on the second day of voir dire. 14RP 83-84, 143. McGowen's demeanor was an ongoing topic during voir dire. 14RP 87-90, 100-14, 119-20, 127, 129-45. One prospective juror described McGowen as "rocking back and forth, almost as if he were a child." 14RP 105-06. Another commented that the jail clothes made McGowen look guilty. 14RP 99-100. Outside the presence of the panel, the judge described McGowen's demeanor, including his being "slumped down," as a voluntary choice that did not make him look good. 14RP 111.

On June 13, 2011, McGowen disrupted voir dire by saying he was facing life in person for snatching his girlfriend's phone. 15RP 30. The judge found his behavior was intended to cause a mistrial and removed McGowen from the courtroom. 15RP 30-37. Defense counsel noted an ongoing competency concern and moved for a mistrial. 15RP 36-38, 46. The court denied the mistrial motion. 15RP 46. An alternate viewing location was set up for McGowen to observe the proceedings. 15RP 32,

37-40, 47. The outburst was addressed during voir dire. 15RP 47-49, 56-62.

After the jury was selected, defense counsel raised the competency issue again, telling the court that counsel had observed McGowen in the alternate viewing room touching animal photos in a National Geographic magazine, rocking back and forth, giggling, making religious-themed remarks and saying something about people spending money to have sex with children. 15RP 76-86. The judge denied a request for a third competency evaluation. 15RP 86.

On June 14, 2011, before the jury was brought in, McGowen was in court. 16RP 21. He had his forehead on some Kleenex and earplugs in his ears. 16RP 21. He mumbled recitations from the Bible and did not speak to counsel. 16RP 21. Counsel again raised the issue of competency, but the court found there was no new evidence to support a finding of incompetency. 16RP 21. McGowen later refused to come to court and was taken to the alternate viewing room. 16RP 36-37. McGowen did not come to court during the remainder of trial. See, e.g., 17RP 3-4, 79; 18RP 138-39; 19RP 4-5; 20RP 4; 21RP 3-4, 89-90; 22RP 3; 23RP 24-29.

On June 15, 2011, defense counsel again raised the competency issue, informing the court that she had tried to speak with McGowen about Barraza's direct testimony and to help her prepare for cross examination,

but got nowhere with him. 17RP 87-88, 91. The court agreed with the prosecutor that there was no new information presented on lack of competency. 17RP 91-92. After the State rested its case, defense counsel told the court she had discussed with McGowen whether he wanted to testify and he declined to do so after weighing the pros and cons. 23RP 112.

After hearing the evidence, a jury convicted McGowen of the lesser crime of misdemeanor harassment on count II and convicted on the remaining counts as charged, returning affirmative special verdicts on the domestic violence aggravator. CP 136-45. The State sought a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA), contending McGowen's prior convictions for second degree robbery under cause number 97-1-01315-8 and second degree robbery under cause number 93-1-04409-3 each constituted a "strike" and that the current convictions for second degree assault each constituted a third "strike." CP 360-61, 365; 33RP 5.

Defense counsel argued McGowen's prior 1993 conviction for second degree robbery under cause number 93-1-04409-3 did not count as a strike under the POAA and therefore McGowen could not be sentenced to life without the possibility of parole. CP 281-88; 308-13. The defense maintained the judgment and sentence for the 1993 second degree robbery,

derived from a guilty plea, was invalid on its face because the offender score and resulting standard range were miscalculated, the court imposed a sentence that was not statutorily authorized, and McGowen was misadvised about a direct sentencing consequence, rendering his guilty plea constitutionally invalid. CP 284-88; 308-13; 33RP 45-52. The offender score and standard range error in the judgment and sentence was the result of improperly including a prior Colorado robbery conviction as a prior offense under the Sentencing Reform Act. 33RP 46-49. In an earlier decision, the Court of Appeals held McGowen's prior Colorado robbery conviction was not comparable to a Washington offense and therefore could not be used for sentencing purposes. CP 282-83 (citing State v. McGowen, 95 Wn .App. 1072, 1999 WL 364058 (1999) (unpublished). The defense argued the State was collaterally estopped from challenging the Court of Appeals' determination that the prior Colorado robbery conviction was not comparable and therefore could not be relied on for sentencing purposes. CP 310-11.

