

FILED  
Court of Appeals  
Division III  
State of Washington  
2/19/2019 4:33 PM

36034-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

LESLIE LEE PITTMAN,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

KATE R. HUBER  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711  
katehuber@washapp.org  
wapofficemail@washapp.org

TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR ..... 3

D. STATEMENT OF THE CASE ..... 5

E. ARGUMENT ..... 9

    1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Pittman to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law. .... 9

        a. The presumption of innocence and due process require the State to prove every element of an offense beyond a reasonable doubt. .... 9

        b. Interpreting the possession statute to have no mental element unconstitutionally shifts the burden of proof to the defendant. .... 11

        c. Requiring Mr. Pittman to prove he lacked knowledge of the drugs in his pocket violated due process. .... 13

    2. The court erred in including two Texas prior convictions in Mr. Pittman’s offender score that are not comparable to Washington felonies. .... 14

        a. A court may not include out-of-state convictions in an offender score unless they are comparable to a Washington felony. .... 14

        b. A Texas guilty plea is not an admission to the elements of the crime unless accompanied by a judicial confession. .... 18

        c. Collateral estoppel cannot relieve the State of its burden of proof at sentencing. .... 19

        d. Mr. Pittman was collaterally estopped from challenging the comparability of his Texas prior convictions. .... 22

        e. The State failed to establish Mr. Pittman’s 2009 and 2007 Texas convictions for unauthorized use of a vehicle were comparable to Washington felonies. .... 23

f.	Because they are not comparable, the court erred in including the 2009 and 2007 Texas prior convictions in Mr. Pittman’s offender score; therefore, resentencing is required. ....	30
3.	Mr. Pittman received ineffective assistance of counsel when his attorney withdrew objections to four other Texas prior convictions that are not comparable to Washington felonies and they were included in his offender score.....	31
a.	An attorney performs deficiently and a defendant is prejudiced when his out-of-state convictions that are not comparable are included in his offender score.....	31
b.	Four of Mr. Pittman’s other Texas prior convictions are not comparable to Washington felonies and should not have been included in his offender score.....	33
i.	Mr. Pittman’s 2008 Texas conviction for credit card abuse is not comparable to a Washington felony. ....	34
ii.	Mr. Pittman’s 1999 Texas conviction for assault in the third degree is not comparable to a Washington felony. ....	38
iii.	Mr. Pittman’s 1996 Texas conviction for forgery is not comparable to a Washington felony. ....	41
iv.	Mr. Pittman’s 1992 Texas conviction for possession of a dangerous drug is not comparable to a Washington felony. ....	43
c.	Mr. Pittman received ineffective assistance of counsel, and resentencing is required. ....	46
4.	This Court should strike the imposition of certain LFOs from Mr. Pittman’s judgment and sentence. ....	47
a.	The court treated Mr. Pittman as indigent but imposed costs.....	47
b.	<i>Ramirez</i> requires this Court to strike the \$100 DNA fee, \$200 criminal filing fee, and interest accrual from Mr. Pittman’s judgment and sentence.....	48
F.	CONCLUSION .....	50

TABLE OF AUTHORITIES

**Cases**

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 9

*Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895)9

*Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1988)..... 12

*Denton v. State*, 911 S.W.2d 388 (Tex. Ct. App. 1995) ..... 26

*Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013)..... 16, 17, 28

*Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)..... 9

*In re Personal Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980).. 30

*In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002)  
..... 30, 33

*In re Personal Restraint of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997)..... 30

*In re Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005)  
..... 15, 16, 28, 30

*In re Personal Restraint of Moi*, 184 Wn.2d 575, 360 P.3d 811 (2015)... 21

*In re Personal Restraint of Schorr*, 191 Wn.2d 315, 422 P.3d 451 (2018)  
..... 30

*In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 9

*Meneffe v. State*, 287 S.W.3d 9 (Tex. Ct. App. 2009) ..... 18, 19

*Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)..... 9

<i>Nelson v. Colorado</i> , ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017) .....	11
<i>Patterson v. New York</i> , 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).....	11
<i>Schad v. Arizona</i> , 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality) .....	11, 12
<i>State v. A.M.</i> , Case No. 96354-1, February 7, 2019, Order .....	10
<i>State v. Adkins</i> , 96 So. 3d 412 (Fla. 2012).....	12
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	10
<i>State v. Barnes</i> , 189 Wn.2d 492, 403 P.3d 72 (2017).....	25
<i>State v. Bell</i> , 649 N.W.2d 243 (N.D. 2002) .....	12
<i>State v. Bergstrom</i> , 162 Wn.2d 87, 169 P.3d 816 (2007) .....	15
<i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....	10, 12
<i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981).....	10
<i>State v. Davis</i> , 3 Wn. App. 2d 763, 418 P.3d 199 (2018).....	16, 17, 32
<i>State v. Eaton</i> , 168 Wn.2d 476, 229 P.3d 704 (2010).....	13
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	15
<i>State v. Garrison</i> , 3 Wn. App. 2d 1019, <i>review denied</i> , 191 Wn.2d 1015 (2018) (unpublished).....	19
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	15, 16, 20, 30
<i>State v. Jackson</i> , 129 Wn. App. 95, 117 P.3d 1182 (2005) .....	15
<i>State v. Johnson</i> , 180 Wn. App. 92, 320 P.3d 197 (2014).....	21, 33
<i>State v. Larkins</i> , 147 Wn. App. 858, 199 P.3d 441 (2008).....	21
<i>State v. Lundstrom</i> , ___ Wn. App. 2d ___, 429 P.3d 1116 (2018).....	49

<i>State v. Martin</i> , 55 Wn. App. 275, 776 P.2d 1383 (1989) .....	25
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	32
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009) .....	22, 23
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	17
<i>State v. Ortega</i> , 120 Wn. App. 165, 84 P.3d 935 (2004).....	18
<i>State v. Parker</i> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	30
<i>State v. Raines</i> , 83 Wn. App. 312, 922 P.2d 100 (1996) .....	31
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	5, 48, 49
<i>State v. Rose</i> , 175 Wn.2d 10, 282 P.3d 1087 (2012) .....	37
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	22, 23
<i>State v. Shelton</i> , 194 Wn. App. 660, 378 P.3d 230 (2016) .....	48
<i>State v. Thieffault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	32
<i>State v. Thomas</i> , 135 Wn. App. 474, 144 P.3d 1178 (2006) .....	15, 17, 18
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	31, 32
<i>Yeager v. United States</i> , 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009).....	21

**Statutes**

Former RCW 9A.36.031 (1999) .....	39
Former RCW 9A.56.010 (2008) .....	36, 37
Former RCW 9A.56.020 (2008) .....	36
Former RCW 9A.56.040 (2008) .....	36

Former RCW 9A.60.010 (1996) .....	43
Former RCW 9A.60.020 (1996) .....	42
Former RCW 69.50.101 (1992) .....	45
Former RCW 69.50.401 (1992) .....	45
Former Tex. Health & Safety Code 481.02 (1992) .....	45
Former Tex. Health & Safety Code 483.001 (1992) .....	44
Former Tex. Health & Safety Code 483.041 (1992) .....	43, 44
Former Tex. Penal Code 22.01 (1999).....	38
Former Tex. Penal Code 32.21 (1996).....	41
Former Tex. Penal Code 32.31 (2008).....	34, 37
RCW 9.94A.500.....	15, 16, 19, 20
RCW 9.94A.505.....	14
RCW 9.94A.510.....	15
RCW 9.94A.517.....	15
RCW 9.94A.520.....	15
RCW 9.94A.525.....	15, 16, 20, 21
RCW 9.94A.530.....	20
RCW 9A.56.068.....	25
RCW 9A.56.075.....	24, 25
RCW 10.01.160 .....	48
RCW 10.82.090 .....	49
RCW 36.18.020 .....	48

RCW 43.43.7541 .....	49
Tex. Code Crim. P. Article 1.15 .....	18
Tex. Penal Code 31.07 .....	24

**Other Authorities**

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (2018).....	48
Laws of 2018, ch. 269, § 1 .....	49
Laws of 2018, ch. 269, § 6.....	48
Laws of 2018, ch. 269, § 17 .....	48
Laws of 2018, ch. 269, § 18.....	49
Laws of 2002, ch. 289, § 2.....	48
Unif. Controlled Substances Act 1970 § 401.....	12

**Rules**

GR 14.1 .....	19
---------------	----

**Constitutional Provisions**

Const. art. I, § 3.....	2, 9, 15, 17
Const. art. I, § 22.....	2, 17, 31
U.S. Const. amend V.....	21
U.S. Const. amend VI.....	2, 17, 31
U.S. Const. amend. XIV .....	2, 9, 15, 17

## **A. INTRODUCTION**

A jury acquitted Leslie Pittman, a homeless man who survives by “dumpster diving,” of all crimes relating to possessing and damaging a stolen vehicle, which he happened upon in an already-destroyed state as he was on his daily route of scavenging through trash for food and items of value. However, the jury convicted Mr. Pittman of possession of a controlled substance for methamphetamine found in pieces of paper and foil recovered from his pockets.

