No. 93950-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB SCHMITT,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Jacob Schmitt, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Schmitt seeks review of the Court of Appeals decision dated November 23, 2016. A copy of the decision is attached as Appendix A. This Court previously extended the time to file this petition until today's date.

C. ISSUES PRESENTED FOR REVIEW

1a. In *State v. Moern*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010), this Court held that "the rules for calculating offender scores [are] to be applied in the order in which they appear" in RCW 9.94A.525. In Mr. Schmitt's case, the Court of Appeals conducted the analysis out of order, looking first to subsection 3 (classification) and then to subsection 2 (wash-out). Should this Court accept review pursuant to RAP 13.4(b)(1) because the lower court's decision conflicts with this Court's precedent?

1b. Must a federal offense (not subject to exclusive federal jurisdiction), be comparable to a Washington offense to interrupt the wash-out period?

1c. Do the phrases "shall be classified" and "shall be scored" as used in RCW 9.94A.525(3) have different meanings?

2a. Should Schmitt be allowed to withdraw his guilty plea where, if the wash out rules are correctly applied, he relied on affirmative misinformation

regarding the direct consequences of his plea agreement making it involuntary?

2b. Was Schmitt denied his Sixth Amendment right to effective assistance of counsel when counsel gave him affirmative misinformation by telling him he would "strike out" if convicted as charged and where he relied on that information to his detriment?

D. STATEMENT OF THE CASE

The Court of Appeals summarized:

> In December 2013, the State charged Schmitt with first degree robbery and attempting to elude a police vehicle. Pursuant to a plea agreement, the charges were reduced to two counts of first degree theft and one count of second degree burglary. Schmitt's criminal history included a 1993 first degree robbery conviction, 1993 first degree burglary conviction, 1993 custodial assault conviction, 1996 second degree robbery conviction, 1998 first degree malicious mischief conviction, and 2001 federal bank robbery conviction. Schmitt was released from prison on the 2001 bank robbery conviction in April 2013. The State initially calculated his offender score as 7 for the theft charges and 8 for the burglary charge. But at sentencing, the court reduced Schmitt's offender score by one point because there was no comparable Washington offense for the federal bank robbery charge.

Appendix A at ¶ 2.

A few additional facts are necessary.

Mr. Schmitt's criminal history included a Burglary 1° and a Robbery 1° from 1993. CP 16 – 21. Mr. Schmitt also had a Robbery 2º from 1996. CP 16, 21. The parties believed this to be his second strike, making the current offense, originally charged as a robbery, his third strike. RP 3 – 4, 10; CP 3, 30 – 31. This understanding was based on the conclusion that Schmitt's 2001 federal bank robbery conviction interrupted any wash out period. CP 16, 21.

Consequently, when he entered a guilty plea, Mr. Schmitt believed that he was facing life without parole as a persistent offender. The prosecutor, defense counsel, and judge also understood Mr. Schmitt would be a persistent offender if convicted of a new "strike." RP 3-4, 10, 26-27; CP 3, 30-31. Thus, Schmitt pled guilty to three class non-strike felonies and agreed to an exceptional sentence of 30-years. RP 3; CP 3-4, 5-14, 15-17. As Schmitt's PRP establishes, Schmitt would not have entered the current plea agreement if, in fact, he was not facing a persistent offender sentence.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals Decision Misapplies the Wash Out Rules.

Introduction

This case concerns whether a non-comparable, non-exclusive federal offense interrupts the wash out period. As the Court of Appeals explained: "Schmitt argues his 1996 second degree robbery conviction washed out." The Court of Appeals continued: "We agree that there is no comparable Washington offense to federal bank robbery; however, RCW 9.94A.525(3) controls, and Schmitt's federal bank robbery conviction interrupts the washout period." *State v. Schmitt*, __ Wn.App. __, 385 P.3d 202 (2016) (Slip opinion at ¶ 5). As a result, the Court of Appeals held "that Schmitt's federal bank robbery conviction is a crime that interrupts the washout period." *Id.* at ¶ 7.

Because the lower court's analysis conflicts with decisions of this Court and the intent of the Legislature, review is mandated.