The State disagreed with the defense argument, contending the judgment and sentence for the 1993 robbery conviction reflected a correct calculation of the offender score and standard range and that the court sentenced McGowen within that range. CP 290-92, 299; 33RP 40-41. The State insisted that McGowen, having never collaterally attacked the

1993 robbery conviction, could not bring an untimely challenge now. CP 292, 295, 302; 33RP 38-45, 52-55.

The court ruled the judgment and sentence for the 1993 robbery conviction was facially valid and that McGowen's plea was valid because "the legal sentencing and proper sentencing is not a direct consequence" of a plea. 33RP 56-61. The court sentenced McGowen to life without the possibility of parole. CP 333. This appeal follows. CP 340-53.

C. ARGUMENT

1. THE COURT ERRED IN FINDING MCGOWEN COMPETENT TO STAND TRIAL WITHOUT OBSERVING THE PROCEDURAL SAFEGUARDS MANDATED BY DUE PROCESS AND STATUTE.

Once a trial court finds reason to doubt competency, it is constitutionally required to hold a formal hearing to resolve the issue so long as competency is contested. Here, defense counsel maintained a challenge to McGowen's competency to stand trial. Judge Prochnau erred in finding McGowen was competent in the absence of executing the procedure required by due process and chapter 10.77 RCW. U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

The accused in a criminal case has a fundamental right not to be tried while incompetent to stand trial. State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009) (citing Drope v. Missouri, 420 U.S. 162, 171-72,

95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); In re Pers. Restraint of Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001)). "Washington law affords greater protection by providing that '[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.'" Fleming, 142 Wn.2d at 862 (alteration in original) (quoting RCW 10.77.050).

"The failure to observe procedures adequate to protect this right is a denial of due process." Heddrick, 166 Wn.2d at 904 (quoting State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing Drope, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103; Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)). "Chapter 10.77 RCW provides such a procedure." Heddrick, 166 Wn.2d at 904. The "[p]rocedures of the competency statute . . . are mandatory and not merely directory." Heddrick, 166 Wn.2d at 904 (quoting Fleming, 142 Wn.2d at 863 (citing State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982)). The "failure to observe these procedures is a violation of due process." Heddrick, 166 Wn.2d at 904.

A defendant's due process right to a fair trial requires the trial court to conduct an evidentiary hearing whenever there is reason to doubt a defendant's competency. See, e.g., Pate, 383 U.S. at 377, 385-86; Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001); Johnson v. Norton, 249

F.3d 20, 26 (1st Cir. 2001); Weisberg v. Minnesota, 29 F.3d 1271, 1275-76 (8th Cir. 1994). Consistent with this constitutional mandate, once the trial court makes a threshold determination that there is "reason to doubt" competency pursuant to RCW 10.77.060, the court must order a formal hearing to determine competency before proceeding to trial. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); State v. Israel, 19 Wn. App. 773, 775, 776-78, 577 P.2d 631 (1978) (due process requires the trial court to make findings of fact and conclusions of law after an evidentiary hearing); cf. State v. Brooks, 16 Wn. App. 535, 538, 557 P.2d 362 (1977) (trial court substantially complied with the purpose and intent of RCW 10.77.060 because defendant received "a full competency hearing" consisting of testimony presented by two experts of the defendant's own choosing).

Procedures used to determine competency under chapter 10.77 RCW may be waived in certain circumstances. Heddrick, 166 Wn.2d at 905, 906-07 (citing Israel, 19 Wn. App. at 779 (statutory requirement that two experts be appointed to examine a defendant waived where trial judge asked questions of defendant and allowed prosecutor to examine her; defense counsel did examine client but instead asked the judge to find client competent at the close of the perfunctory examination)). The

procedures may be waived when defense counsel withdraws a competency challenge. Heddrick, 166 Wn.2d at 908. But "so long as a defendant maintains a challenge to competency, the chapter 10.77 RCW procedures are mandatory to satisfy due process." Id. at 909.

