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I. STATEMENT OF FACTS

The State agrees with the statement of the case as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is a claim that the two prior Texas convictions were not adjudications of guilt but rather were deferred adjudications. Because of that, the defendant claims that they should be removed from his offender score.

On May 3, 2010 the defendant entered guilty pleas to the following crimes:

Count 1: Obtain or Attempt to Obtain a Controlled Substance by Fraud or Forged Prescription (RCW 69.50.403) committed on or about July 19, 2009; and

Count 2: Bail Jumping (Class B or C Felony) (RCW 9A.76.170(1)&(3)(c)); as charged in the Amended Information.

At the time of his pleas of guilty and as of the date of sentencing, the defendant had the following felony convictions:

No.	Crime	County/State Cause No.	Date of Crime	Date of Sentence
1	Theft of Property >\$1500 - <\$20K	Travis/TX DIDC08302304	8/6/2008	3/17/2010

2	Theft from Person	Travis/TX DIDC08302238	8/8/2008	3/17/2010
3	Possess Dangerous Drug – Hydrocodone	Williamson/TX 08-02312-1	3/21/2008	11/17/2008
4	Theft of Property >\$1500 - <\$20K	Fayette/TX 2010R-014	1/26/2010	2/17/2010

The certified copies of those documents were presented to the court (CP 44) and the issue became how to calculate the scoring. The Texas documents demonstrate that the defendant pled guilty to the crimes, but then the adjudication of that was deferred by the Texas court as part of their sentencing system. The State submits that, under our system, the matter is a “conviction”.

With respect to the criminal proceedings in each Texas case listed in Nos. 1, 2, and 3 above, the defendant contends that the certified records of the proceedings in each case indicate that the Texas court “deferred adjudication” under the Texas Code of Criminal Procedure. He contends that because the Texas courts did not enter a judgment of guilty, the proceedings did not result in a “conviction” and do not constitute a prior “conviction” and should not be included in his Offender Score under Chapter 9.94A RCW, the Sentencing Reform Act of Washington.

The State submits that the records relating to convictions listed above as numbers 1, 2, and 3 include documents which reflect that the

defendant entered into a plea agreements within the Texas system, that the Texas court complied with Texas procedural requirements concerning admonishing the defendant concerning the plea as required. See Texas Code of Criminal Procedure Article 26.13, and Article 27.13. Each record contains a specific recitation by the judge finding that the plea was knowingly, intelligently and voluntarily made and stating that the court accepted the defendant's plea of guilty.

RCW 9.94A.030 (10) provides:

“Conviction” means an adjudication of guilty pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

In State v. Morely, 134 Wn.2d 588, 952 P.2d 167 (1998) the defendants claimed that their military courts-martial could not be included in their Offender Score because they were not convictions pursuant to Title 10 under the above definition of a conviction in the SRA. The Washington Supreme Court specifically rejected the argument. It held that the clear legislative direction to courts to include out of state and foreign convictions in sentencing under the SRA would be completely without effect if sentencing courts had to sift through the procedural requirements of other states and exclude all convictions from other jurisdictions that did not meet the various procedural requirements in Title 10 RCW. Therefore

the Court limited the applicability of the “Title 10” reference in the definition of “Conviction” to Washington convictions. State v. Morely, supra, pp 595-600. Morely makes it clear that an out of state conviction which includes a verdict or finding of guilty, or acceptance of a plea of guilty, is a “conviction” under the SRA whether or not accompanied by a formal “adjudication of guilt”.

We agree the definition of RCW 9.94A.030(9) appears plain and unambiguous on its face. It states a conviction is an adjudication of guilty pursuant to Titles 10 and 13 RCW. While it makes sense to apply this definition to convictions from this state, it would be absolutely unworkable to require out-of-state convictions to comply with Washington criminal procedure before allowing the out-of-state convictions to be included in a defendant's criminal history. Nothing in the SRA states or implies that a sentencing court must conduct the tedious task of comparing out-of-state criminal procedures to in-state procedures. When we look to some of the leading authorities on the SRA, DAVID BOERNER, SENTENCING IN WASHINGTON (1985); STATE OF WASH. SENTENCING GUIDELINES COMM'N, ADULT SENTENCING GUIDELINES MANUAL (1996); and State of Wash. Sentencing Guidelines Comm'n, *Report to the Legislature* (1983), we find no mention of a sentencing court having to conduct such a ridiculous inquiry.

-(Morely, 134 Wn.2d at 596)

Defendant's argument in the present case seems to be that although the Texas courts in each of his Texas proceedings formally accepted his plea of guilty in compliance with Texas procedural requirements, the

court's compliance with Texas procedure (Article 42.12, Texas Code of Criminal Procedure) by which the court "deferred adjudication" and proceeded to impose probation means that his accepted guilty pleas are not "convictions". Such a conclusion is inconsistent with the definition of conviction in RCW 9.94A.030, and with the principles in State v. Morely.