The Legislatively Established Order for Determining an Offender Score

This Court explained in *State v. Moeurn*, 170 Wash.2d 169, 240 P.3d 1158 (2010), that the calculation of an offender score has three steps: first, identify all prior convictions; second, eliminate those that wash out; and third, count the prior convictions that remain. *Moeurn,* 170 Wash.2d at 175. "We reasoned that the legislature intended this procedure because the statute itself is structured to apply its provisions in the order in which they appear." *State v. Sandholm*, 184 Wash. 2d 726, 739, 364 P.3d 87 (2015).

The issue before this Court in *Moeurn* was whether an anticipatory offense, attempted assault in the second-degree, was a Class C felony requiring a five-year crime free period to wash out under .525(2), or because .525(4) required anticipatory offenses to be scored as if they were completed offenses, a crime free period of ten years was required in order for the offense to wash out. This Court explained:

> Notably, subsection (4), directing courts to "[s]core" anticipatory offenses the same as completed offenses, follows the washout step, but precedes the "counting" step. The logical inference is that "[s]core" in subsection (4) relates to the third step. When the offender score rules are applied sequentially, as we believe they should be, class C anticipatory offenses will wash out before they can be scored as a completed offense pursuant to subsection (4).

Id. at 175.

Applying those rules to this case, the first step is to determine what offenses wash out.

But, the Court of Appeals took another approach—one at odds with the statute and this Court's directive. The Court of Appeals went first to the scoring section (subsection 3) and used that subsection to determine the wash out period (subsection 2). The Court of Appeals held:

> Here, federal bank robbery is not comparable to any offense under Washington law. *Lavery*, 154 Wash.2d at 262, 111 P.3d 837. But RCW 9.94A.525(3) requires that Schmitt's federal bank robbery conviction be recognized in Washington as a class C felony. Therefore, the federal bank robbery conviction would be considered "any crime" in Washington.

Id. at ¶ 9.

But, RCW 9.94.525(3) concerns scoring ("the offense shall be scored as a Class C felony"). How federal bank robbery or any other non-comparable, non-exclusive federal conviction should be "scored" according to RCW 9.94A.525(3) is a step that *follows* the wash out determination.[1] The Court of Appeals erred by conducting scoring first.

In determining wash out, prior convictions are to be included or excluded. A non-comparable offense is excluded. The calculation of offender scores begins in subsection 3. In other words, the scoring in .525(3) relates to the third step (counting), not the second step (wash out).

When the rules of the "offender score" statute are executed in sequential order as intended by the legislature, this is what happens to Mr. Schmitt's prior

[1] It is important to note that the sentencing court, after concluding that Schmitt's federal bank robbery was not comparable to a Washington crime, did not include it in Schmitt's offender score. The State conceded and did not appeal either the non-comparability or the scoring decisions. Therefore, those issues are not before this Court. The only issue is whether a non-comparable crime interrupts wash out.

convictions. The first step requires the court to identify prior convictions:

1.	Robbery 1 – Class A	Sentenced: 7/30/93	Released: 6/21/96
2.	Burglary 1- Class A	Sentenced: 8/24/93	Released: 6/21/96
3.	Cust. Assault – Class C	Sentenced : 8/24/93	Released: 6/09/94
4.	Robbery 2 – Class B	Sentenced:	Released:
5.	Mal. Mischief 1– Class B	Sentenced: 8/11/98	Released: 8/6/99
6.	Fed. Bank Robb–Non comp	Sentenced: 5/4/01	Released: 4/23/13

Because Mr. Schmitt acknowledged the existence of these prior convictions, the second step under .525(2) is to determine which prior convictions are "included" in the offender score.

Schmitt's prior Washington convictions are clearly included. But, his federal bank robbery, a non-comparable foreign offense, is excluded. As a result, that offense is not scored in the third step.

However, the Court of Appeals jumped over the second step to the third step and held that a non-comparable, non-exclusive federal crime should be included in the list of prior convictions. Therefore, the lower court held that a non-comparable federal offense constitutes a crime that interrupts the wash out period.

This Court should accept review because the approach of the Court of Appeals conflicts with this Court's decisions construing the legislative intent.

A Non-Comparable Offense is Not a Crime

The SRA defines a crime in RCW 9A.04.040 (1) as:

> An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime.

> Crimes are classified as felonies, gross misdemeanors, or misdemeanors.

When performing a comparability analysis, the key inquiry is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington. *State v Marley*, 134 Wn.2d 588, 952 P.2d 167, 176 (1998). There is no comparable "offense defined" under Washington law for federal bank robbery. *See In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 262, 111 P.3d 837 (2005) (federal bank robbery and robbery under Washington's criminal statutes are not legally or factually comparable).Therefore, the federal offense is not the requisite "any crime" under .525(2) necessary to stop the washout of Mr. Schmitt's class B and class C felonies.