The procedure and ruling challenged on appeal involves Judge Prochnau's finding of competency on June 7, 2011. 12RP 2-8; CP 124-25. The WSH evaluator opined McGowen was competent. CP 126-32. Defense counsel, however, still had very serious concerns about McGowen's competency.[3] 12RP 3-4. Unlike in Heddrick, McGowen's counsel did not withdraw her competency challenge. Yet the court did not conduct a formal evidentiary hearing before deciding competency. This was a due process violation and a statutory error. Heddrick, 166 Wn.2d at 909; Israel, 19 Wn. App. at 775; Pate, 383 U.S. at 377, 385-86.

In finding McGowen competent, the court considered the WSH reports, the jail calls, and McGowen's behavior. 12RP 6-8. But after finding a reason to doubt competency, the court failed to hold a formal evidentiary hearing on the matter in which the WSH evaluator could be examined. Examination was especially important because the WSH evaluator was unable to conduct a full evaluation due to McGowen's

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[3] In the boilerplate, pre-printed portion of the written findings and conclusions on competency, it erroneously states that defense counsel spoke in support of a determination of competency. CP 124.

refusal to participate. The critical question was whether McGowen's behavior was purposeful or was the manifestation of mental illness that rendered him unable to rationally assist counsel. That was an area of inquiry where examination of the WSH evaluator, including cross examination by defense counsel, would have been useful.

McGowen's personal claim that he was "very competent" did not withdraw defense counsel's challenge to his competency. 12RP 6. McGowen's protestation is immaterial because it is "contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." Medina v. California, 505 U.S. 437, 450, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (quoting United States v. DiGilio, 538 F.2d 972, 988 (3d Cir. 1976)).

Judge Prochnau's finding of competency on June 7, 2011 is the product of an inadequate procedure and is therefore infirm. 12RP 6-8; CP 124-25. This Court should reverse the conviction because the court's failure to adhere to adequate procedural safeguards in determining competency violated due process and statutory requirements. Pate, 383 U.S. at 377, 385-86; Marshall, 144 Wn.2d at 273, 281 (reversing conviction where trial court denied motion to withdraw plea despite

evidence of incompetency without conducting formal competency hearing compliant with competency statute).

Reversal rather than remand for a retroactive competency hearing is required, given the inherent difficulties of such a nunc pro tunc determination even under the most favorable circumstances. Pate, 383 U.S. at 387; Drope, 420 U.S. at 183; see also Dusky v. United States, 362 U.S. 402, 403, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (remanding for a new trial "in view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago."); Griffin v. Lockhart, 935 F.2d 926, 931 (8th Cir. 1991) (reversing conviction instead of ordering a retrospective competency hearing despite the existence of a contemporaneous medical report because "over three years have passed since his trial and it seems impossible to now conduct a meaningful nunc pro tunc hearing.").

2. THE COURT ERRED IN DENYING MCGOWEN'S REQUEST TO DISCHARGE COUNSEL IN THE ABSENCE OF ADEQUATE INQUIRY.

Criminal defendants have the right to assistance of counsel. U.S. Const. amend. VI; Wash. Const., art. I, § 22. Although indigent defendants do not have an absolute right to counsel of choice, substitution of counsel is required where there is a conflict of interest, an irreconcilable

conflict or a complete breakdown in communication between the attorney and the defendant. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001) (Stenson II); State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The trial court abused its discretion in failing to appoint new counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown in communication.