That the Texas courts in each of the above cases did actually accept the Defendant's plea of guilty, and that the plea is binding upon the Defendant, can be understood from a review of Article 26.13 of the Texas Code of Criminal Procedure, as discussed in Ortiz v. State, 933 S.W.2d 102, (Tex. Crim. App. 1996). In that case, the defendant tendered a plea of guilty pursuant to a plea agreement to the lesser crime of robbery. The trial court "accepted" his plea of guilty but reserved its ruling on whether it would accept the plea agreement. Later the trial court ruled that it would not accept the plea agreement, and told defendant to withdraw the plea. When defendant was then prosecuted for the more serious crime of aggravated robbery, he claimed that he was placed in double jeopardy because he had earlier pled guilty to the lesser crime. In ruling on this question, the appellate court pointed out that the trial court had not complied with all of the requirements of Article 26.13 of the Code of Criminal Procedure, because the trial court had not accepted or rejected the plea agreement, which the Code required the court to do when

accepting the plea. The appellate court held that the trial court's "acceptance" of the guilty plea was therefore conditional and was not binding on the parties and not effective as a conviction for double jeopardy purposes.

By contrast, in the Defendant's Texas court proceedings, in each of the disputed cases, the Texas court record on its face indicates that the court complied with the requirements of its procedural code, including accepting the plea agreement, and then specifically accepted the Defendant's plea of guilty. Therefore it must be concluded that the Defendant's pleas of guilty in the Texas courts must be accepted by this Court as "convictions" under RCW 9.94A.030.

No published Washington case has been found ruling on this identical issue. However, it is clear from State v. Morely, that the intent of the Washington legislature is that where out of state court proceedings clearly have resulted in a determination of guilt, either by plea, or verdict or finding after trial, of conduct which if committed in Washington would be a felony crime, those out of court convictions should be included in the Offender Score in the interest of consistent sentences among defendants similarly charged who have been found to have committed similar criminal conduct, wherever it has occurred, in the past.

It is worth noting, although not dispositive of the present issue, that under Washington sentencing law prior to enactment of the SRA, a defendant was permitted to enter a plea of guilty to most felony crimes, and the Superior Court was permitted to defer the imposition of any sentence for a period up to the maximum term for the crime, and place the defendant on probation. Upon successful completion of probation requirements the defendant was entitled to have his plea of guilty vacated, a plea of not guilty substituted therefore, and to have an order of dismissal entered. (See RCW 9.95.200-.240) In State v. Wade, 44 Wn.App. 154, 721 P.2d 977 (1986) it was held that dismissal of a charge under this procedure did not prevent the conviction from being included in the Offender Score pursuant to the SRA, because of the *proviso* in RCW 9.95.240 specifically providing that such prior conviction could be pleaded and proved in any prosecution for a subsequent offense. The deferred sentence procedure in Chapter 9.95 was nearly identical in substance to the Texas criminal procedure utilized in Defendant's Texas court convictions.

The State therefore submits that each of the above listed Texas convictions must be included in Defendant's offender score, resulting in an Offender Score of 5, and a Standard Range of 6+ to 18 months on Count 1, and 17 to 22 months on Count 2.

Judge Nichols, on the date of sentencing, commented on previous arguments made as it related to the deferred adjudication in Texas. He had an opportunity to review memorandums from both the State and defense and after hearing the prior arguments he made the following comments:

JUDGE NICHOLS: As I recall, we were talking about the deferred adjudication in Texas and whether that is applicable as a conviction in the State of Washington. I have read the State's memorandum. I've looked at the Defense Memorandum and come across my own memorandum. I don't think there would need to be any further argument.

I – I agree with the State that the definition of conviction under the statute includes an acceptance of a plea of guilty. The Texas, on their deferred adjudication, it says, "After receiving a plea of guilty, they can go through a deferred adjudication." The Texas order deferring the adjudication says, "And, the defendant pled guilty thereto." And, the plea of guilty admits guilt. That does seem to meet the definition of 9.94A.030(9).

Also, there was an unpublished opinion that dealt with precisely the same issue that we have here out of Division 3. It was a Texas deferred prosecution and they did count that as a conviction for purposes of calculating. And, even though it is unpublished, it does follow the same logic that I was using when I came across the case. So, I do think that even though it was a deferred adjudication and we are talking adjudication, the fact that he pled guilty, accepted the plea of guilty and our definition includes a plea of guilty, I think all of that would substantiate the Texas deferred prosecutions as points for our adjudication.

-(RP, Sentencing Hearing May 13, 2010, 16, L6 – 17, L9)

The State submits that counting the Texas convictions in the defendant's offender score was the correct determination by the trial court and as such should be upheld on appeal.

III. CONCLUSION

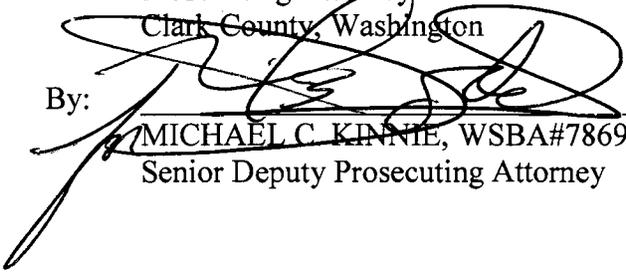
The trial court should be affirmed in all respects

DATED this 12th day of JAN, 2011.

Respectfully submitted:

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