Mr. Pittman denied knowingly possessing the pieces of paper and foil and denied knowingly possessing methamphetamine. Nonetheless, a jury convicted him of possession because he was unable to prove his lack of knowledge by a preponderance of the evidence. Requiring a defendant to prove unwitting possession impermissibly shifts the burden of proof and violates the presumption of innocence and due process.

Following his conviction, the court erroneously included several Texas prior convictions in Mr. Pittman’s offender score that are not comparable to Washington offenses. In addition, Mr. Pittman received ineffective assistance of counsel when his attorney withdrew objections to the State’s lack of proof of the comparability of several other Texas convictions.

## **B. ASSIGNMENTS OF ERROR**

1. In violation of due process as guaranteed by the Fourteenth Amendment and article I, § 3, the offense of possession of a controlled substance lacks a mens rea element, violates the presumption of innocence, and improperly shifts the burden to defendants to prove their possession was “unwitting.”

2. In violation of the Fourteenth Amendment, article I, § 3, and the Sentencing Reform Act (SRA), the court erred in finding a previous sentencing proceeding in a separate and unrelated matter collaterally estopped Mr. Pittman from challenging the calculation of his offender score in this case.

3. In violation of the Sixth and Fourteenth Amendments, article I, §§ 3 and 22, and the SRA, the court erred in finding in the alternative that two prior convictions were “legally and factually comparable” to Washington offenses and in including them in Mr. Pittman’s offender score.

4. Mr. Pittman was denied his Sixth Amendment right to the effective assistance of counsel when his attorney withdrew objections to the comparability and failed to challenge the inclusion of several prior convictions in his offender score.

5. The court erred in entering Finding of Fact 3.<sup>1</sup> CP 343.
6. The court erred in entering Finding of Fact 4. CP 343.
7. The court erred in entering Finding of Fact 5. CP 344.
8. The court erred in entering Finding of Fact 6. CP 344.
9. The court erred in entering Finding of Fact 7. CP 344.
10. The court erred in entering Finding of Fact 8. CP 344.
11. The court erred in entering Finding of Fact 9. CP 344.
12. The court erred in entering Finding of Fact 10. CP 344.
13. Recent amendments to the legal financial obligation (LFO)

statutes require the DNA fee, the criminal filing fee, and the accrual of interest be stricken from the judgment and sentence.

### **C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Criminal laws that lack a mens rea element and shift the burden to defendants to prove their innocence are contrary to the fundamental principles of the presumption of innocence and due process. In Washington, courts have interpreted possession of a controlled substance as a strict liability crime, and a person in possession of a controlled substance is presumed guilty unless he can prove “unwitting possession.” Does this presumption of guilt impermissibly shift the burden of proof and

---

<sup>1</sup> The court’s “Findings of Fact and Conclusions of Law – Offender Score & Comparability” is at CP 342-51 and attached as Appendix 1.

violate the presumption of innocence and due process such that this Court should reverse Mr. Pittman's conviction?

2. The SRA and state and federal constitutions require the State to prove the facts supporting a defendant's offender score. The State must prove the comparability of out-of-state prior convictions. Here, Mr. Pittman contested the comparability of two Texas prior convictions for unauthorized use of a vehicle, but the court found a previous sentencing proceeding in an unrelated case precluded Mr. Pittman from challenging the comparability of these convictions. Did the court err in finding Mr. Pittman was collaterally estopped from challenging these prior convictions?

3. The SRA and state and federal constitutions prohibit courts from including out-of-state convictions in a defendant's offender score where the convictions are not comparable to a Washington felony. Here, the court included two Texas prior convictions that are not comparable to Washington felonies. Did the court err in including the challenged non-comparable Texas prior convictions in Mr. Pittman's offender score?

4. Even though the State did not prove Mr. Pittman's six other Texas prior convictions are comparable to Washington felonies, defense counsel withdrew his objections to their comparability and stipulated to an offender score that included them. The court then sentenced Mr. Pittman

using an offender score including these non-comparable offenses. Did Mr. Pittman receive ineffective assistance of counsel?

5. Recent amendments to the LFO statutes prevent courts from imposing the criminal filing fee where a defendant is indigent, prevent courts from imposing the DNA fee where the State has previously collected a DNA sample from that individual, and eliminate interest accrual on non-restitution portions of LFOs. *State v. Ramirez*<sup>2</sup> held these amendments apply prospectively to individuals whose cases are pending on direct appeal. Here, Mr. Pittman was indigent, but the court imposed the criminal filing fee, imposed the DNA fee even though Mr. Pittman has been convicted previously of an offense that required the collection of a sample, and ordered all LFOs shall bear interest from the date of the judgment and sentence. Should this Court strike the criminal filing fee, DNA fee, and immediate accrual of interest from the judgment?

#### **D. STATEMENT OF THE CASE**

Mr. Pittman is homeless man who follows a regular path of “dumpster diving” to find what he needs to survive. RP 361. Mr. Pittman searches mainly for discarded food to eat, discarded items of value to sell, or discarded items he can use himself. RP 361-62. One of the spots he frequents on his “routes” is the dumpsters at the Horizon Apartments. RP

---

<sup>2</sup> 191 Wn.2d 732, 426 P.3d 714 (2018).

362. Mr. Pittman includes this spot on his regular routes because of the success he has had in scavenging from the dumpster when the building evicts people. RP 362. At the time, Horizon Apartments was known as a troubled area frequented by people hanging out, doing drugs, and rummaging through stuff, and the area with the dumpsters often had discarded items and trash strewn about. RP 205, 240-41.

On the day of his arrest, as Mr. Pittman approached the dumpsters at Horizon Apartments, he discovered a new car that was damaged with all the doors open and with “crap scattered everywhere.” RP 363. Mr. Pittman looked inside of the car but did not take anything from it or damage it. RP 393, 400-02. As Mr. Pittman was sorting through the trash in the area, the apartment manager approached him and told him to clean up the area or he would call the police. RP 232, 246, 367-69. Not wanting to lose this regular spot on his route, Mr. Pittman started cleaning up the area, placing items in the dumpster, in his pockets, and in the car. RP 368-70.

One of the apartment residents flagged down a police officer who was in the area on an unrelated investigation and directed him to Mr. Pittman. RP 226-27. The resident initially noticed Mr. Pittman because he “didn’t look like he belonged with the car,” and the resident claimed to have seen Mr. Pittman move the car and “yank[] stuff out of the back of

the car.” RP 195, 197-98. The officer discovered the vehicle had been stolen from a local car dealership and arrested Mr. Pittman. RP 233-34.

When police searched Mr. Pittman, they recovered pieces of folded foil and paper from his pants pockets. RP 292. These small folded objects contained methamphetamine. RP 337-40. Mr. Pittman denied knowing he possessed methamphetamine in his pockets. RP 375. He surmised the foil and paper were probably among items of trash he picked up and put in his pocket on his route that day, but he did not specifically recall putting those items in his pocket. RP 375, 380-83, 388-89. Mr. Pittman admitted to the arresting officer he had consumed methamphetamine either the day before his arrest or earlier that day. RP 389, 404.

Mr. Pittman denied stealing, possessing, or damaging the car. RP 372-73, 376-79, 400-02. The jury believed him, acquitting him of possession of a stolen motor vehicle and malicious mischief. CP 74-77, 79. As to the drug possession charge, the court instructed the jury Mr. Pittman had to prove his possession was unwitting. CP 103; RP 435. The jury convicted Mr. Pittman of possession of a controlled substance. CP 78.

At sentencing, Mr. Pittman specifically contested the comparability of his 2009 and 2007 prior convictions from Texas for unauthorized use of a vehicle. RP 489-90; CP 137-40, 165-68. However, the court held the State did not need to prove the comparability of these

offenses because in a previous sentencing proceeding in an unrelated case Mr. Pittman acknowledged the comparability of these convictions. RP 490; CP 342-46. In the alternative, the court found that the convictions were “legally and factually comparable” and included them in his offender score. RP 490, 501; CP 322, 342-46. In addition, the court included in his offender score six other prior convictions from Texas. CP 322. Mr. Pittman’s attorney withdrew his objection to the comparability of these offenses. RP 489. Although no statute requires stipulation to criminal history following a jury trial, counsel stipulated to an offender score that included these six other prior convictions. RP 489.

The court ultimately found Mr. Pittman had an offender score of nine, resulting in a presumptive standard range of 12+ to 24 months. CP 323. The court imposed a sentence of 23 months with credit for 541 days already served. CP 325; RP 496. The court also imposed 12 months of community custody. CP 325. Finally, the court imposed the \$500 victim assessment penalty, \$200 criminal filing fee, \$100 DNA collection fee, ordered the immediate accrual of interest, and set a schedule of \$20 per month commencing August 1, 2018. CP 327-28.

## E. ARGUMENT

### 1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Pittman to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law.