This Court held in *State v. McCorkle*, 137 Wn.2d 490, 496, 973 P.2d 461 (1999) (partially superceded by statute on other grounds), that whether a prior out-of-state conviction “washes out” cannot be determined without first determining whether the conviction is comparable to a class A, B, or C felony under Washington law. The earlier Court of Appeals decision in *McCorkle*, further established that a non-comparable conviction does not count as a “conviction” under the wash out rules:

> Classification of the 1980 Ohio conviction/1982 parole for unauthorized use of a motor vehicle is especially critical. Unless on remand the State can establish at least a class C felony classification for this Ohio offense, the 1976 Georgia burglary conviction cannot be included in McCorkle's offender score if release from confinement for that burglary predates McCorkle's next conviction (1986 Washington burglary): by more than five years, if the Georgia burglary is comparable to a class C Washington felony; or 10 years, if comparable to a class B

> Washington felony. RCW 9.94A.360(2). The same would hold true for the 1975 Oregon larceny and 1969 and
> 1971 North Carolina escape convictions.

State v. McCorkle, 88 Wn.App. 485, 498, 945 P.2d 736 (1997).

When the wash out determination precedes scoring, as this Court has said it must, there is no need to move to the third step and classify and score a non-comparable offense. When these rules are performed in sequential order, wash out occurs before an offense is scored. Here, Schmitt's prior class B and class C felony convictions wash out in step 2 and there is no need to move to step three.

Classification of a Non-Comparable, Non-Exclusive Federal Crime

RCW 9.94A.525(3) first provides:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.

It is uncontested that Schmitt's federal bank robbery is not comparable to a Washington offense. *Id.* at ¶ 5 ("We agree that there is no comparable Washington offense to federal bank robbery.").

The Court of Appeals also correctly concluded:

> To determine whether a conviction interrupts the washout period, we first start with a comparability analysis. *State v. Crocker*, No. 46897–2–II, —– Wash.App. ——–, 385 P.3d 197, 200, 2016 WL 6873228 (Wash. Ct. App. Nov. 22, 2016). Following *Crocke*r, "any crime" under RCW 9.94A.525(2)(b) "must be defined as a crime under Washington law." *Id*. at *4–5.

Schmitt, at ¶ 6.

RCW 9.94A.525(3) then adds:

> If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense *shall be scored* as a class C felony equivalent if it was a felony under the relevant federal statute.

(emphasis added).

A review of .525(4) through (21) shows that every reference to a prior offense is characterized as a "conviction" except in the third sentence of .525(3). That is because the Legislature did not intend that a defendant who has not committed a crime under Washington law could have a conviction.

"When we interpret a criminal statute, we give it a literal and strict interpretation." *State v. Bililaon*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume that the legislature means exactly what it says." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2002), *citing Davia v. Dept. of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

Despite these differences, the lower court held: "RCW 9.94A.525(3) requires that Schmitt's federal bank robbery conviction be recognized in Washington as a class C felony." *Id.* at ¶ 9.

As noted previously, the sentence relied on by the Court of Appeals by its own language concerns only scoring, not classification. "When different words are used in the same statute, it is presumed that a different

meaning was intended to attach to each word." *Simpson Inv. Ca. v. Dept of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741(2000) (*quoting State ex rel. Public Disclosure Comm v. Raina*, 87 Wn2d 626, 634, 555 P.2d 1368 (1976). If the legislature intended a non-comparable, non-exclusive federal conviction to be classified as a "class C felony," the statute would have continued with the language used in the first two sentences of .525(3), and specified that it "shall be classified as a class C felony." Further, having specified classification as a class C felony, the legislature would not have any need to use the word "equivalent," because the federal offense would be an actual Washington felony.

The holding by the lower court in this case conflicts with another decision of the Court of Appeals, another reason this Court should grant review. See *State v. Farnsworth*, 133 Wash. App. 1, 21, 130 P.3d 389, 400 (2006*), as amended* (June 14, 2006), *as amended* (Mar. 13, 2007), *review granted, cause remanded*, 159 Wash. 2d 1004, 151 P.3d 976 (2007) ("In order to use Farnsworth's Utah conviction in calculating his offender score, however, the 'prior felony conviction' used for his Utah conviction had to be comparable to the 'prior conviction' element under Washington's unlawful firearm possession law."). Because Division Two has interpreted this statute in two distinctly different ways, they have rendered it ambiguous and review by this Court is necessary to discern the legislature's intent. *Christensen v. Ellsworth*, 162, Wn.2d 365, 373, 173 P.3d 228 (2007).

