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SUPREME COURT NO. 98162-1
COURT OF APPEALS NO. 52904-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ILLYA WATKINS,

Petitioner.

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

The Honorable Chris Lanese, Superior Court Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Illya Watkins asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Watkins, COA No. 52904-1-II, attached as appendix A to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. The state included a California burglary and Ohio convictions for aggravated robbery and receiving stolen property in Watkins' offender score following his plea to felony violation of a no contact order (FVNCO). None of these offenses is legally comparable to a Washington felony. Where the state presented no documentation, such as a charging document, to establish factual comparability, did the court exceed its sentencing authority in including these offenses in Watkins' offender score?

2. To the extent counsel contributed to the error by failing to object or by tacitly acknowledging comparability, did Watkins receive ineffective assistance of counsel?

3. The court of appeals Division II declined to consider the first issue reasoning Watkins "stipulated" to the comparability of the priors by agreeing with the state's offender score calculation. Where the

court's reasoning clearly conflicts with Division III's published decision in State v. Richmond, 3 Wn. App.2d 423, 415 P.3d 1208 (2018), should this Court accept review under RAP 13.4(b)(2)?

4. In denying Watkins' ineffective assistance claim, Division II held Watkins did not show deficient performance. It reasoned that had Watkins' attorney raised a comparability challenge to Watkins' out-of-state convictions when negotiating the plea agreement with the prosecutor, the plea agreement could have fallen apart. Prior to taking the plea agreement, Watkins was facing trial on an alleged third strike. The appellate court speculated Watkins would then have been facing trial and potentially life in prison as a third striker.

However, during negotiations, had counsel raised the comparability challenge to two of the prior qualifying strike offenses – the California burglary and Ohio aggravated robbery – Watkins most likely would not have been in jeopardy of life imprisonment as a third striker. These offenses were from 1986 and 1993, respectively – well before case files were stored on computers. It is highly unlikely the prosecutor would have been able to establish factual comparability.

Defense counsel is supposed to provide effective representation during the plea negotiation phase. State v. Estes, 188 Wn.2d 450, 395 P.3d 1045 (2017) (defense counsel's failure to investigate the impact of

deadly weapon enhancements under the persistent offender accountability act (POAA) amounted to ineffective assistance of counsel).

The only reason Watkins took the plea was to avoid striking out. Where Watkins likely would not have pled guilty *or could have negotiated for a better deal*, did Division II err in finding no ineffective assistance by Watkins' attorney's failure to challenge comparability? Should this Court accept review where Division II's decision conflicts with this Court's decision in State v. Estes, 188 Wash. 2d 450, and involves a significant question of law under the state and federal constitutions? RAP 13.4(b)(1), (b)(3).

D. STATEMENT OF THE CASE

The prosecutor charged Watkins with two offenses allegedly committed against his girlfriend Marie Sinfield: first degree burglary (a strike offense) *or in the alternative* residential burglary; and FVNCO (based on prior misdemeanor violations). CP 4-5. The prosecutor also charged Watkins with one count involving Sinfield's daughter Nicole Sinfield, arising out of the same incident: second degree assault (allegedly because Watkins squirted Nicole[1] with bleach during a verbal argument) *or in the alternative*, fourth degree assault. CP 4-5.

[1] Because Nicole and Marie Sinfield share the same last name, first names will be used to avoid confusion. No disrespect is intended.

The state also gave notice it was seeking life in prison if Watkins were convicted of either the burglary or assault charge. Notice of Persistent Offender, attached as Appendix B. CP 71. Two of the three convictions that purportedly qualified as prior most serious offenses consisted of a 1986 first degree burglary from California and a 1993 aggravated robbery from Ohio. CP 34; Prosecutor's Statement of Criminal History, attached as Appendix C[2]. CP 72-74. RCW 9.94A.030.