- a. The presumption of innocence and due process require the State to prove every element of an offense beyond a reasonable doubt.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Due process permits this presumption to be overcome only where the State proves every essential element of the charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

It is fundamental that “wrongdoing must be conscious to be criminal.” *Morrisette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). The apparent absence of a mental element from a statute does not mean none is required. *Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely

shown that a legislature intended to exclude a traditional mental element, the courts will imply one. *See, e.g., State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000) (declining to interpret unlawful possession of firearm statute as strict liability offense and instead interpreting knowledge element, despite absence of apparent mental intent element in statute). Failure to imply a mens rea element creates the potential to criminalize innocent conduct.

Notwithstanding the foregoing principles, Washington courts have construed the possession of a controlled substance statute as creating a strict liability crime with no mental element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). *But see State v. A.M.*, Case No. 96354-1, February 7, 2019, Order (granting petition for review of 76758-5-I, presenting issue of interpretation and constitutionality of Washington's possession of controlled substance statute as strict liability offense with no mens rea element). The State need only prove the nature of the substance and the fact of possession, not that the possession was knowing. *Bradshaw*, 152 Wn.2d at 537-38. For the innocent to avoid conviction, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. *Id.* at 538. Such an interpretation turns the presumption of innocence on its head and creates a presumption of guilt.

- b. Interpreting the possession statute to have no mental element unconstitutionally shifts the burden of proof to the defendant.

This impermissible burden shifting scheme deprives persons of their liberty without due process of law. A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017).

History and tradition provide guidance on when the constitutional line is crossed:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

*Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. at 650 (Scalia, J. concurring) (“It is precisely the historical practices that *define* what is ‘due.’”).

Washington appears to be the only state that interprets drug possession as a true strict liability crime. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring); *see Bradshaw*, 152 Wn.2d at 534; *Dawkins v. State*, 313 Md. 638, 647 n.7, 547 A.2d 1041 (1988); *State v. Bell*, 649 N.W.2d 243, 252 (N.D. 2002) (legislature changed North Dakota law to require mental element); *Adkins*, 96 So. 3d at 415-16 (Florida applying knowledge to possession, although not exact nature of substance).

That nearly every drug possession offense in this country has a mens rea requirement is unsurprising. As acknowledged in *Bradshaw*, the Uniform Controlled Substances Act of 1970 has a “knowingly or intentionally” requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); *Bradshaw*, 152 Wn.2d at 534. This element demonstrates the offense of possession of a controlled substance has traditionally required proof of knowledge.

Washington’s drug possession law is contrary to the practice of every other state. It is contrary to the tradition of requiring the State prove a mens rea element in drug possession crimes. This indicates the possession statute violates due process. *Schad*, 501 U.S. at 640.

Stripped of the traditional mental element of knowledge, there is no “wrongful quality” about a person’s conduct in possessing drugs. To

conclude otherwise criminalizes the innocent behavior of possessing property. Washington's possession statute is unconstitutional.

- c. Requiring Mr. Pittman to prove he lacked knowledge of the drugs in his pocket violated due process.

Courts must construe criminal statutes to avoid constitutional deficiencies. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). The jury convicted Mr. Pittman without proof beyond a reasonable doubt that he knowingly possessed a controlled substance. In addition, the jury was able to presume Mr. Pittman guilty and to require him to disprove this presumption only by showing his possession was unwitting.

Interpreting possession of a controlled substance to lack a mens rea element transforms it into a strict liability offense. Our courts disfavor strict liability offenses because such offenses potentially criminalize innocent behavior. Similarly, requiring a defendant to prove lack of knowledge through unwitting possession impermissibly shifts the burden of proof and violates the presumption of innocence and due process.

Construing the law to require Mr. Pittman to prove he did not know he possessed the methamphetamine found in his pockets required him to rebut a presumption of guilt. This unconstitutional burden shifting violated the presumption of innocence and due process. This Court should reverse Mr. Pittman's conviction.

**2. The court erred in including two Texas prior convictions in Mr. Pittman’s offender score that are not comparable to Washington felonies.**

The court sentenced Mr. Pittman based on a presumptive sentencing range calculated with an offender score of nine. CP 323; RP 491. In calculating the offender score, the court included two Texas prior convictions that Mr. Pittman specifically challenged: 2009 and 2007 convictions for unauthorized use of a vehicle. CP 137-40, 165-68, 322; RP 489-90. The court found Mr. Pittman was collaterally estopped from challenging these convictions because in a prior, unrelated sentencing proceeding, he agreed these convictions were comparable. CP 343-44. The court also found the convictions were “legally and factually comparable.” CP 344-46. However, Texas defines this offense to have elements broader than the elements for similar offenses in Washington. Therefore, the offense is not comparable, and the court erred in including the convictions in Mr. Pittman’s offender score. This Court should remand for resentencing.

- a. A court may not include out-of-state convictions in an offender score unless they are comparable to a Washington felony.

The SRA requires courts to sentence defendants within a presumptive range based on the seriousness level of the crime of conviction and the defendant’s offender score. RCW 9.94A.505,

9.94A.510, 9.94A.517, 9.94A.520; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). A defendant's offender score is based on his number of prior qualifying convictions within a certain time frame. RCW 9.94A.525; *Ford*, 137 Wn.2d at 479.

Appellate courts review the calculation of a defendant's offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Appellate courts also review the classification of an out-of-state conviction de novo. *State v. Jackson*, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005).

Out-of-state prior convictions may be included in a defendant's offender score only where they are comparable to a qualifying Washington offense. RCW 9.94A.500(1), 9.94A.525(3); *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 254-56, 111 P.3d 837 (2005); *State v. Thomas*, 135 Wn. App. 474, 477, 144 P.3d 1178 (2006).

"The burden to prove prior convictions at sentencing rests firmly with the State." *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012); *Ford*, 137 Wn.2d at 480. Due process requires the State to prove a defendant's offender score by a preponderance of the evidence. U.S. Const. amend. XIV; Const. art. I, § 3; *Hunley*, 175 Wn.2d at 909-10. This includes proving the existence, validity, and comparability of prior

convictions by a preponderance of the evidence. RCW 9.94A.500(1), RCW 9.94A.525(3); *Hunley*, 175 Wn.2d at 909-10.

To determine comparability, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington offenses. *Lavery*, 154 Wn.2d at 255. Only where the elements are comparable may a court count the out-of-state conviction towards a defendant's offender score. *Id.* at 254-58. If the out-of-state offense is broader than the Washington offense or is missing elements included in the Washington offense, it is not comparable. RCW 9.94A.525(3); *Descamps v. United States*, 570 U.S. 254, 276-78, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); *Lavery*, 154 Wn.2d at 258. In other words, if a defendant could be convicted under the out-of-state statute without being found guilty of a felony under the relevant Washington statute, the offenses are not comparable, and courts may not include out-of-state convictions for such offenses in a defendant's offender score.

Courts may not consider facts in documents related to out-of-state convictions unless those facts are proven beyond a reasonable doubt, or those facts are admitted by the defendant and are tethered to the essential elements of the crime in the out-of-state offense. *Descamps*, 570 U.S. at 276-78; *Lavery*, 154 Wn.2d at 257-58; *State v. Davis*, 3 Wn. App. 2d 763, 781-82, 418 P.3d 199 (2018). This restriction constrains courts to consider

only specific documents and also to consider only facts directly related to elements of the offense. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

“[T]he elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven.” *Id.* “[F]acts in a charging document that are untethered to the elements of a crime are outside the proper scope of what courts may consider.” *Davis*, 3 Wn. App. 2d at 782. Courts may not assume facts unrelated to elements were proven or admitted even where those facts are contained within the indictment or other documents. *Descamps*, 570 U.S. at 277-78; *Thomas*, 135 Wn. App. at 486; U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

“[S]uperfluous facts” are not reliable, even where included in a judgment or plea because defendants lack an incentive to contest facts unrelated to elements. *Descamps*, 570 U.S. at 270. For example, in *Thomas*, this Court recognized that even where the judgment stated that the defendant admitted the crimes as charged in the complaint, and where the complaint contained the necessary element under Washington law, the statutes were not legally comparable because the superfluous fact was not an element under California law. 135 Wn. App. at 483-87. The court held,

“Where facts alleged in the charging documents are not directly related to the elements, a court may not assume those facts have been proved or admitted.” *Id.* at 486.

Likewise, in *State v. Ortega*, this Court recognized that *Apprendi* prohibits a sentencing court from considering facts of the out-of-state conviction except in circumstances with certain safeguards. 120 Wn. App. 165, 84 P.3d 935 (2004) (declining to find Texas offense comparable where age of victim not proven beyond a reasonable doubt). Thus, even admissions to non-element facts cannot be considered in assessing comparability.

- b. A Texas guilty plea is not an admission to the elements of the crime unless accompanied by a judicial confession.