A trial court has the discretion to grant or deny a motion for substitution of counsel. Stenson II, 142 Wn.2d at 733. Constitutional considerations, however, provide a check on the exercise of this discretion. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel. Bland v. Cal. Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir. 1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000). In reviewing a trial court's refusal to appoint new counsel for error, three factors are considered: (1) the adequacy of the trial court's inquiry; (2) the timeliness of the motion; and (3) the extent of the conflict. Stenson II, 142 Wn.2d at 724 (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

On February 14, 2011, McGowen affirmatively agreed with defense counsel that he was making a motion to discharge counsel. 2RP 6.

Judge Kessler proceeded to ask whether McGowen knew the charges and maximum penalty. 2RP 6-7. After McGowen said he did not understand, the court denied what it described as a motion to proceed pro se. 2RP 7; CP 37.

The court did not apply the correct legal standard in determining McGowen's motion to discharge counsel. In determining whether to grant a motion for new counsel, the trial court must inquire into the nature and extent of the conflict or breakdown in communication as well as the timeliness of the motion. Stenson II, 142 Wn.2d at 724. Judge Kessler did not do that.

Instead, the court treated McGowen's request to discharge counsel as a request to proceed pro se. A request to proceed pro se must be knowingly and intelligently made. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). This is why the court asked if McGowen knew the charges he faced and the maximum penalty. 2RP 6.

But McGowen did not make a motion to represent himself. He made a motion to discharge counsel. 2RP 6. A demand to proceed pro se must be unequivocal. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997) (Stenson I), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). Courts must indulge in every reasonable presumption against a defendant's waiver of his right to counsel. In re

Detention of Turay, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). McGowen did not make an unequivocal request to proceed pro se. Yet the court presumed McGowen was demanding to represent himself. Under these circumstances, it was improper for the court to treat McGowen's motion to discharge counsel as a motion to proceed pro se rather than a motion for new counsel.

A court necessarily abuses its discretion when its decision is based on the application of an incorrect legal analysis. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). The correct legal analysis here required consideration of the factors used to determine a request for new counsel rather than a request to proceed pro se.

The court failed to conduct a sufficient inquiry into McGowen's request to remove appointed counsel. Before ruling on a motion for new counsel, the court must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson II, 142 Wn.2d at 723-24. An adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." State v. Cross, 156 Wn.2d 580, 610, 132 P.3d 80 (2006). The court's inquiry should be such "as might ease the

defendant's dissatisfaction, distrust, and concern." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001). The inquiry must also provide a "sufficient basis for reaching an informed decision." Adelzo-Gonzalez, 268 F.3d at 777 (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). With this goal in mind, the trial court should question the attorney and defendant "privately and in depth" about the extent of the conflict. Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160).

"Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." Nguyen, 262 F.3d at 1003. "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Id. at 1003-04 (quoting Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)). An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003.

The record demonstrates a serious breakdown in communications and conflict with appointed counsel to the point where McGowen would not or could not assist his attorneys in his own defense. 1RP 2-4; 2RP 3-7. The court found McGowen competent, but did not inquire into the nature

of the conflict and the basis for breakdown in communication by asking any pertinent questions of McGowen.

"Before the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995). The trial court's inquiry here was inadequate because it did not fully inform itself of the extent of the conflict. Such a conclusion is in accord with precedent. In Cross, the Supreme Court found sufficient inquiry where the trial court made "careful review" of the extent of the conflict, which allowed the court to become "fully apprised" of the problem at hand. Cross, 156 Wn.2d at 610. The trial court there denied the defendant's motion to discharge counsel only after making repeated inquiries, conducting an "extensive" *in camera* hearing, and reviewing briefs on the subject. Id. at 605-06, 608, 610. Similarly, the Court in Stenson II found sufficient inquiry where the trial court considered exhaustively detailed descriptions of the extent of the reputed conflict given at an *in camera* hearing. Stenson II, 142 Wn.2d at 726-29, 731. By way of contrast, the court's inquiry of McGowen on the conflict issue was nonexistent, and so did not allow for the court to make a fully informed decision on his request to discharge assigned counsel.