Finally, this Court has held that time spent in jail pursuant to violation of probation stemming from a misdemeanor does not interrupt the wash out period. *State v. Ervin*, 169 Wash. 2d 815, 826, 239 P.3d 354, 359 (2010).[2]

2. Mr. Schmitt's Guilty Plea Was Both Involuntary and the Product of Ineffective Assistance of Counsel.

Because the Court of Appeals incorrectly concluded that none of Schmitt's prior convictions wash out, it summarily dismissed his involuntary guilty plea and ineffectiveness claims. As a result, Schmitt will highlight those claims here and largely rely on his prior pleadings.

Schmitt claimed his guilty plea was involuntary under *Boykin v. Alabama*, 395 U.S. 238 (1969), as was premised on the misinformation that a current conviction for a most serious offense would result in a persistent offender life sentence. If that premise was mistaken, as Schmitt now claims, then his plea was involuntary and his offender score agreement was based on a mistake of law. If Schmitt is correct that his second-degree robbery conviction washes out and he has only one strike, it follows that his plea was involuntary; that his current sentence is unlawful; and that counsel was ineffective. *See State v. Sandoval,* 171 Wash.2d 163, 249 P.3d 1015 (2011). Inaccurate advice about an offender score can constitute deficient performance (State v. Saunders, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2004)),

[2] Mr. Schmitt asserts that his federal Due Process rights are implicated because the statute gives rise to a liberty interest under *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

just as it can render a guilty plea involuntary. State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006).

Mr. Schmitt also establishes prejudice a second way because he would not have entered a guilty plea and because he would have received a lesser sentence, if given accurate advice and sentenced according to the law.

F. CONCLUSION

Based on the above, this Court should accept review and reverse.

DATED this 23rd day of January, 2017.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis certify that on today's date I electronically filed the attached Petition for Review causing a copy to be sent to opposing counsel at:

jschach@co.pierce.wa.us

January 23, 2017//Portland, OR /s/Jeffrey Ellis

Filed
Washington State
Court of Appeals
Division Two

November 23, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. v. JACOB IVAN SCHMITT, Appellant.	No. 46773-9-II Consolidated with:
In re the Personal Restraint of JACOB IVAN SCHMITT, Petitioner.	No. 47706-8-II PART PUBLISHED OPINION

LEE, J. – Jacob Ivan Schmitt pleaded guilty to two counts of first degree theft and one count of second degree burglary. He appeals, contending his prior 1996 second degree robbery conviction washed out, even though he was convicted of federal bank robbery in 2001, because the subsequent crime was not comparable to a Washington offense. We hold that the 1996 robbery conviction did not wash out because Schmitt committed an intervening federal felony offense for which he spent over 10 years incarcerated. In the unpublished portion of the opinion, we address and reject Schmitt's remaining arguments except his argument concerning the court's imposition

of discretionary legal financial obligations (LFOs). Accordingly, we affirm the judgment and sentence except for the imposition of discretionary LFOs, which we reverse and remand for the trial court to conduct an individualized inquiry into Schmitt's current and future ability to pay; we deny Schmitt's consolidated Personal Restraint Petition (PRP); and we waive appellate costs.

FACTS

In December 2013, the State charged Schmitt with first degree robbery and attempting to elude a police vehicle. Pursuant to a plea agreement, the charges were reduced to two counts of first degree theft and one count of second degree burglary. Schmitt's criminal history included a 1993 first degree robbery conviction, 1993 first degree burglary conviction, 1993 custodial assault conviction, 1996 second degree robbery conviction, 1998 first degree malicious mischief conviction,[1] and 2001 federal bank robbery conviction. Schmitt was released from prison on the 2001 bank robbery conviction in April 2013. The State initially calculated his offender score as 7 for the theft charges and 8 for the burglary charge. But at sentencing, the court reduced Schmitt's offender score by one point because there was no comparable Washington offense for the federal bank robbery charge. Schmitt appeals.