Unlike some states, Texas law does not require defendants pleading guilty to admit the truth of facts contained within the charging document. *Meneffe v. State*, 287 S.W.3d 9, 13-18 (Tex. Ct. App. 2009) (discussing Tex. Code Crim. P. Article 1.15). Rather, in pleading guilty, Texas law permits a defendant to “consent to the proffer of evidence in testimonial or documentary form, or to an oral or written stipulation of what the evidence against him would be, **without necessarily admitting to its veracity or accuracy.**” *Id.* at 13 (emphasis added). Alternatively, a defendant “may enter a sworn written statement . . . specifically admitting

his culpability.” *Id.* Therefore, in Texas, neither a sworn plea of guilty nor a stipulation of evidence automatically denotes an admission to the facts contained in the charging document. Neither a guilty plea nor a stipulation of evidence to the charged offense admit the accuracy of the charged facts. *Id.* Only a judicial confession in which a defendant specifically acknowledges the factual allegations in the charging document are true and correct is an admission in Texas. *Id.*

Without a specific judicial confession or other proof that a defendant admitted to specific facts relevant to essential elements, the State may not rely on a Texas indictment, judgment, or even a statement of guilty plea to prove a defendant admitted to facts. *Id.* at 13-18. Therefore, courts may not rely on facts contained in those documents to establish elements. *See, e.g., State v. Garrison*, 3 Wn. App. 2d 1019, \*4-\*5, *review denied*, 191 Wn.2d 1015 (2018) (unpublished) (declining to find comparability based on Texas information and judgment because State failed to produce evidentiary stipulation or judicial confession).<sup>3</sup>

c. Collateral estoppel cannot relieve the State of its burden of proof at sentencing.

Nothing in RCW 9.94A.500 permits courts to forgo a hearing and to rely on a previous sentencing hearing to determine a prior conviction.

---

<sup>3</sup> Cited only as persuasive authority under GR 14.1.

Rather, the statute specifically requires an independent determination of an offender score on each occasion on which a defendant is sentenced. RCW 9.94A.500(1). An affirmative acknowledgement *in the instant sentencing* of the existence or comparability of a prior conviction may satisfy the State's burden *at the instant sentencing*. RCW 9.94A.530(2); *see Hunley*, 175 Wn.2d at 908-12. However, nothing binds a defendant to an acknowledgment made in another case.

RCW 9.94A.530(2) permits the State to rely on information “admitted, acknowledged, or proved in a trial or at the time of sentencing” to determine a sentence. The plain language of the statute refers to admissions or acknowledgements at the time of the instant sentencing, not in previous unrelated sentencing proceedings. Therefore, the State may not rely on a defendant's admission or acknowledgment in a previous sentencing proceeding to establish the conviction in a current sentencing proceeding. A court must make an independent determination of a defendant's offender score on each occasion on which he is sentenced.

RCW 9.94A.525(22) also makes clear that a court's prior determination of an individual's offender score has no bearing on a subsequent determination. “The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal

history or offender score for the current offense.” *Id.*; *see also State v. Johnson*, 180 Wn. App. 92, 102-03, 320 P.3d 197 (2014) (rejecting defendant’s argument that different court’s determination at previous sentencing bound instant court and estopped it from counting prior convictions differently).

In addition to the constitutional constraints of due process and the statutory requirements of the SRA, the Fifth Amendment foundation of collateral estoppel prevents courts from applying the doctrine against defendants. Collateral estoppel applies to criminal cases solely as an extension of the Double Jeopardy Clause. It cannot prevent a criminal defendant from again challenging his sentence. *See generally Yeager v. United States*, 557 U.S. 110, 119, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009) (recognizing double jeopardy precludes the State from relitigating previously-decided issues); *accord In re Personal Restraint of Moi*, 184 Wn.2d 575, 580, 360 P.3d 811 (2015); *see also State v. Larkins*, 147 Wn. App. 858, 866-67, 199 P.3d 441 (2008) (accepting State’s concession that collateral estoppel cannot relieve State of its burden of proof at sentencing because, if crime is not comparable, “an injustice would exist” and, therefore, collateral estoppel cannot apply).

d. Mr. Pittman was collaterally estopped from challenging the comparability of his Texas prior convictions.

Here, despite Mr. Pittman's present affirmative challenge, the court held the State proved the comparability of Mr. Pittman's 2009 and 2007 unauthorized use of a vehicle convictions because in an unrelated previous sentencing hearing, Mr. Pittman acknowledged his Texas convictions were comparable to Washington felonies. CP 343-46 (Findings of Fact 3-5, Conclusions of Law 3-4); RP 491-91, 501. In so holding, the court found Mr. Pittman was collaterally estopped from challenging the comparability of his Texas convictions in the instant sentencing.<sup>4</sup>

Because the SRA and due process require the State to prove a defendant's offender score, including criminal history, at each individual sentencing hearing, and because collateral estoppel does not apply against defendants, the court erred in finding any prior acknowledgments by Mr. Pittman precluded his ability to challenge his out-of-state convictions at the instant sentencing.

The cases to which the court cited do not suggest otherwise. *State v. Ross* and *State v. Mendoza* both discuss the State's ability to satisfy

---

<sup>4</sup> In Findings of Fact 6-10 and Conclusions of Law 5-8, the court also found the two challenged Texas convictions to be "both legally and factually comparable to Washington felony offenses." CP 343-46. Therefore, Mr. Pittman addresses not only the court's collateral estoppel finding but also the comparability finding.

their burden of proving out-of-state convictions when a defendant affirmatively acknowledges those convictions *in that sentencing proceeding*. Neither case suggests an admission in one sentencing proceeding binds a defendant in all future sentencing proceedings. *State v. Mendoza*, 165 Wn.2d 913, 926-29, 205 P.3d 113 (2009) (discussing affirmative acknowledgement in context of defendant's agreement with, objection to, or silence in instant sentencing proceeding); *State v. Ross*, 152 Wn.2d 220, 230-32, 95 P.3d 1225 (2004) (holding defendant's affirmative acknowledgement at sentencing that prior convictions were comparable binds defendant at that sentencing, unless defendant shows error).

The SRA and basic due process require the court conduct a sentencing proceeding every time a defendant is convicted of a crime. The court erred in finding otherwise and in ruling Mr. Pittman's previous acknowledgment precluded him from challenging the prior convictions in the instant sentencing.

- e. The State failed to establish Mr. Pittman's 2009 and 2007 Texas convictions for unauthorized use of a vehicle were comparable to Washington felonies.

Mr. Pittman specifically challenged the comparability of his 2009 and 2007 Texas convictions for unauthorized use of a vehicle. CP 137-40, 165-68; RP 489-90. After finding Mr. Pittman was precluded from

challenging these convictions, the court also made a comparability finding. CP 343-46; RP 490-91. The court included both convictions in Mr. Pittman's offender score, finding them "legally and factually comparable." CP 322, 344-46. The court found them comparable "to either Taking a Motor Vehicle without Permission in the 2<sup>nd</sup> degree, or Possession of a Stolen Motor Vehicle." CP 345-46. Because the Texas statute for unlawful use of a vehicle is not comparable to either Washington felony, the court erred in including it in Mr. Pittman's offender score.

The Texas statute of which Mr. Pittman was convicted in 2009 and 2007 provides:

A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner.

Tex. Penal Code 31.07(a).<sup>5</sup>

Washington's taking a motor vehicle without permission in the second degree statute, which is a class C felony, defines that offense as:

A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drive away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or

---

<sup>5</sup> The statute was last amended in 1994, and the same version was in effect in 2009 and 2007.

she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

RCW 9A.56.075(1), (2).<sup>6</sup>

Washington's possession of a stolen vehicle, which is a class B felony, defines that offense as:

A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

RCW 9A.56.068(1), (2).<sup>7</sup>

The Texas offense is broader than both Washington felonies.

Indeed, the State conceded the statutes are not legally comparable below. CP 216. Both Washington statutes apply only to "motor vehicles" whereas the Texas statute applies to "vehicles," itemized as boats and airplanes, with no requirement they be motorized, as well as to motor-propelled vehicles. In addition, Washington has further limited the definition of motor vehicles under certain statutes. *See, e.g., State v. Barnes*, 189 Wn.2d 492, 497-98, 403 P.3d 72 (2017) (interpreting plain meaning of "motor vehicle" in theft statute as limited to "cars and other automobiles" and holding motorized lawn mower is not "motor vehicle" under statute); *State v. Martin*, 55 Wn. App. 275, 276-77, 776 P.2d 1383 (1989) (holding

---

<sup>6</sup> The Washington statute was last amended in 2003, and the same version was in effect in 2009 and 2007.

<sup>7</sup> The Washington statute was enacted in July 2007 and has not been amended since. Therefore, the same version was in effect in 2009 and 2007.

motorboat is not “motor vehicle” within meaning of taking motor vehicle without permission statute).

Both Washington statutes require knowledge of the lack of permission (in the taking a motor vehicle statute) or that the vehicle is stolen (in the possession of a stolen vehicle statute). The Texas statute requires that the *operation* be knowing but does not apply knowledge to the lack of the owner’s consent. Finally, with respect to the Washington taking a motor vehicle statute, Washington law requires a “taking,” whereas Texas law merely requires operation. Texas courts have held “operation” does not require the defendant move or drive the vehicle. *See Denton v. State*, 911 S.W.2d 388, 390 (Tex. Ct. App. 1995) (rejecting defendant’s claim of insufficient evidence of operation required for unauthorized use of vehicle where he neither drove nor moved vehicle and holding “operation” requires “[taking] action to affect the functioning of [the] vehicle in a manner that would enable the vehicle’s use”).