The totality of the charges stemmed from an incident allegedly involving a spray bottle. CP 1-2. Allegedly, Watkins squirted Nicole with bleach because she wanted to make something to eat and he was cleaning the kitchen. Nicole called the police and reported the incident and also that there was a no contact order prohibiting Watkins from being within 500 feet of Marie's residence, where they all lived. CP 1. But Marie was not even at home at the time. RP 15.[3]

The prosecutor and Watkins ultimately reached a settlement. Watkins entered an Alford plea to FVNCO in exchange for a joint recommendation for a prison based DOSA and the state agreed to drop counts (1) and (3). CP 27-32. Watkins' motivation was to avoid any

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[2] Watkins also has a 2000 assault II conviction from Thurston County. CP 34.
[3] "RP" refers to the plea and sentencing hearing on October 17, 2018.

possibility of striking out on the alleged burglary or second degree assault charge, although there were many defenses he could have asserted had he gone to trial. RP 19.

The state calculated Watkins' standard range as 51-60 months, based on offender score of 7. CP 28. This calculation included 3 points for the following out-of-state convictions:

Crime	Sentencing Court	Crime Date
Burglary 1st	Long Beach, CA	3/12/1986
Receiving Stolen Property	Richland Co, OH	7/19/1993
Aggravated Robbery	Richland Co, OH	7/19/1993

CP x.

The court imposed a prison based DOSA based on half the mid-point of the standard range (as calculated) – 55.5 months – divided into 27.75 months of incarceration and 27.75 months of community custody. CP 36.

On appeal, Watkins argued the court erred in including the foreign convictions in Watkins' offender score on grounds they are not legally comparable and the state failed to prove factual comparability. Brief of Appellant (BOA) at 5-18; citing State v. Thiefault, 160 Wn.2d 409, 415,

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[5] "RP" refers to the plea and sentencing hearing on October 17, 2018.

158 P.3d 580 (2007). Specifically, the 1986 burglary is not comparable because California did not require the state to prove an unlawful entry. BOA at 9-12; (citing State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006); Cal Penal Code sec. 459). California burglary also encompasses a much broader range of property. Thomas, at 478.

The 1993 Ohio aggravated robbery is not comparable to a Washington felony because it could be based on a theft offense or an attempted theft – rather than robbery – and because it did not require the perpetrator to be armed or to display a weapon. BOA at 12-16 (cf. OH ST section 2911.02 (1982); OH ST sec. 2911.02 (1995); RCW 9A.56.200 (1975)).

Finally, the 1993 Ohio receiving stolen property is not comparable to a Washington offense because it does not require knowledge that the property is stolen. BOA at 17-18 (cf. OH ST 2913.51 (1986); RCW 9A.56.140 (1987).

Watkins alternatively argued that to the extent Watkins' attorney contributed to the trial court's error in including these offenses by failing to object, Watkins received ineffective assistance of counsel. BOA at 19-22 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580

(2007) (counsel ineffective for failing to object to court's faulty comparability analysis).

Significantly, the state did not challenge Watkins' comparability analysis. Rather, it argued Watkins stipulated to comparability and that he could not show prejudice for his ineffective assistance of counsel claim. Brief of Respondent (BOR).

Division II sided with the state. The court completely dodged resolution of the comparability challenge, reasoning that Watkins stipulated to comparability. Appendix at 6. The court also held Watkins' could not show deficient performance to establish ineffective assistance of counsel. Appendix at 8.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION II'S DECISION CONFLICTS WITH DIVISION III'S DECISION IN STATE V. RICHMOND. RAP 13.4(b)(2).

Watkins' Statement of Defendant on Plea of Guilty contains the following boilerplate language:

> The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete.

CP 30. On appeal, Watkins argued this was merely an agreement that the convictions exist, not that they are comparable. BOA at 11. Moreover, he pointed out that in the section wherein the prosecutor indicated her recommendation would be for a prison term based DOSA of 27.75 months of incarceration and 27.75 months of community custody, defense counsel did not join. CP 30. Furthermore, defense counsel said nothing at sentencing about the offender score or criminal history. RP 18-21.

Watkins argued his conduct amounted to "mere agreement with the state's offender score calculation" and was "insufficient to constitute an affirmative acknowledgment that an out-of-state conviction meets the terms of the comparability analysis." BOA at 11 (citing State v. Richmond, 3 Wn. App.2d 423, 415 P.3d 1208 (2018)).