The court erred in denying McGowen's motion to discharge counsel without conduct an adequate inquiry into the matter. The erroneous denial of a motion to substitute counsel requires reversal and remand for a new trial. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. In the event this Court declines to reverse the convictions, the alternative remedy is remand for an evidentiary hearing to determine (1) the nature and extent of the conflict between McGowen and his attorneys, and (2) whether that conflict deprived McGowen of his constitutional right to assistance of counsel. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000); RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.").

3. MCGOWEN'S LIFE SENTENCE MUST BE VACATED BECAUSE ONE OF THE PRIOR CONVICTIONS IS FACIALLY INVALID.

The judgment and sentence for the prior 1993 robbery conviction is constitutionally invalid on its face. That prior conviction cannot form a basis for sentencing McGowen to life without the possibility of parole under the threes strikes law. McGowen's sentence must therefore be reversed.

Under the Persistent Offender Accountability Act (POAA), otherwise known as the "three strikes" law, a defendant who commits a

"most serious offense" faces a mandatory life sentence without the possibility of parole if he has two prior convictions for "most serious offenses." RCW 9.94A.030(32), (37)(a); RCW 9.94A.570.

A defendant's "criminal history" consists of the defendant's "prior convictions . . . whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11). A prior conviction that is "constitutionally invalid on its face may not be considered" in a sentencing proceeding. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). "Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Ammons, 105 Wn.2d at 188.

Thus, where the documents of the prior conviction establish an infirmity of constitutional magnitude on their face, the conviction may not be counted as a "strike" under the POAA. See State v. Herzog, 48 Wn. App. 831, 834, 740 P.2d 380 (1987) (where documents of prior West German conviction demonstrated, on their face, that defendant was found guilty by jury of less than six persons, conviction was facially invalid and could not be included in offender score).

Since Ammons, the meaning and scope of "facial invalidity" has primarily been developed in case law involving collateral attacks. In re Pers. Restraint of Coats, 173 Wn.2d 123, 134 n.7, 138-42, 267 P.3d 324

(2011). It is important to remember, however, that a challenge to the use of a prior conviction for sentencing purposes under the POAA is not a collateral attack on that prior conviction. The State failed to heed the distinction in arguing McGowen's challenge to the validity of the 1993 robbery conviction was an improper and untimely collateral attack. CP 292, 295, 302; 33RP 38-45, 52-55. McGowen's objection to the use of that conviction is not a collateral attack. "Rather, his arguments are directed at the present use of a prior conviction to establish his current status as a persistent offender." State v. Knippling, 166 Wn.2d 93, 103, 206 P.3d 332 (2009) (citing State v. Carpenter, 117 Wn. App. 673, 678, 72 P.3d 784 (2003) (objecting to a prior conviction in a POAA sentencing proceeding is not a collateral attack). The general one year time bar on collateral attacks under RCW 10.73.090 is therefore irrelevant.

Errors rendering a judgment facially invalid occur when a court exceeds its statutory authority in entering the judgment and sentence. Coats, 173 Wn.2d at 135, 143-44. A miscalculated offender score evident on the face of a judgment and sentence renders it invalid. See In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866-67, 871, 50 P.3d 618 (2002) (judgment and sentence invalid on its face if sentence based upon a miscalculated offender score and "a defendant cannot agree to punishment in excess of that which the Legislature has established"); In re Pers.

Restraint of LaChapelle, 153 Wn.2d 1, 6, 14, 100 P.3d 805 (2004) (judgment and sentence facially invalid where court plainly miscalculated offender score); In re Pers. Restraint of Bradley, 165 Wn.2d 934, 937-39, 941, 944, 205 P.3d 123 (2009) (same).