Therefore, multiple scenarios exist in which one could be guilty of the Texas offense but would not be guilty of conduct prohibited by either Washington statute. For example, it would be possible to be convicted in Texas if one knowingly operated a row boat and lacked the effective consent of the owner. In Washington, conversely, this conduct would not be criminalized because a row boat is not a motor vehicle. Too,

Washington requires knowledge (of the lack of permission in the one statute and that the vehicle is stolen in the other), and, as to the taking a motor vehicle offense, Washington requires a taking, not mere operation.

The Texas statute is broader than both Washington statutes. Therefore, the court erred in finding “the Texas offenses are legally comparable to either Taking a Motor Vehicle without Permission in the 2<sup>nd</sup> degree, or Possession of a Stolen Motor Vehicle.” CP 345 (Conclusion of Law 6); *see also* CP 344 (Findings of Fact 7-10).

The court also found the Texas statute was “factually comparable” to both Washington statutes. This, too, was erroneous. First, as explained above, courts may only look to the facts to ascertain the relevant elements of an out-of-state conviction, not to determine whether a defendant actually committed certain acts that would qualify as an offense in Washington. Second, even under a broader concept of “factual comparability,” the court’s conclusion was wrong.

In support of the 2009 conviction, the State submitted the following documents: Affidavit for Warrant of Arrest and Detention (CP 176-77), Indictment (CP 178-80), Plea of Guilty, Admonishments, Voluntary Statements, Waivers, Stipulation & Judicial Confession (CP 181-84), and two copies of Judgment of Conviction by Court – Waiver of Jury Trial (CP 185-86, 285-86).

No authority permits courts to look to an arrest warrant or accompanying affidavit. Such documents contain no admissions by the defendant or facts proven beyond a reasonable doubt.

The Plea of Guilty contains a statement, “I have read and understand the indictment or information filed in this case and admit: I committed and am guilty of each and every allegation it contains.” CP 183. The Indictment states the grand jury found Mr. Pitman did “intentionally or knowingly operate a motor-propelled vehicle, to-wit: an automobile, without the effective consent of . . . the owner there of.” CP 178.

First, the Court should find this is insufficient to establish the vehicle in Texas would have qualified as a motor vehicle in Washington. Texas does not differentiate between the various different vehicles covered by its statute -- boats, airplanes, or motor-propelled vehicles -- in establishing guilt. Thus, Mr. Pittman would have had no incentive to contest the accuracy of the specific vehicle included in the Indictment, and Mr. Pittman would have had no incentive to mount a defense that he engaged in unauthorized use of a vehicle other than a motor vehicle because it would not have affected the determination of guilt. *Descamps*, 570 U.S. at 270; *Lavery*, 154 Wn.2d at 257 (“Where the foreign statute is broader than Washington’s, that examination [of underlying facts] may not

be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.”).

Second, the allegations in the indictment do not establish Mr. Pittman took or drove the vehicle, as opposed to merely operated it, nor do they establish Mr. Pittman had knowledge of the lack of owner consent. Therefore, even if vehicle was an automobile, the documents do not support the other essential elements of the Washington offenses. Therefore, the conviction remains broader.

In support of the 2007 conviction, the State submitted the following documents: Affidavit for Warrant of Arrest and Detention (CP 273-74), Indictment (CP 275-76), Plea of Guilty, Admonishments, Voluntary Statements, Waivers, Stipulation & Judicial Confession (CP 221-24) and Judgment of Conviction by Court – Waiver of Jury Trial (CP 271-72). The Plea contains an admission that Mr. Pittman read the indictment and admits “I committed each and every element of the offense now charged against me.” CP 223. The Indictment states the grand jury found Mr. Pitman did “intentionally or knowingly operate a motor-propelled vehicle, to-wit: an automobile, without the effective consent of . . . the owner there of.” CP 275.

For the same reasons as the 2009 conviction, the State failed to establish this 2007 conviction is comparable to either Washington felony.

The Texas statute is broader than either relevant Washington felony. Therefore, the court erred in including the 2009 and 2007 Texas prior convictions in Mr. Pittman's offender score.

- f. Because they are not comparable, the court erred in including the 2009 and 2007 Texas prior convictions in Mr. Pittman's offender score; therefore, resentencing is required.

Courts may not impose sentences in excess of a sentence authorized by law. *In re Personal Restraint of Schorr*, 191 Wn.2d 315, 322-23, 422 P.3d 451 (2018); *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002); *In re Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). "A sentencing court acts without statutory authority under the [SRA] when it imposes a sentence based on a miscalculated offender score." *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The remedy for an erroneously calculated offender score is remand for resentencing. *Lavery*, 154 Wn.2d at 261-62; *Hunley*, 175 Wn.2d at 916. The remedy remains the same even where the erroneous offender score does not alter the presumptive range. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997); *see also Hunley*, 175 Wn.2d at 916 (remanding for resentencing because "The judgment and sentence should reflect [the defendant's] accurate offender score"); *State v. Raines*, 83 Wn.

App. 312, 315, 922 P.2d 100 (1996) (holding erroneous sentence must be corrected even where defendant served entire sentence because sentence could influence future sentencing court).

**3. Mr. Pittman received ineffective assistance of counsel when his attorney withdrew objections to four other Texas prior convictions that are not comparable to Washington felonies and they were included in his offender score.**

The court included six other Texas prior convictions in Mr. Pittman's offender score. CP 322. Mr. Pittman's attorney withdrew his objections to the comparability of these convictions and stipulated to an offender score that included these convictions. RP 489. Because four of these offenses have elements broader than the elements for similar offenses in Washington, they are not comparable. Therefore, Mr. Pittman received ineffective assistance of counsel where his attorney withdrew his objections and stipulated to an offender score that included these offenses. The court sentenced Mr. Pittman with an inaccurate offender score, and this Court should reverse the sentence and remand for resentencing.

- a. An attorney performs deficiently and a defendant is prejudiced when his out-of-state convictions that are not comparable are included in his offender score.

The federal and state constitutions guarantee defendants the right to effective assistance of counsel. 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); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

An appellate court must grant relief based on an ineffective assistance of counsel claim where the appellant demonstrates the attorney's performance was deficient and that prejudice resulted from the deficiency. *Strickland*, 466 U.S. at 688-89; *McFarland*, 127 Wn.2d at 334-35.

Defense counsel provides deficient assistance where he fails to object to an inaccurate offender score. *State v. Thiefault*, 160 Wn.2d 409, 417, 158 P.3d 580 (2007) (holding defense counsel's failure to object to trial court's erroneous comparability analysis constitutes ineffective assistance of counsel, vacating sentence, and remanding for resentencing); *Davis*, 3 Wn. App. 2d at 783-84. Likewise, such deficient performance necessarily prejudices a defendant where the inaccurate offender score affects the sentencing range. *Thiefault*, 160 Wn.2d at 417; *Davis*, 3 Wn. App. 2d at 783-84.

To assess the performance of defense counsel in this context, an appellate court must engage in a comparability analysis. *Thiefault*, 160 Wn.2d at 414-15. "Prejudice is self-evident as it increases the defendant's offender score." *Davis*, 3 Wn. App. 2d at 783. Therefore, where the appellate court finds the out-of-state offense not comparable, a defendant can establish prejudice when the sentencing court included the not-comparable offense in his offender score.

Where a defendant's offender score contains a legal error, the defendant may challenge the score on appeal, despite an affirmative agreement to the score at sentencing. *Johnson*, 180 Wn. App. at 99; *see also Goodwin*, 146 Wn.2d at 874-75 (court not bound by "an erroneous concession related to a matter of law").

- b. Four of Mr. Pittman's other Texas prior convictions are not comparable to Washington felonies and should not have been included in his offender score.

The court included six other Texas prior convictions in Mr. Pittman's offender score. CP 322; RP 490-91. Four of those offenses contain elements broader than the relevant Washington statutes. Therefore, Mr. Pittman's attorney performed deficiently when he stipulated to an offender score including these offenses, and their inclusion prejudiced Mr. Pittman. Moreover, because nothing requires a stipulation to an offender score following a jury trial, there was no reasonable strategic basis for doing so.

- i. Mr. Pittman's 2008 Texas conviction for credit card abuse is not comparable to a Washington felony.*

The court included Mr. Pittman's 2008 Texas conviction for credit card abuse in his offender score.<sup>8</sup> CP 322. Because this offense contains elements broader than any relevant Washington statute, it is not a comparable offense, and it should not have been included in Mr. Pittman's offender score.