Division II disagreed and attempted to distinguish Division III's decision in Richmond:

> In this case, the parties presented the sentencing court with a stipulation, signed by the prosecutor, Watkins' attorney, and Watkins himself before Watkins entered his plea. The stipulation included Watkins' criminal history and his offender score which included the out-of-state convictions. A score sheet from the Sentencing Guidelines Manual was attached to the stipulation and both detailed the prior and other current convictions that were counted in the offender score. The score sheet demonstrated that the offender score of seven was reached by adding together seven prior felony convictions. Watkins stated that his attorney read him the plea agreement, he understood the agreement, and that his attorney answered his questions

> about the agreement to his satisfaction. Watkins further stated that he understood his offender score and what it meant in the context of the plea agreement. Watkins affirmatively acknowledged the inclusion of his out-of-state convictions by entering a plea agreement to a negotiated resolution. The state was not required to prove Watkins' criminal history because he stipulated to it in the plea agreement. Bergstrom, 162 Wn.2d at 95.[6]
>
> Watkins analogizes his case to State v. Richmond, 3 Wn. App. 2d 423, 415 P.3d 1208, review denied, 191 Wn.2d 1009 (2018). Richmond is factually distinct from Watkins' case. In Richmond, the State and defense counsel agreed at sentencing that an out-of-state felony conviction was to be included in the defendant's offender score. 3 Wn. App. 2d at 430. There was no guilty plea or Alford plea and the sentencing court did not conduct a comparability analysis. Richmond, 3 Wn. App. 2d at 430. Division Three of this court held that the defense's agreement with the State as to the inclusion of that out-of-state felony conviction did not constitute a comparability analysis or relieve the State of its burden to provide a comparability analysis. Richmond, 3 Wn. App. 2d at 437. In Watkins' case, because he stipulated to the inclusion of is out-of-state felony convictions in his offender score, the State was not required to prove comparability. See Bergstrom, 162 Wn.2d at 95. Thus, the two cases are factually distinct and Watkins' argument fails.

Appendix at 6-7.

First, the court's first paragraph of reasoning only shows agreement to the state's calculation of Watkins' offender score. The "stipulation" presented to the sentencing court signed by the parties and "Watkins himself" before he entered his plea was simply the Statement of Defendant on Plea of Guilty. RP (10/17/18). 3. It contained the

[6] State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

boilerplate language addressed above indicating Watkins' agreement to the prosecutor's statement of his criminal history. Attached to the Statement of Defendant was a list of Watkins' criminal history, which included the out-of-state convictions. Attached to that is the prosecutor's scoring sheet. At most, however, these circumstances show no more than mere agreement to the prosecutor's calculation of the offender score, not an affirmative acknowledgment of the comparability of the out-of-state convictions. Mere failure to object to the State's summary of criminal history does not constitute an acknowledgment, even if the defendant agrees with the state's standard range calculation. State v. Hunley, 175 Wn.2d 901, 912, 287 P.3d 584 (2012).

Similarly, none of Watkins' statements at the plea and sentencing hearing constitute affirmative acknowledgment. Addressing the Statement of Defendant during the plea colloquy, the court merely asked if, before signing it, Watkins' attorney went over it with him. RP 6. The court followed up by asking whether, if Watkins had any questions, his attorney answered them to his satisfaction. The court never asked anything about comparability of the priors. RP 6. Finally, to establish that Watkins "affirmatively acknowledged" his offender score, Division II points to the fact that Watkins stated he understood the standard range based on the

offender score recited in the Statement of Defendant. RP 7. But this again, indicates no more than agreement.

This case is no different than Richmond. There, the prosecutor presented a proposed judgment and sentence with an Idaho conviction included as part of the offender score. The parties agreed the Idaho conviction should be included in the offender score. There was no discussion of comparability. Richmond, 3 Wn. App. 2d at 431. Division Three concluded there was no affirmative acknowledgment. Because there was nothing more than agreement here (at most), Division II's decision conflicts with Division III's in Richmond. RAP 13.4(b)(2).

Perhaps recognizing this, Division II tries to further distinguish this case from Richmond based on the fact that sentencing here followed an Alford plea, rather than a jury trial. Appendix at 6. As if a defendant can agree to an illegal sentence as part of a negotiated plea agreement. See e.g. In re Goodwin, 146 Wash. 2d 861, 50 P.3d 618 (2002) (A defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence.). If that is the state of the law in Division II, this case also involves an issue of substantial public interest this Court should review. RAP 13.4(b)(4).