The judgment and sentence for McGowen's 1993 robbery conviction, on its face, reflects a miscalculation of the offender score and corresponding standard range sentence. The judgment and sentence lists a standard range of 13-17 months based on an offender score of "3." CP 306. That offender score is derived from two prior Colorado convictions, a second degree burglary and a robbery. CP 306. The Colorado robbery conviction added two points to the offender score. See Former RCW 9.94A.360(3) (1993) ("Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law."); Former RCW 9.94A.360(9) (1993) (if present conviction is for a violent offense, count two points for each prior adult violent felony conviction). McGowen was sentenced to a standard range sentence of 13 months. CP 307.

The court had no authority to impose that sentence because it was based on a miscalculated offender score. The 1993 judgment and sentence is therefore facially invalid. Coats, 173 Wn.2d at 135, 143-44; Goodwin,

146 Wn.2d at 867, 873-74; LaChapelle, 153 Wn.2d at 6, 14; Bradley, 165 Wn.2d at 937-39, 941, 944.

The Colorado robbery conviction was not comparable to a Washington offense and therefore could not contribute to the offender score for the 1993 robbery conviction. The Court of Appeals has already decided the merits of this issue. CP 282-83 (citing State v. McGowen, 95 Wn .App. 1072, 1999 WL 364058 (1999) (unpublished). The court only had the authority to sentence McGowen to a standard range sentence of 6-12 months based on an offender score of "1."[4]

The defense correctly argued the State was collaterally estopped from challenging the non-comparability of the Colorado robbery conviction as part of the sentence it presently sought against McGowen. CP 310-11. The court nonetheless opined the State was not collaterally estopped from showing the factual comparability of the Colorado robbery conviction and therefore the judgment and sentence for the 1993 robbery conviction did not show a facial invalidity. 33RP 59. The court is wrong.

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[4] See Former RCW 9.94A.360(9) (1993) (if present conviction is for a violent offense, count two points for each prior adult violent felony conviction and one point for each prior adult nonviolent felony conviction); Former RCW 9.94A.320 (1993) (second degree robbery has seriousness level of IV); Former RCW 9.94A.310 (1993) (sentencing grid shows current offense with seriousness level of IV and offender scorer of "1" has standard range of 6-12 months). For the Court's convenience, the Sentencing Guidelines Commission manual page for a 1993 second degree robbery offense is attached as appendix A.

The State is completely estopped from arguing the Colorado robbery conviction could legally be included in the judgment and sentence for 1993 Washington robbery conviction.

The Court of Appeals affirmed the trial court's ruling that the Colorado robbery conviction is not comparable to a Washington offense. McGowen, 1999 WL 364058 at 1, 6-7; see Martin v. Wilbert, 162 Wn. App. 90, 93 n.1, 253 P.3d 108 (appellate court may consider unpublished opinions in examining issues such as collateral estoppel), review denied, 173 Wn.2d 1002 (2011). The State was given the opportunity to prove that Colorado offense was comparable but was unable to do so by showing the offenses were factually the same notwithstanding the different legal elements. McGowen, 1999 WL 364058 at 2, 6-7.

Collateral estoppel "precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment." State v. Polo, 169 Wn. App. 750, 763, 282 P.3d 1116 (2012) (quoting State v. Harrison, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003)). Collateral estoppel applies where (1) the issue in the prior adjudication is identical, (2) the prior adjudication is a final judgment on the merits, (3) the party against whom the doctrine is asserted was party to or in privity with a party to the prior adjudication, and (4) barring the relitigation of the

issue will not work an injustice on the party against whom the doctrine is applied. Harrison, 148 Wn.2d at 561.

The issue here is identical: whether the Colorado robbery conviction is comparable to a Washington offense for sentencing purposes. The prior Court of Appeals decision affirming the trial court's ruling is a final decision on the merits of the comparability issue. The parties were the same. And there is no injustice because the State had a full and fair opportunity to prove the Colorado conviction was comparable. See Braaten v. Saberhagen Holdings, 137 Wn. App. 32, 40, 151 P.3d 1010 (2007) ("Injustice in the collateral estoppel context does not refer to a substantive injustice, but to whether the party was afforded a full and fair hearing."), rev'd on other grounds, 165 Wn.2d 373, 198 P.3d 493 (2008).