In 2008, Texas Penal Code 32.31 provided:

(b) A person commits an offense if:

- (1) with intent to obtain a benefit fraudulently, he presents or uses a credit card or debit card with knowledge that: (A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder; or (B) the card has expired or has been revoked or cancelled;
- (2) with intent to obtain a benefit, he uses a fictitious credit card or debit card or the pretended number or description of a fictitious card;
- (3) he receives a benefit that he knows has been obtained in violation of this section;
- (4) he steals a credit card or debit card or, with knowledge that it has been stolen, receives a credit card or debit card with intent to use it, to sell it, or to transfer it to a person other than the issuer or the cardholder;
- (5) he buys a credit card or debit card from a person who he knows is not the issuer;

---

<sup>8</sup> In a prior, unrelated sentencing proceeding, the sentencing court declined to include this prior Texas conviction in Mr. Pittman's offender score, presumably finding the State failed to establish the existence or comparability of this prior conviction by a preponderance of the evidence. CP 348, 350. Ironically, this was the same sentencing proceeding that the instant sentencing court found bound Mr. Pittman and precluded him from challenged the unauthorized use of a vehicle convictions.

- (6) not being the issuer, he sells a credit card or debit card;
- (7) he uses or induces the cardholder to use the cardholder's credit card or debit card to obtain property or service for the actor's benefit for which the cardholder is financially unable to pay;
- (8) not being the cardholder, and without the effective consent of the cardholder, he possesses a credit card or debit card with intent to use it;
- (9) he possesses two or more incomplete credit cards or debit cards that have not been issued to him with intent to complete them without the effective consent of the issuer. For purposes of this subdivision, a card is incomplete if part of the matter that an issuer requires to appear on the card before it can be used, other than the signature of the cardholder, has not yet been stamped, embossed, imprinted, or written on it;
- (10) being authorized by an issuer to furnish goods or services on presentation of a credit card or debit card, he, with intent to defraud the issuer or the cardholder, furnishes goods or services on presentation of a credit card or debit card obtained or retained in violation of this section or a credit card or debit card that is forged, expired, or revoked;
- or
- (11) being authorized by an issuer to furnish goods or services on presentation of a credit card or debit card, he, with intent to defraud the issuer or a cardholder, fails to furnish goods or services that he represents in writing to the issuer that he has furnished.
- (c) It is presumed that a person who used a revoked, cancelled, or expired credit card or debit card had knowledge that the card had been revoked, cancelled, or expired if he had received notice of revocation, cancellation, or expiration from the issuer. For purposes of this section, notice may be either notice given orally in person or by telephone, or in writing by mail or by telegram. If written notice was sent by registered or certified mail with return receipt requested, or by telegram with report of delivery requested, addressed to the cardholder at the last address shown by the records of the issuer, it is presumed that the notice was received by the cardholder no later than five days after sent.

The State did not identify any comparable Washington felonies.

The closest Washington offense appears to be theft in the second degree.

In 2008, Washington defined theft in the second degree as:

(1) A person is guilty of theft in the second degree if he or she commits theft of: (a) Property or services which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value, other than a firearm as defined in RCW 9A.41.010 or a motor vehicle; or (b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or (c) An access device.

Former RCW 9A.56.040. In addition, in 2008, RCW 9A.56.020(1) defined

“theft” as:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

Finally, in 2008, Washington defined “access device” as:

any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument;

Former RCW 9A.56.010(1).

The Texas statute has broader elements and is therefore not comparable to this statute. The Texas statute permits conviction even where the card is expired, revoked, or cancelled. Tex. Penal Code 32.31(b)(1)(A), (B). Conversely, the Washington statute specifically requires that the card “can be used” to obtain something of value at the time the defendant possesses it. RCW 9A.56.010(1). Because an expired, revoked, or canceled card cannot be used to obtain something of value, the Washington statute is narrower. *See, e.g., State v. Rose*, 175 Wn.2d 10, 13-18, 282 P.3d 1087 (2012) (unactivated card not access device within meaning of statute because could not be used to obtain something of value at time of possession).

The State submitted the following documents: Warrant of Arrest & Affidavit (CP 279-80), Information (CP 281-82), and Judgment of Conviction by Court – Waiver of Jury Trial (CP 277-78). Nothing permits courts to consider the arrest warrant or accompanying affidavit. Nothing in the Judgment incorporates or adopts allegations made in the Information or other charging document. Therefore, the court cannot look to those documents. The Judgment itself merely reflects the charge of conviction: credit card abuse. Finally, the State filed no judicial confession or other document containing admission by Mr. Pittman. Therefore, this offense is not comparable and should not have been included in the offender score.

*ii. Mr. Pittman's 1999 Texas conviction for assault in the third degree is not comparable to a Washington felony.*

The court included Mr. Pittman's Texas assault in the third degree conviction in his offender score. CP 322; RP 490-91. Because this offense contains elements broader than any relevant Washington statute, it is not a comparable offense, and it should not have been included in Mr. Pittman's score.

In 1999, Texas Penal Code Section 22.01 provided:

- (a) A person commits an offense if the person:
  - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
  - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse;
  - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is:
  - (1) a felony if the third degree of the offense is committed against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant; of
  - (2) a state jail felony if it shown on the trial of the offense that the offense was committed against a family member and that the defendant has been previously convicted of an offense against a family member under this section two or more times.
- (c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor, except that an offense under Subsection (a) (3) is a Class A misdemeanor if the offense was committed

against an elderly individual or disabled individual, as those terms are defined by Section 22.04.

(d) For purposes of Subsection (b), the actor is presumed to have known the person assaulted was a public servant if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant.

(e) In this section, "family" has the meaning assigned by Section 71.01, Family Code.

In Washington, RCW 9A.36.031, assault in the third degree, is the closest offenses. However, it is not comparable. In 1999, RCW 9A.36.031 provided:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or (b) Assaults a person employed as a transit operator or driver by a public or private transit company while that person is performing his or her official duties at the time of the assault; or (c) Assaults a school bus driver employed by a school district or a private company under contract for transportation services with a school district while the driver is performing his or her official duties at the time of the assault; or (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or (e) Assaults a fire fighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or (h) Assaults a nurse,

physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: “Nurse” means a person licensed under chapter 18.79 RCW; “physician” means a person licensed under chapter 18.57 or 18.71 RCW; and “health care provider” means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

The Texas statute is broader than the Washington assault statute.

Washington requires the target of the assault be “a law enforcement officer or other employee of a law enforcement agency,” whereas Texas criminalize assault where the target is “a public servant.” In addition, Washington only criminalizes the conduct when the law enforcement officer or employee is “performing his or her official duties at the time of the assault,” whereas Texas also criminalizes the conduct when a public servant is “discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant.” Therefore, the Texas statute is broader and not comparable.

The State submitted the following documents: Indictment (CP 201-04), Written Admonishments and Plea Bargain Agreement with Defendant’s Written Waiver of Rights and Stipulation of Evidence (CP 205-209), and two copies of the Judgment (CP 210-12, 263-65).

The Stipulation of Evidence and Judicial Confession contained a “judicial admission” that Mr. Pittman did “unlawfully, intentionally, knowingly and recklessly cause serious bodily [sic] to Officer Wade Boedeker, a public servant.” CP 208. However, nothing in this statement admits that the assault occurred while the officer was performing his official duties as required by Washington statute. In addition, nothing admits that “Officer Wade Boedeker, a public servant,” is “a law enforcement officer or other employee” of law enforcement as required by the Washington statute. Therefore, the offense is not comparable to a Washington felony and should not have been included in Mr. Pittman’s offender score.

*iii. Mr. Pittman’s 1996 Texas conviction for forgery is not comparable to a Washington felony.*

The court included Mr. Pittman’s 1996 Texas conviction for forgery in his offender score. CP 322; RP 490-91. Because this offense contains elements broader than any relevant Washington statute, it is not a comparable offense.

In 1996, Texas Penal Code Section 32.21 defined Forgery as:

(a) For purposes of this section: (1) “Forge” means: (A) to alter, make, complete, execute, or authenticate any writing so that it purports: (i) to be the act of another who did not authorize that act; (ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or (iii) to be a copy of an original when no such

original existed; (B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of Paragraph (A); or (C) to possess a writing that is forged within the meaning of Paragraph (A) with intent to utter it in a manner specified in Paragraph (B). (2) "Writing" includes: (A) printing or any other method of recording information; (B) money, coins, tokens, stamps, seals, credit cards, badges, and trademarks; and (C) symbols of value, right, privilege, or identification.

(b) A person commits an offense if he forges a writing with intent to defraud or harm another.

(c) Except as provided in Subsections (d) and (e) an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a state jail felony if the writing is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check or similar sight order for payment of money, contract, release, or other commercial instrument.

(e) An offense under this section is a felony of the third degree if the writing is or purports to be: (1) part of an issue of money, securities, postage or revenue stamps; (2) a government record listed in Section 37.01(1)(C); or (3) other instruments issued by a state or national government or by a subdivision of either, or part of an issue of stock, bonds, or other instruments representing interests in or claims against another person.

(f) A person is presumed to intend to defraud or harm another if the person acts with respect to two or more writings of the same type and if each writing is a government record listed in Section 37.01(1)(C).

In 1996, Washington defined forgery as:

(1) A person is guilty of forgery if, with intent to injure or defraud: (a) He falsely makes, completes, or alters a written instrument or; (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

Former RCW 9A.60.020.