As an aside, Division II's reliance on this Court's decision in Bergstrom is inapposite as that case did not involve the inclusion of out-of-state convictions. The state is required to prove out-of-state convictions qualify as a felony under Washington law. State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999); RCW 9.94A.500(1).

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THIS CASE INVOLVES A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS AND BECAUSE DIVISION II'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE V. ESTES. RAP 13.4(b)(1), (b)(3).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. See U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Washington has adopted Strickland v. Washington's two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim. Strickland, 466 U.S. at 687.

Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that "but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyllo, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); Strickland, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a "'conceivable effect on the outcome'" to prevail. State v. Crawford, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 693, 104 S.Ct. 2052). At the same time, a "reasonable probability" is lower than a preponderance standard. Strickland, 466 U.S. at 694, 104 S.Ct. 2052; *Jones,* 183 Wash.2d at 339, 352 P.3d 776. Rather, it is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S. Ct. 2052.

The appellate court rejected Watkins' ineffective assistance of counsel claim on grounds he did not show deficient performance:

> In this case, Watkins acknowledged at sentencing that (1) his attorney read him the plea agreement, (2) he understood the agreement, and (3) his attorney answered his questions about the agreement to his satisfaction. Watkins now claims that his attorney performed deficiently because he failed to object to the inclusion of his out-of-state convictions in his offender score. However, had

> Watkins' attorney raised such an objection when negotiating with the prosecutor, the plea agreement could have fallen apart and Watkins could have been in a position to proceed to trial and, if convicted of the first degree burglary or the second degree assault charges, face imprisonment for the rest of his life. Watkins testified that he understood his offender score and what it meant in the context of the plea agreement. Watkins then decided to enter an Alford plea. Nothing in the record suggests that Watkins' attorney was deficient in providing Watkins with counsel regarding the plea.

Appendix at 8-9.

The appellate court is incorrect. The only reason Watkins pled guilty was to avoid striking out, meaning he believed he had two prior strike offenses. At least one of those had to be the California burglary or the Ohio robbery. But neither qualified as legally comparable. The record establishes – by virtue of Watkins' plea – his attorney never researched or communicated with Watkins about the lack of comparability of the foreign convictions. This amounted to deficient performance under this Court's decision in State v. Estes.

There, counsel failed to research the effect the charged deadly weapon enhancements had on the underlying charges of felony harassment and third degree assault; in effect, counsel failed to realize and communicate with his client that they constituted strike offenses. This constituted ineffective assistance of counsel. State v. Estes, 188 Wn.2d 450, 463, 395 P.3d 1045 (2017).

Here, counsel likewise failed to research the persistent offender accountability act – specifically, the fact that it did not apply. If he had, he would have known the state's proof was deficient, and he could have advised his client he had only one potential prior strike. This could have led to a better outcome for Watkins – either by taking his case to trial or by negotiating for a better deal. See e.g. Estes, at 466 ("Here, it is reasonably probable that had Estes known that there was a much higher change that he would be spending life in prison, the result of the proceeding would have differed.").

This Court should accept review of Watkins' ineffective assistance claim because Division II's reasoning doesn't sync with this Court's decision in Estes and involves a significant question of constitutional law. RAP 13.4(b)(1), (b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review.

RAP 13.4(b)(1), (b)(2), (b)(3) and (b)(4).

Dated this 6th day of February, 2020.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

January 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ILLYA NAPOLEAN WATKINS, Appellant.	No. 52904-1-II UNPUBLISHED OPINION

SUTTON, J. — Illya Napolean Watkins appeals his judgment and sentence for a felony violation of a no contact order, arguing that the sentencing court erred by including three out-of-state felony convictions in calculating his offender score. Watkins also argues that his attorney was ineffective at sentencing because he failed to object to the inclusion of the out-of-state felony convictions in Watkins' offender score. We hold that the sentencing court did not err by including Watkins' out-of-state felony convictions in calculating his offender score because he stipulated to their inclusion and waived any objection based on comparability on appeal. We also hold that Watkins did not receive ineffective assistance of counsel because he does not demonstrate deficient performance. We affirm.