The State suggested reliance on the previous Court of Appeals decision would be going beyond the face of the judgment and sentence to find invalidity. 33RP 53-54. But the facial invalidity rule "permits consideration of documents that bear on the trial court's authority to impose a valid judgment and sentence," even when such documents are not part of the judgment and sentence itself. In re Pers. Restraint of Carrier, 173 Wn.2d 791, 800, 272 P.3d 209 (2012) ("Carrier's 1985 dismissal order is a court document of unquestionable authenticity that has a direct bearing on the trial court's authority to impose a life sentence. We

therefore consider the dismissal order insofar as it reveals that Carrier's judgment and sentence includes the dismissed indecent liberties conviction in his criminal history."). There is no sound reason why a Court of Appeals decision that decisively bears on the trial court's authority to impose a valid judgment and sentence in relation to the comparability of an out-of-state conviction should not be accorded the same status.

Under the SRA, a "conviction" includes "a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). McGowen's plea to the 1993 robbery was involuntary and constitutionally invalid because he pled guilty based on a misunderstanding about the direct sentencing consequences. This infirmity is apparent from the face of the judgment and sentence. The trial court therefore exceeded its authority in relying upon the conviction at sentencing.

A defendant's misunderstanding of sentencing consequences when pleading guilty constitutes constitutional error. State v. Mendoza, 157 Wn.2d 582, 589, 141 P.3d 49 (2006). "It is a violation of due process to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily." State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)); U.S. Const. Amend. XIV, Wash. Const. art. I, § 3. A guilty plea is deemed involuntary when based on misinformation

regarding a direct consequence of the plea. Mendoza, 157 Wn.2d at 590-91. The standard range is a direct consequence of a guilty plea. Id. at 590-91; State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

The trial court in the present case ruled McGowen's 1993 plea was valid because "the legal sentencing and proper sentencing is not a direct consequence" of a plea. 33RP 60. That ruling is plainly wrong in light of the foregoing authority.

Although unnecessary to demonstrate facial invalidity of the judgment and sentence, examination of the plea documents only reinforces the error evident within the four corners of the judgment and sentence. Facial invalidity of the judgment and sentence may be shown by documents related to plea agreements. Coats, 173 Wn.2d at 140, 142; In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353-54, 5 P.3d 1240 (2000). The plea form listed the standard range as 3-9 months based on an offender score of zero and unknown criminal history. 33RP 57; Sentencing Ex. 2, 3.

The trial court asserted "the plea does not incorrectly count the Colorado conviction in the offender score. In fact, it found the score as zero." 33RP 60. Yet the offender score and the standard range set forth in the plea form are wrong. Sentencing Ex. 2, 3. McGowen was not sentenced based on an offender score of zero and a standard range of 3-9

months. He was misadvised of a direct sentencing consequence. Even if the plea agreement could be read as anticipating criminal history might ultimately be found and included for sentencing purposes, the sentence that was actually imposed could never comport with an accurate representation of the direct sentencing consequences because the court exceeded its authority in including the Colorado robbery conviction in the offender score. The 13 month standard range sentence that was imposed on McGowen based on an offender score of "3" was illegal because the Colorado robbery conviction could not lawfully be included in the offender score.

The facial invalidity in the judgment and sentence demonstrates McGowen was misinformed of the standard range, a direct consequence of his plea. McGowen's plea was involuntary, and thus constitutionally infirm, as a result of the error. A plea, upon acceptance, is a conviction. RCW 9.94A.030(9). The 1993 robbery conviction is invalid on its face.

The State argued any invalidity in the sentence did not render the underlying conviction invalid, quoting Coats for the proposition that "an involuntary plea does not render a judgment and sentence facially invalid." 33RP 39, 44 (quoting Coats, 173 Wn.2d at 141). Coats, and the cases it relied upon for this proposition, involved untimely collateral attacks on a

judgment and sentence. The proposition has been applied to collateral attacks on a conviction.