The Texas statute is broader than the Washington statute. Washington only criminalizes the acts of “makes, completes, or alters,” whereas Texas criminalizes the acts of “alter, make, complete, execute, or authenticate.” Therefore, one who executes or authenticates a writing could be convicted of the offense in Texas but would not be guilty of the offense in Washington. Texas also defines more broadly “writing” compared with Washington’s narrower definition of “written instrument” as defined in RCW 9A.60.010(1).

The State submitted only one document related to this offense: a Judgement on Verdict of Guilty By Court. CP 258-60. The Judgment may not be considered in the absence of a judicial confession adopting or admitting allegations in it. In addition, it contains nothing to more narrowly identify the elements. Therefore, the offense is not comparable.

*iv. Mr. Pittman’s 1992 Texas conviction for possession of a dangerous drug is not comparable to a Washington felony.*

The court included Mr. Pittman’s 1992 Texas conviction for possession of a dangerous drug in his offender score. CP 322; RP 490-91.

In 1992, Texas Health & Safety Code Section 483.041 defined possession of dangerous drug as:

(a) A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2).

(b) Except as permitted by this chapter, a person commits an offense if the person possesses a dangerous drug for the purpose of selling the drug.

(c) Subsection (a) does not apply to the possession of a dangerous drug in the usual course of business or practice or in the performance of official duties by the following persons or an agent or employee of the person: (1) a pharmacy, drug store, dispensary, apothecary shop, or prescription laboratory registered by the board; (2) a practitioner; (3) a person who obtains a dangerous drug for lawful research, teaching, or testing, but not for resale; (4) a hospital that obtains a dangerous drug for lawful administration by a practitioner; (5) an officer or employee of the federal, state, or local government; (6) a manufacturer or wholesaler registered with the commissioner of health under Chapter 431 (Texas Food, Drug, and Cosmetic Act); or (7) a carrier or warehouseman.

(d) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this section, in which event the offense is a Class A misdemeanor.

1992 Texas Health & Safety Code Section 483.001(3) defined

“dangerous drug” as:

a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend: (A) Caution: federal law prohibits dispensing without prescription; or (B) Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.

In Washington in 1992, RCW 69.50.401(d) defined possession of a controlled substance as:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(ii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

In 1992, RCW 69.50.101(d) defined as “controlled substance” “a drug, substance, or immediate precursor in Schedules I through V of Article II.”

The Texas statute is infinitely broader than the comparable Washington statute, for possession of a controlled substance. Washington possession of a controlled substance requires the substance be listed in Schedules I-V, whereas Texas defines dangerous drug as drugs not included in Texas’s Schedules I-V. Therefore, the Texas statute is broader than the Washington statute.

In addition, if one were to look instead to Texas’s controlled substances statute, for example, Section 481.102, the Texas statute prohibited the possession of any substance listed in Penalty Group I. However, the Texas statute includes some substances in Penalty Group I

that are not included in Washington's Schedules I through V. For example, Texas prohibits possession of Methadol, Monoacetylmorphine, and Carfentanil. None of these substances are prohibited by Washington's Schedules and, therefore, Washington's possession of a controlled substance statute. Therefore, the Texas statute is broader than the Washington statute, and the State failed to prove comparability.

In support of this 1992 conviction, the State submitted a Judgment on Plea of Guilty or Nolo Contendere Before Court – Waiver of Jury Trial (CP 251-53). The Judgment lists the offense of conviction as “possession of a controlled substance, namely: cocaine of less than twenty-eight grams.” CP 251. However, no judicial confession or other document containing admissions from Mr. Pittman adopts the factual allegations. Therefore, the court may not rely on the Judgment to find facts. Because this offense contains elements broader than any relevant Washington statute, it is not a comparable offense, and it should not have been included in Mr. Pittman's offender score.

- c. Mr. Pittman received ineffective assistance of counsel, and resentencing is required.

Four of the Texas prior offenses have elements broader than the elements for similar offenses in Washington; therefore, they are not comparable. However, Mr. Pittman's attorney stipulated to these offenses,

and the court included them in Mr. Pittman's offender score. The court sentenced Mr. Pittman based on this inaccurate offender score. This establishes both that Mr. Pittman's attorney performed deficiently and that the deficient performance prejudiced Mr. Pittman.

Mr. Pittman received ineffective assistance of counsel. This Court should vacate the sentence and remand for resentencing.

**4. This Court should strike the imposition of certain LFOs from Mr. Pittman's judgment and sentence.**

- a. The court treated Mr. Pittman as indigent but imposed costs.

The court conducted no inquiry into Mr. Pittman's indigency status before imposing LFOs. RP 497. However, the court ordered Mr. Pittman be appointed counsel at public expense at the beginning of the case, and appointed counsel represented Mr. Pittman for the duration of the case. In addition, the court found Mr. Pittman indigent for purposes of appeal. CP 340-41. Finally, the court imposed only those costs then believed to be mandatory. CP 327-28; RP 497. Thus, the court treated Mr. Pittman as indigent.

The court imposed the \$200 criminal filing fee and \$100 DNA collection fee. CP 327; RP 497. Mr. Pittman has two previous adult felony convictions in Washington State in the years 2013 and 2014. CP 322. Therefore, the State previously collected a DNA sample from Mr. Pittman.

*See State v. Shelton*, 194 Wn. App. 660, 667, 378 P.3d 230 (2016) (noting amendments requiring all adults convicted of any felony provide DNA sample became effective in 2002); Laws of 2002, ch. 289, § 2 (enacting statute mandating collection of DNA samples from adults convicted of any felony). Finally, the court ordered interest accrue from the date of the judgment through payment in full and ordered payments commence on August 1, 2018. CP 328 (“The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full.”).

- b. Ramirez requires this Court to strike the \$100 DNA fee, \$200 criminal filing fee, and interest accrual from Mr. Pittman’s judgment and sentence.

In Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (2018) our legislature amended the LFO statutes to prohibit more clearly courts from imposing costs when a defendant is indigent. Laws of 2018, ch. 269, § 6. In doing so, the legislature removed from a court’s discretion the nebulous determination of whether a defendant “is or will be able to pay” costs and instead unequivocally mandated that if a person is indigent under the statute, the court may not impose certain costs. RCW 10.01.160(3). Those costs include criminal court filing fees. RCW 36.18.020(2)(h) (prohibiting imposition of criminal court filing fee on indigent defendants); Laws of 2018, ch. 269, § 17(2)(h). In addition,

amendments prohibit collection of the DNA fee where the State previously collected a DNA sample from the defendant. RCW 43.43.7541 (exempting fee and collection of DNA where State already collected sample); Laws of 2018, ch. 269, § 18. Finally, amendments eliminate interest accrual on LFOs except for restitution. RCW 10.82.090(1) (“no interest shall accrue on nonrestitution [LFOs]”); Laws of 2018, ch. 269, § 1. The amendments took effect June 7, 2018.

In *Ramirez*, the Court held these amendments apply prospectively to all defendants whose cases are pending on direct appeal. 191 Wn.2d at 747-50. A resentencing hearing is unnecessary, and appellate courts may remand with a directive that the LFOs be stricken from the judgment and sentence. *Id.* at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike criminal court filing and DNA fees, as well as discretionary LFOs); *State v. Lundstrom*, \_\_\_ Wn. App. 2d \_\_\_, 429 P.3d 1116, 1121 (2018) (following *Ramirez* and reversing imposition of criminal court filing and DNA fees and remanding).

Mr. Pittman is indigent, and the court treated him as such. However, the court imposed fees and interest which the legislature now prohibits in amended statutes. Under *Ramirez*, these amendment apply prospectively, and this Court should strike the DNA and criminal filing

fees as well as the imposition of interest from Mr. Pittman's judgment and sentence.

#### **F. CONCLUSION**

Mr. Pittman's conviction for possession of a controlled substance should be reversed because requiring Mr. Pittman to prove unwitting possession unconstitutionally shifted the burden of proof and violated the presumption of innocence and due process of law.

In the alternative, this Court should reverse and remand for resentencing because the court included several Texas prior convictions in Mr. Pittman's offender score that are not comparable to Washington felonies.

Finally, the Court should find the imposition of discretionary LFOs and interest impermissible and strike all but the \$500 victim assessment fee.