FACTS

The State charged Watkins with residential burglary/domestic violence and felony violation of a no contact order/domestic violence. The State later amended the charges to first degree burglary/domestic violence (Count I), or in the alternative, residential burglary/domestic

violence; felony violation of a no contact order/domestic violence (Count II); and second degree assault (Count III), or in the alternative, fourth degree assault/domestic violence. Based on Watkins' prior criminal history, the State notified him that it intended to seek sentencing as a persistent offender, and that based on a conviction for the first degree burglary or second degree assault, it intended to request a sentence of life in prison without the possibility of release.

Watkins accepted a plea agreement and the State agreed to recommend a drug offender sentencing alternative if he pled to a single count of felony violation of a no contact order. The State agreed to dismiss Count I and Count III in addition to other charges in Thurston County under a different cause number.

In his plea statement, Watkins stipulated to the following:

> The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

Clerk's Papers (CP) at 28.

The parties presented the sentencing court with this stipulation, signed by the prosecutor, Watkins' attorney, and Watkins himself, before Watkins made his plea. The stipulation included Watkins' criminal history and his offender score of seven based on an attached statement of criminal history. The statement of criminal history included three out-of-state felony convictions: a California felony conviction for first degree burglary, an Ohio felony conviction for receiving stolen property, and an Ohio felony conviction for aggravated robbery. A score sheet from the Sentencing Guidelines Manual was attached to the stipulation and they both detailed the

convictions that were counted in the offender score including the three out-of-state felony convictions. The State calculated Watkins' standard range as 51-60 months, based on an offender score of 7. This calculation includes three points for the out-of-state convictions.

Above Watkins' signature on the statement of criminal history was the following acknowledgment:

> The defendant and the defendant's attorney hereby stipulate that the above is a correct statement of the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled cause.

CP at 73.

At the plea hearing, the court inquired of Watkins whether (1) his attorney read him the plea agreement, (2) he understood the agreement, and (3) his attorney answered his questions about the agreement to his satisfaction. Watkins responded, "Yes," to each question. Report of Proceedings (RP) at 6. Watkins further testified that he understood his offender score and what it meant in the context of the plea agreement.

During the State's sentencing recommendation, the prosecutor said,

> [A]s the [c]ourt can tell from the defendant's criminal history, had he been convicted in the 1733 case, he was facing a third strike that carried with it the possibility – or that carried with it, if convicted, [of] life imprisonment. This recommendation for a prison-based [drug offender sentencing alternative] is a joint recommendation by the parties.

RP at 10. Watkins' counsel did not disagree, stating, "[W]e appreciate the State's willingness to make this recommendation." RP at 19.

The sentencing court accepted Watkin's *Alford* plea[1] to the felony violation of a no contact order and dismissal of Counts I and III in exchange for a joint sentencing recommendation for a prison based drug offender sentencing alternative. The State indicated that Watkins had two prior strike offenses and wanted to avoid the possibility of a third strike if convicted of the first degree burglary or second degree assault charges. The State explained that its motivation for offering Watkins a drug offender sentencing alternative was twofold: (1) he could address his substance abuse issues, and (2) the victim's statement at sentencing could be respected.

The court adopted the "jointly recommended sentence" agreed to in the plea agreement. RP at 24. The court sentenced Watkins to a prison based drug offender sentencing alternative of half the mid-point of the standard range (as calculated)—55.5 months—divided into 27.75 months of incarceration and 27.75 months of community custody. Watkins appeals.

ANALYSIS

I. Offender Score

Watkins argues that the sentencing court erred by including his out-of-state felony convictions in his offender score because neither the California burglary conviction nor the Ohio convictions for receiving stolen property or aggravated robbery are comparable to a Washington felony. Watkins argues that the boiler plate language in the plea agreement—that he agreed with the prosecutor's statement of criminal history—is merely an agreement that the convictions exist and is not an affirmative stipulation that the out-of-state convictions are comparable to Washington felony offenses. Watkins also argues that the sentencing recommendation was the State's, his

[1] *See North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Newton,* 87 Wn.2d 363, 552 P.2d 682 (1976).

attorney did not join, and his attorney did not say anything about the offender score or criminal history at sentencing. Because Watkins stipulated to the inclusion of his out-of-state convictions in his offender score, we hold that the sentencing court did not err by including those convictions in his offender score.