[1] Based on our record, the 1998 first degree malicious mischief offense occurred while Schmitt was incarcerated on the 1996 second degree robbery offense. He was released from incarceration for both the 1996 and 1998 offenses in August 6, 1999, and was arrested on the federal bank robbery charge 24 days later. (PRP attachment – June 25, 2015 declaration)

ANALYSIS

Schmitt argues his 1996 second degree robbery conviction washed out. We disagree.

Under RCW 9.94A.525(2)(b), class B felonies wash out after 10 years "if since the last date of release from confinement . . . the offender had spent ten consecutive years *in the community* without committing *any crime* that subsequently results in a conviction." (Emphasis added). RCW 9.94A.525(2)(b) contains both a trigger clause and a continuity clause. *See State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010) (concerning RCW 9.94A.525(2)(c), a statute similar to RCW 9.94A.525(2)(b) but governs class C felonies.) The trigger clause identifies the beginning of the 10-year period, and the continuity clause sets forth the substantive requirements an offender must satisfy during the 10-year period. *Id.* This case involves the continuity clause – whether Schmitt spent "ten consecutive years *in the community* without committing *any crime* that subsequently results in a conviction." RCW 9.94A.525(2)(b) (emphasis added).

Schmitt argues that he was actually considered "in the community" the entire time he was incarcerated on his federal bank robbery conviction because there is no comparable Washington offense for federal bank robbery. We agree that there is no comparable Washington offense to federal bank robbery; however, RCW 9.94A.525(3) controls, and Schmitt's federal bank robbery conviction interrupts the washout period.

To determine whether a conviction interrupts the washout period, we first start with a comparability analysis. *State v. Crocker*, No. 46897-2-II, slip op. at 3 (Wash. Ct. App. Nov. 22, 2016). Following *Crocker*, "any crime" under RCW 9.94A.525(2)(b) "must be defined as a crime under *Washington* law." *Id.* at *4-5.

Schmitt had a 2001 federal bank robbery conviction for which he was released in 2013. Federal bank robbery is classified as a serious violent felony under federal statutes. 18 U.S.C. § 2113(a), 18 U.S.C. § 3559(c)(2)(F)(i). Federal bank robbery, however, is not comparable to robbery in Washington. *See In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 262, 111 P.3d 837 (2005) (federal bank robbery and robbery under Washington's criminal statutes are not legally or factually comparable). The question then is whether Schmitt's 2001 federal bank robbery conviction would still be considered "any crime" for purposes of interpreting RCW 9.94A.525(2)(b)'s continuity clause such that it interrupts the washout period. We hold that Schmitt's federal bank robbery conviction is a crime that interrupts the washout period.

RCW 9.94A.525(3) provides in relevant part:

> Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

Thus, federal felony offenses that have no comparable offense under Washington law or that are subject to exclusive federal jurisdiction are recognized under our offender score statute as class C felonies.

Here, federal bank robbery is not comparable to any offense under Washington law. *Lavery*, 154 Wn.2d at 262. But RCW 9.94A.525(3) requires that Schmitt's federal bank robbery conviction be recognized in Washington as a class C felony. Therefore, the federal bank robbery conviction would be considered "any crime" in Washington.

This case is distinguished from *Crocker*, which addressed an out-of-state conviction where the only comparable Washington offense was a civil infraction. *Crocker*, No. 46897-2-II, slip op. at *6). Our Supreme Court has held that such minor offenses do "not interrupt the washout." *Ervin*, 169 Wn.2d at 826. Here, however, we address a federal felony conviction. Since RCW 9.94A.525(3) characterizes federal bank robbery as a class C felony in Washington, and Schmitt did not spend 10 consecutive years in the community because of that federal felony conviction, his federal bank robbery conviction interrupts the washout period for the 1996 second degree robbery conviction.

We hold that Schmitt's 1996 second degree robbery conviction did not wash out because he was not released from confinement for his 2001 federal bank robbery conviction until April 2013. His current offense was committed in December 2013. Schmitt's federal bank robbery conviction is a class C felony in Washington per RCW 9.94A.525(3). Therefore, Schmitt fails to show that he spent "ten consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(b). Thus, Schmitt fails to show that his 1996 second degree robbery conviction washes out.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Schmitt also argues that his plea was involuntary and he was denied his right to effective assistance of counsel. In his statement of additional grounds (SAG) for review, Schmitt argues the sentencing court failed to take into account his ability to pay when imposing LFOs. In his consolidated PRP, Schmitt alleges the sentencing court miscalculated his offender score and he was denied his right to effective assistance of counsel. And in his supplemental brief to his direct appeal, Schmitt objects to the imposition of appellate costs under *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). As stated previously, we affirm the judgment and sentence except for the imposition of discretionary LFOs, which we remand to strike from the judgment and sentence; and we deny the PRP.