McGowen does not raise a collateral attack. Knippling, 166 Wn.2d at 103; Carpenter, 117 Wn. App. at 678. McGowen is not seeking to withdraw his guilty plea to the 1993 robbery conviction as part of this proceeding. He seeks to prevent the use of that unconstitutional conviction for the purpose of challenging his current POAA sentence.

Second, even if applicable, the rule does not defeat McGowen's challenge to the constitutional validity of the 1993 robbery conviction. As Coats explains, "[t]he question is not . . . whether the plea documents are facially invalid, but rather whether the judgment and sentence is invalid on its face. The plea documents are relevant only where they may disclose invalidity in the judgment and sentence." Coats, 173 Wn.2d at 141 (quoting In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002)). "[A]n invalid plea agreement cannot *on its own* overcome the one year time bar or render an otherwise valid judgment and sentence invalid." Coats, 173 Wn.2d at 141-42 (emphasis added) (quoting In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 782, 203 P.3d 375 (2009)). "In short, we may examine a plea statement to evaluate a claim that a judgment and sentence is not valid on its face, but not the other way

around." Coats, 173 Wn.2d at 142; accord In re Pers. Restraint of Toledo-Sotelo, 176 Wn.2d 759, 770, 297 P.3d 51 (2013).

Here, the face of the judgment and sentence shows invalidity because the court exceeded its statutory authority in treating the Colorado conviction as comparable offense, resulting in an incorrect offender score and standard range sentence. The plea documents simply confirm the invalidity that already exists on the face of the judgment and sentence. And those plea documents, considered in conjunction with the judgment and sentence, demonstrate McGowen was misadvised of the standard range — a direct sentencing consequence that rendered his plea, and thus conviction, constitutionally invalid.

For this reason, the court could not treat the 1993 robbery conviction as a conviction that was constitutionally valid on its face. A prior conviction that is "constitutionally invalid on its face may not be considered" in a sentencing proceeding. Ammons, 105 Wn.2d at 187-88. McGowen is not lawfully subject to a sentence of life under the POAA. The case must be remanded for resentencing.

D. CONCLUSION

For the reasons set forth, McGowen respectfully requests that this Court reverse the convictions and hold the prior 1993 robbery offense does not qualify as a "most serious offense" under the POAA.

DATED this 12th day of November 2013

Respectfully Submitted,

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APPENDIX A

ROBBERY, SECOND DEGREE

(RCW 9A.56.210)

VIOLENT

(If sexual motivation finding/verdict, use form on page III-27)

I. OFFENDER SCORING (RCW 9.94A.360 (9))

ADULT HISTORY: (If the prior offense was committed *before* 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed *after* 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of serious violent and violent felony convictions . . . . . _____ x 2 = _____

Enter number of nonviolent felony convictions . . . . . _____ x 1 = _____

JUVENILE HISTORY: (Adjudications entered on the same date count as one offense except for violent offenses with separate victims)

Enter number of serious violent and violent felony adjudications . . . . . _____ x 2 = _____

Enter number of nonviolent felony adjudications . . . . . _____ x 1/2 = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions . . . . . _____ x 2 = _____

Enter number of nonviolent felony convictions . . . . . _____ x 1 = _____

STATUS: Was the offender on community placement on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IV)	3 - 9 months	6 - 12 months	12+ - 14 months	13 - 17 months	15 - 20 months	22 - 29 months	33 - 43 months	43 - 57 months	53 - 70 months	63 - 84 months

B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).

III. SENTENCING OPTIONS

A. If sentence is one year or less: part or all of the sentence may be converted to partial confinement (RCW 9.94A.380).

B. If sentence is one year or less: community supervision may be ordered for up to one year (RCW 9.94A.383).

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69048-5-I
	)	
LEWIS MCGOWEN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEWIS MCGOWEN
DOC NO. 712677
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF NOVEMBER 2013.

X Patrick Mayovsky