We review the calculation of an offender score de novo. *State v. Bergstrom,* 162 Wn.2d 87, 92, 169 P.3d 816 (2007). RCW 9.94A.525 explains the process for how a defendant's offender score is calculated. Generally, each prior felony conviction that has not washed-out counts as one point. RCW 9.94A.525(1) and (2). Out-of-state convictions are classified according to their comparable Washington offense. RCW 9.94A.525(3). Our Supreme Court has held that

> [a]lthough the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, we have stated a defendant's *affirmative acknowledgement* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies [Sentencing Reform Act[2]] requirements.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (citing *State v. Ford*, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999)). Mere failure to object to the State's summary of criminal history does not constitute an acknowledgement, even if the defendant agrees with the State's standard range calculation. *State v. Hunley,* 175 Wn.2d 901, 912, 287 P.3d 584 (2012). A criminal defendant cannot waive a challenge to a miscalculated offender score or a legal error, but he can waive factual error or errors involving the trial court's discretion. *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

[2] Sentencing Reform Act of 1981, ch. 9.94A RCW.

In this case, the parties presented the sentencing court with a stipulation, signed by the prosecutor, Watkins' attorney, and Watkins himself, before Watkins entered his plea. The stipulation included Watkins' criminal history and his offender score which included the out-of-state convictions. A score sheet from the Sentencing Guidelines Manual was attached to the stipulation and both detailed the prior and other current convictions that were counted in the offender score. The score sheet demonstrated that the offender score of seven was reached by adding together seven prior felony convictions. Watkins stated that his attorney read him the plea agreement, he understood the agreement, and that his attorney answered his questions about the agreement to his satisfaction. Watkins further stated that he understood his offender score and what it meant in the context of the plea agreement. Watkins affirmatively acknowledged the inclusion of his out-of-state convictions by entering a plea agreement to a negotiated resolution. The State was not required to prove Watkins' criminal history because he stipulated to it in the plea agreement. *Bergstrom,* 162 Wn.2d at 95.

Watkins analogizes his case to *State v. Richmond,* 3 Wn. App. 2d 423, 415 P.3d 1208, *review denied* 191 Wn.2d 1009 (2018). *Richmond* is factually distinct from Watkins' case. In *Richmond*, the State and defense counsel agreed at sentencing that an out-of-state felony conviction was to be included in the defendant's offender score. 3 Wn. App. 2d at 430. There was no guilty plea or *Alford* plea and the sentencing court did not conduct a comparability analysis. *Richmond,* 3 Wn. App. 2d at 430. Division Three of this court held that the defense's agreement with the State as to the inclusion of that out-of-state felony conviction did not constitute a comparability analysis or relieve the State of its burden to provide a comparability analysis. *Richmond,* 3 Wn. App. 2d at 437. In Watkins' case, because Watkins stipulated to the inclusion

of his out-of-state felony convictions in his offender score, the State was not required to prove comparability. *See Bergstrom,* 162 Wn.2d at 95. Thus, the two cases are factually distinct and Watkins' argument fails.

Because Watkins stipulated to the inclusion of his out-of-state convictions in his offender score, we hold that the sentencing court did not err by including those convictions in his offender score.

II. Ineffective Assistance of Counsel

Watkins argues that his attorney below was ineffective because he failed to object to the inclusion of his out-of-state convictions in his offender score.[3] We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel,

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[3] Watkins analogizes his case to *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007). *Thiefault* is factually distinct from Watkins' case. In *Thiefault*, the superior court conducted a comparability analysis at sentencing and found that the defendant's federal and out-of-state convictions were comparable to their Washington counterparts. 160 Wn.2d at 413. The defendant's attorney did not object to the comparability analysis or to the superior court's finding that the convictions were comparable. *Thiefault,* 160 Wn.2d at 413. In Watkins' case, Watkins' attorney could not have objected to the comparability analysis because the State did not present a comparability analysis. The superior court did not conduct a comparability review because Watkins stipulated to the inclusion of his out-of-state felony convictions in his offender score. By stipulating to his offender score, the State was not required to prove his criminal history, including the comparability of his out-of-state convictions. *Bergstrom,* 162 Wn.2d at 95. Thus, the two cases are factually distinct and Watkins' argument fails.