ADDITIONAL FACTS

In the plea agreement, Schmitt stated, "Although the defendant does not agree with the State's calculation of offender score, the defendant voluntarily, knowingly and intelligently enters into this plea, including the recommendation for an exceptional sentence." Clerk's Papers (CP) at 17.

During the plea hearing, the trial court inquired into Schmitt's objection to his offender score. Defense counsel argued the federal bank robbery conviction should not be counted because there is no comparable Washington offense. The trial court agreed and deducted one point off Schmitt's offender score.

The trial court then inquired whether Schmitt wanted to proceed with the agreement. Schmitt conferred with his attorney and then informed the court he wanted to proceed with pleading guilty. When questioned whether the plea was freely and voluntarily given, Schmitt replied, "Yes." Report of Proceedings (RP) at 18.

The trial court accepted his plea and sentenced Schmitt to 120 months on each count to run consecutively for a total of 360 months' incarceration. The trial court also ordered Schmitt to pay LFOs in the amount of $500 for crime victim assessment, $100 for a deoxyribonucleic acid (DNA) database fee, $500 for court-appointed attorney fees and defense costs, and $200 for filing fee. There was no inquiry into Schmitt's ability to pay and no objection by defense counsel.

ADDITIONAL ANALYSIS

A. GUILTY PLEA

We address whether Schmitt's guilty plea violated due process because it was not made knowingly, intelligently, and voluntarily. Schmitt contends he was induced to plead guilty because he feared he would be sentenced under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981 (POAA), chapter 9.94A RCW, also known as the "three strikes law." He alleges that he believed the originally charged first degree robbery was a third strike. But now he believes that the federal bank robbery conviction should not be counted and the 1996 conviction should wash out, leaving him with only one strike (the 1983 first degree robbery). With only one strike, he would not have entered into a plea agreement.

As a threshold matter, the State argues Schmitt waived this argument. A defendant attempting to withdraw his guilty plea for the first time on appeal must demonstrate a manifest constitutional error. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001). A defendant unlawfully induced into pleading guilty raises a manifest error affecting a constitutional right under RAP 2.5(a)(3). Thus, this issue may be raised for the first time on appeal. *Id.* at 7.

Due process requires that when a criminal defendant pleads guilty, his plea must be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). A guilty plea which is the product of, or is induced by coercive threat, fear, persuasion, promise, or deception, however, is invalid. *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601, *review denied*, 385 U.S. 905 (1966). Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. *Id.*at 642.

Under the POAA, a "[p]ersistent offender" is defined as someone who at the time of sentencing for a current most serious offense, has been convicted twice before of most serious offenses under RCW 9.94A.525. RCW 9.94A.030(38)(a)(ii).[2] The statute states in part that the defendant must have "been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses." RCW 9.94A.030(38)(a)(ii). RCW 9.94A.525(2)(b), however, provides that class B felonies wash out after 10 years "if since the last date of release from confinement . . . the

[2] Subsections of RCW 9.94A.030 were renumbered in 2015, but the text of this subsection is unchanged; therefore, we will cite to the current subsection.

offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction."

The record here shows the trial court concluded that Schmitt's 2001 federal bank robbery conviction did not count in Schmitt's offender score because there was no comparable Washington offense. Since the 2001 federal conviction did not count in his offender score, Schmitt argues the time served for the conviction would also not count in determining whether he was "in the community" for 10 years prior to committing the current offense; thereby washing out the 1996 robbery. RCW 9.94A.525(2)(b). Based on our holding above, the 2001 bank robbery interrupted the 10-year washout period. Since Schmitt was not in the community for 10 consecutive years without committing a crime, his 1996 conviction did not wash out. Schmitt was properly apprised of his two prior strikes and that the first degree robbery charge would be a third strike. Thus, his argument that he was unlawfully induced into pleading guilty is without merit. He fails to show his plea was not made knowingly, intelligently, and voluntarily.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Schmitt next argues he was denied effective assistance of counsel because counsel failed to advise him that he was not facing his third strike. To prevail on a claim of ineffective assistance of counsel, the appellant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Representation is deficient if after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Id.* at 33

(quoting *Strickland*, 466 U.S. at 688). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id.* at 34.