the appellant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. Representation is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 446 U.S. at 688). Prejudice exists if there is a reasonable probability that, except for counsel's errors, the results of the proceedings would have differed. *Grier*, 171 Wn.2d at 34. If either prong is not satisfied, the appellant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

In the context of plea bargaining, "'effective assistance of counsel' merely requires that counsel 'actually and substantially [assist] his client in deciding whether to plead guilty.'" *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (alternation in original) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). "The decision whether or not to plead guilty is the defendant's alone." *In re Pers. Restraint of Burlingame*, 3 Wn. App. 2d 600, 610, 416 P.3d 1269 (2018).

In this case, Watkins acknowledged at sentencing that (1) his attorney read him the plea agreement, (2) he understood the agreement, and (3) his attorney answered his questions about the agreement to his satisfaction. Watkins now claims that his attorney performed deficiently because he failed to object to the inclusion of his out-of-state convictions in his offender score. However, had Watkins' attorney raised such an objection when negotiating with the prosecutor, the plea agreement could have fallen apart and Watkins could have been in a position to proceed to trial and, if convicted of the first degree burglary or the second degree assault charges, face imprisonment for the rest of his life. Watkins testified that he understood his offender score and what it meant in the context of the plea agreement. Watkins then decided to enter an *Alford* plea.

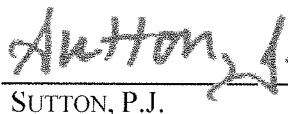
Nothing in the record suggests that Watkins' attorney was deficient in providing Watkins with counsel regarding the plea.

Because Watkins testified that his attorney had explained the plea agreement to him to his satisfaction and understanding, his argument that his attorney performed deficiently fails. Because Watkins fails to prove his attorney performed deficiently, we hold that Watkins did not receive ineffective assistance of counsel.

CONCLUSION

We hold that the sentencing court did not err by including Watkins' out-of-state felony convictions in calculating his offender score because he stipulated to their inclusion and waived any objection based on comparability on appeal. We also hold that Watkins did not receive ineffective assistance of counsel because he does not demonstrate deficient performance. We affirm.

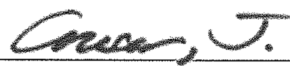
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



SUTTON, P.J.

We concur:

GLASGOW, J.



CRUSER, J.

APPENDIX B

E-FILED
THURSTON COUNTY, WA
SUPERIOR COURT
May 21, 2018
Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ILLYA NAPOLEAN WATKINS, Defendant.	NO. 17-1-01733-34 **NOTICE OF PERSISTENT OFFENDER**

TO THE DEFENDANT(S), ILLYA NAPOLEAN WATKINS, Notice is hereby provided that the Plaintiff, State of Washington, will seek a sentence of life in prison without the possibility of release based upon a conviction for Burglary in the First Degree or Assault in the Second Degree. The defendant is currently charged with both Burglary in the First Degree/ Domestic Violence and Assault in the Second Degree/Domestic Violence which are both a "most serious offense". A review of the defendant's criminal history indicated that he has been convicted prepviously of two separate offenses that also constitute "most serious offenses". The legal basis for such a sentence is contained in RCW 9.94A.570, RCW 9.94A.030(38), and RCW 9.94A.030(33).

DATED this 21 day of May, 2018.

Elizabeth McMullen, WSBA #45207
Deputy Prosecuting Attorney

JON TUNHEIM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754 3358

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APPENDIX C

3

17-1-01733-34
STPATTY 79
Statement of Prosecuting Attorney
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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2018 OCT 17 PM 3:29

Linda Myhre Enlow
Thurston County Clerk

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
ILLYA NAPOLEAN WATKINS,
Defendant.