Based on our holding above, Schmitt's 1996 conviction did not wash out—he had two prior most serious offense convictions in 1993 and 1996. His 2013 first degree robbery charge, therefore, would qualify as a third strike under RCW 9.94A.525. Defense counsel properly instructed him likewise. Also, counsel effectively negotiated a plea agreement to prevent sentencing under the POAA and successfully argued to reduce Schmitt's offender score by showing Schmitt's 2001 had no comparable Washington offense. Thus, Schmitt's argument that counsel provided deficient representation is without merit.

C. LFOs

In his pro se SAG, Schmitt argues the sentencing court erred by failing to make an individualized determination of his ability to pay before imposing LFOs. While Schmitt challenges the imposition of all LFOs, only the attorney fees and defense costs are discretionary and properly before this court. *See* RCW 7.68.035(1); RCW 36.18.020(2)(h); RCW 43.43.7541; *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

Schmitt did not object when the sentencing court failed to make an on the record assessment of his present and future ability to pay before imposing discretionary LFOs. Despite this failure to object, we have discretion to consider LFO challenges raised for the first time on appeal. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). We exercise our discretion to consider this issue.

RCW 10.01.160(3) provides in part that a court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of

payment of costs, the court shall take account of the financial resources of the defendant." In order to comply with the statute, an individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d at 838. Here, Schmitt had been incarcerated for over 10 years prior to his current arrest. There was mention that "for at least a short period of time [he was] working in a job" after release from federal prison, but no mention of the type of job he held or his salary. RP at 22.

Since the record shows that the trial court failed to make any individualized inquiry, the trial court found Schmitt indigent, and he was recently release from long-term incarceration, the proper recourse under these facts is to reverse the imposition of discretionary LFOs and remand for the trial court to conduct an individualized inquiry into Schmitt's current and future ability to pay.[3]

D. PRP

Turning to Schmitt's PRP, the collateral relief afforded under a PRP is limited and requires the petitioner to show that he was prejudiced. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 596, 316 P.3d 1007 (2014). There is no presumption of prejudice on collateral review. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). The petitioner must either make a prima facie showing of a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a nonconstitutional error that inherently constitutes a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990). Without either such showing, this court must deny the petition. *Id.* at 810, 812.

[3] Because we reverse the imposition of discretionary LFOs and remand, we need not address Schmitt's argument that defense counsel was ineffective for failing to object to the imposition of discretionary LFOs.

Based primarily on the same argument made in his direct appeal, Schmitt argues the sentencing court miscalculated his offender score because all his convictions washed out, except the 1993 convictions. He further argues defense counsel was ineffective for miscalculating Schmitt's offender score during plea negotiations, not apprising him of the wash out statute, and failing to argue his 1996 robbery did not count as a strike.

For the same reasons discussed above, all of Schmitt's PRP arguments are without merit. Because we hold that the time Schmitt spent incarcerated on the federal felony conviction interrupted RCW 9.94A.525(2)(b)'s 10-year wash out period, none of Schmitt's prior offenses washed out. Thus, there was no miscalculation of his offender score and counsel did not render ineffective assistance of counsel relating to the prior offenses. Schmitt fails to make a prima facie showing of a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a nonconstitutional error that inherently constitutes a complete miscarriage of justice. Without either such showing, we deny his petition.

E. APPELLATE COSTS

Schmitt objects to awarding appellate costs to the State in light of *Sinclair*, 192 Wn. App. 380, arguing he lacks the ability to pay. The trial court entered an order of indigency for this appeal on October 9, 2014. We presume a party remains indigent "throughout the review" unless the trial court finds otherwise. RAP 15.2(f). RCW 10.73.160(1) vests the appellate court with discretion to award appellate costs. Under RAP 14.2, that discretion may be exercised in a decision terminating review. We exercise our discretion and hold that an award of appellate costs to the State is not appropriate.

We affirm the judgment and sentence except for the imposition of discretionary LFOs, which we reverse and remand for the trial court to make an individualized inquiry into Schmitt's current and future ability to pay; we deny the PRP; and we waive appellate costs.

Lee, J.

We concur:

Johanson, P.J.

Sutton, J.