NO. 17-1-01733-34

PROSECUTOR'S STATEMENT OF CRIMINAL HISTORY

______ There are no known convictions for SRA purposes.
______ The defendant's known criminal history:

CRIME	SENTENCE DATE	SENTENCING COURT	CRIME DATE	ADULT/ JUV	CRIME TYPE
Burglary 1st	5/28/1986	Long Beach CA	03/12/1986	A	F
Receiving Stolen Property Aggravated Robbery **(STRIKE OFFENSE)** (6-15 year sentence prevents washout)	11/16/1995	Richland Co, OH	07/19/1993	A	NV SV
Order Prohibit Contact-Violation, DV Order Prohibit Contact-Violation, DV Order Prohibit Contact-Violation, DV Order Prohibit Contact-Violation, DV Order Prohibit Contact-Violation, DV Assault In The Second Degree, DV **(STRIKE OFFENSE)** Malicious Mischief-1, DV Malicious Mischief-2, DV	08/17/2000	Thurston Superior 00-1-00222-3	02/15/2000 02/16/2000 02/17/2000 2/23/2000 2/24/2000 2/13/2000 2/13/2000 2/13/2000	A	GM GM GM GM GM V NV NV
Assault 4th Degree, DV Theft-1 Over $5k (Not Firearm), DV	03/14/2014	Thurston Superior 13-1-01612-9	10/31/2013 10/31/2013	A	GM NV
Other history not counting as points					
Possession Control Substance Paraphrenia (Prevents Washout)	09/17/2002	Grover Beach, CA	08/06/2002	A	M
Theft	03/09/2004	Los Angeles, CA	05/28/2003	A	M

2002 2004 misd. prevents wash 6-25-09. 6-9 2009 misd.

PROSECUTOR'S STATEMENT OF CRIMINAL HISTORY-1

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Thurston County Prosecuting Attorney
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360/786-5540 Fax 360/754-3358

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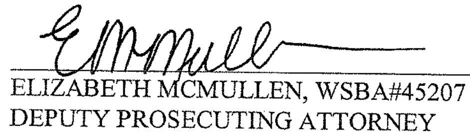
Petty Theft w/ prior (Does not Match WA Felony) (Prevents Washout)	09/30/2004	Torrance, CA	03/02/2004	A	NV
Vandalism (Prevents Washout)	06/25/2009	Carson, CA	04/08/2009	A	M
Use/Under Unfl Contrld Substance	6/10/2010	Carson, CA	04/08/2010	A	M

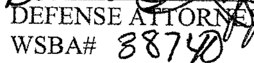
DATED this 17 day of October, 2018



ELIZABETH MCMULLEN, WSBA#45207
DEPUTY PROSECUTING ATTORNEY

The defendant and the defendant's attorney hereby stipulate that the above is a correct statement of the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled cause.

ILLYA NAPOLEAN WATKINS,
DEFENDANT



DEFENSE ATTORNEY
WSBA# 38740

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Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
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Watkins
17-1-01733-34

Domestic Violence Court Order Violation

RCW 26.50.110
CLASS C* – NONVIOLENT/CRIMES AGAINST PERSONS
OFFENDER SCORING RCW 9.94A.525(21)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent/Sex Offense where domestic violence has been plead and proven scoring form on page 255.

ADULT HISTORY:

Enter number of domestic violence felony convictions as listed below* .... ____ x 2 = ____

Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(42)) plead and proven after 8/1/11 .... ____ x 1 = ____

Enter number of other felony convictions .... 7 x 1 = 7

JUVENILE HISTORY:

Enter number of subsequent domestic violence felony dispositions as listed below* .... ____ x 1 = ____

Enter number of serious violent and violent felony dispositions .... ____ x 1 = ____

Enter number of nonviolent felony dispositions .... ____ x ½ = ____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other domestic violence felony convictions as listed below* .... ____ x 2 = ____

Enter number of other repetitive domestic violence offense convictions plead and proven after 8/1/11 .... ____ x 1 = ____

Enter number of other felony convictions .... ____ x 1 = ____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) ____ + 1 = ____

**If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:*

Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.

Total the last column to get the **Offender Score** (Round down to the nearest whole number)........ 7

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	47.5m 41 - 54	55.5m 51 - 60*	60 - 60*	60 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

NIELSEN KOCH P.L.L.C.

February 06, 2020 - 3:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v. Illya Napolean Watkins, Appellant
Superior Court Case Number:	17-1-01733-1

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