DATED this 19th day of February, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

KATE R. HUBER (WSBA 47540)  
Washington Appellate Project (91052)  
Attorneys for Appellant  
[katehuber@washapp.org](mailto:katehuber@washapp.org)  
[wapofficemail@washapp.org](mailto:wapofficemail@washapp.org)

# APPENDIX 1

Findings of Fact and Conclusions of Law –  
Offender Score & Comparability

CP 342-51

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CN: 201601037187

**SN: 89**

PC: 10

**FILED**

**APR 30 2018**

TIMOTHY W. FITZGERALD  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SPOKANE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

LESLIE LEE PITTMAN

DOB: 06/23/67

No 16-1-03718-7

PA# 16-9-62953-0

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW – OFFENDER  
SCORE & COMPARABILITY

This matter was scheduled for sentencing on April 20, 2018. The defendant Leslie L. Pittman was present and represented by Michael Vander Giessen. The State of Washington was present and represented by Deputy Prosecuting Attorney Preston U. McCollam. These Findings of Fact and Conclusions of Law incorporate by reference the oral record from the April 20, 2018 courtroom proceedings. The court thus being fully advised in the premises now makes and enters the following:

FINDINGS OF FACT

- 1
- 2 1. On June 12, 2014 the defendant signed two separate understandings of criminal
- 3 history in two separate cause numbers before the Spokane County Superior Court.
- 4 These understandings of criminal history were signed pursuant to pleas of guilty on
- 5 two separate Spokane County Superior Court informations 14-1-01020-7 & 13-1-
- 6 02147-2.<sup>1</sup> The defendant was scored as a 9 for sentencing purposes.
- 7 2. On June 12, 2014 the defendant signed the understanding of criminal history under
- 8 and with the advice of counsel David Loebach. This document along with its
- 9 attendant judgment and sentence was filed herein by the State for the purpose of
- 10 proving prior offenses.
- 11 3. The defendant affirmatively agreed that the State met its burden of proving by a
- 12 preponderance of the evidence the defendant's prior convictions. The defendant
- 13 stipulated and affirmatively agreed that each of the listed criminal convictions
- 14 contained within his criminal history counted toward his offender score, sentencing
- 15 range, and were the equivalent of a Washington State criminal felony offense.<sup>2</sup> The
- 16 defendant did not challenge the comparability of any conviction other than credit or
- 17 debit card abuse. Based on his Texas convictions, the defendant was scored as a 9.
- 18 4. The defendant here did not merely acquiesce or agree to the State's calculation of his
- 19 criminal history. Rather the defendant waived any objection he had to the calculation
- 20 and moreover, affirmatively acknowledged that his out-of-State convictions were
- 21 comparable to Washington offenses. He initialed and signed the documents affirming
- 22
- 23
- 24

25 <sup>1</sup> Understandings of Criminal History attached as Exhibit A.

<sup>2</sup> With the exception to a 2008 conviction for Credit Card Abuse.

1 the above while under advisement of counsel.

- 2 5. Consequently, the State's burden to prove the prior convictions and determine  
3 comparability is satisfied by a preponderance of the evidence.
- 4 6. Notwithstanding the foregoing, the court conducted its own analysis of the  
5 defendant's criminal history utilizing the copies of the judgments and sentences,  
6 indictments, and statement of plea of guilty provided by the State and filed herein.
- 7 7. The court finds that the two disputed convictions from Travis County, Texas of  
8 "Unauthorized Use of Motor Vehicle" (conviction dates 6/15/2009 & 12/5/2007) are  
9 both legally and factually comparable to Washington felony offenses.
- 10 8. Both convictions are legally comparable to a Washington felony vehicle offense  
11 based on the information provided.
- 12 9. Both convictions are factually comparable to a Washington felony vehicle offense  
13 based on the indictments and judgments and sentences in each matter.
- 14 10. Because these convictions are both legally and factually comparable they shall be  
15 included in the defendant's offender score.

16  
17 **CONCLUSIONS OF LAW**

- 18 1. The existence of a prior conviction is a question of fact to be determined by the court.  
19 *In re Pers. Restraint of Adolph*, 170 Wn.2d 556,66-67 (2010). It is the State's  
20 obligation not the defendant, to assure that the record before the sentencing court  
21 supports the criminal history determination. *Id.* ; *See also State v. Ford*, 137 Wn.2d  
22 472 (1999).
- 23 2. The State proved the existence and comparability of the priors here by a  
24 preponderance of the evidence. The preponderance of evidence standard is not a  
25

1 difficult one to meet, but the State must at least introduce evidence of some kind to  
2 support the criminal history alleged. *State v. Hunley*, 175 Wn. 2d 901, 910, (2012)  
3 (citing *Ford*, 137 Wn.2d at 480). The State here has done so in multiple ways.

4 3. First and foremost, the State's burden to prove the prior convictions and determine  
5 comparability of out-of-state offenses is satisfied by the defendant's previous  
6 affirmative acknowledgement as to the comparability of his Texas convictions and his  
7 waiver of any objection to those convictions for sentencing purposes. *State v. Ross*,  
8 152 Wn. 2d 220, 229-30, 95 P.3d 1225 (2004) (a defendant's affirmative  
9 acknowledgment satisfies the SRA); *State v. Mendoza*, 165 Wn.2d 913, 929, 205 P.3d  
10 113 (2009), *disapproved of on other grounds by State v. Jones*, 182 Wn.2d 1, 338  
11 P.3d 278 (2014).

12 4. The defendant's previous affirmative acknowledgement, waivers, and stipulations  
13 made with the advice of competent counsel before this Superior Court satisfy the  
14 requirements of the SRA. *See, Id.* As a result the State here has met its burden and the  
15 out-of-state convictions at issue shall be counted for sentencing purposes.  
16

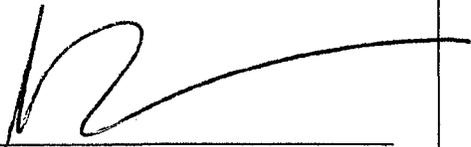
17 5. Furthermore, the court conducted a comparability analysis using the two-part analysis  
18 adopted in Washington. *See, State v. Thiefault*, 160 Wn.2d 409, 415, (2007). As a  
19 result, this court holds that the Texas convictions for Unauthorized Use of a Motor  
20 Vehicle are both legally and factually comparable to Washington felony offenses.

21 6. After comparing the elements of the Texas offense to that of a Washington offense  
22 the court finds that the Texas offenses are legally comparable to either Taking a  
23 Motor Vehicle without Permission in the 2<sup>nd</sup> degree, or Possession of a Stolen Motor  
24 Vehicle.  
25

1 7. When determining factual comparability, the sentencing court looks to the conduct of  
2 the defendant, "as evidenced by the indictment or information, to determine if the  
3 conduct itself would have violated a comparable Washington statute." *State v. Arndt*,  
4 179 Wn. App. 373, 379,(2014). This court reviewed the out-of-state indictments,  
5 judgements and sentences, as well as the statement on plea of guilty that were  
6 provided by the State.

7 8. The indictments on their face provide sufficient facts to determine that the  
8 defendant's conduct if it occurred in Washington would constitute a felony vehicle  
9 crime. *See e.g., Id.* at 378-81. Thus the defendant's Texas convictions are factually  
10 comparable to either Taking a Motor Vehicle without Permission in the 2<sup>nd</sup> degree, or  
11 Possession of a Stolen Motor Vehicle. *i.e. Id.*  
12

13  
14  
15 DONE IN OPEN COURT this 27 day of April, 2018.

16  
17  
18   
19 JUDGE ANNETTE PLESE

20  
21  
22 Presented by:  
23   
24 \_\_\_\_\_  
25 Preston U. McCollam  
Deputy Prosecuting Attorney  
WSBA No. 46549

Approved as to form:  
  
~**Electronic Approval**~  
Michael Vander Giessen  
Counsel for Defendant  
WSBA No. 45288

# Exhibit A

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

FILED

JUN 13 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )

Plaintiff, )

v. )

LESLIE LEE PITTMAN )  
WM 06/23/67 )

Defendant(s). )

No. 14-1-01020-7

PA# 14-9-52259-0

RPT# 003-14-0950246

RCW 9A.56.075-F (#08037)

UNDERSTANDING OF DEFENDANT'S  
CRIMINAL HISTORY  
(ST)

Pursuant to CrR 4.2 (e) the parties set out the following:

1.4 PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY  
(RCW 9.94A.525):

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
EVASDE ARREST (F)	021709		A	TRAVIS CO, TX	061509
UNAUTH USE MV	021709		A	TRAVIS CO, TX	061509
CREDIT CARD ABUSE	081008		A	TRAVIS CO, TX	100108
UNAUTH USE MV	102607		A	TRAVIS CO, TX	120507
ASSAULT 3	071799		A	MADISON CO, TX	061900
FORGERY	012396		A	MADISON CO, TX	061196
DANG DRUGS	021092	DRUG	A	TARRANT CO, TX	022592
THEFT OF PPTY	102890		A	TARRANT CO, TX	031591
FAIL STOP/RENDER AID	102890		A	TARRANT CO, TX	031591
EVASDE ARREST	101807	MISD.	A	TRAVIS CO, TX	102407
POSS DANG DRUG	062707	MISD.	A	TRAVIS CO, TX	070307
POSS MARIJUANA	053007	MISD.	A	TRAVIS CO, TX	060607
EVASDE ARREST	022505	MISD.	A	TRAVIS CO, TX	030305
CRIM TRESPASS	022505	MISD.	A	TRAVIS CO, TX	030305
RESIST ARREST	072799	ARREST MISD.	A	TARRANT CO, TX	012000

*obj. Not  
Washington  
Comparable*

348

( ) Prior convictions counted as one offense in determining offender score (RCW 9.94A.525(5)): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

1.4(a) This statement of Prosecutor's Understanding of Defendant's Criminal History is based upon present information known to the Prosecutor and does not limit the use of additional criminal history if later ascertained.

1.5 Defendant's understanding and agreement that his/her criminal conviction history is set forth above in this document. Defendant affirmatively agrees that the State has proven, by a preponderance of the evidence, defendant's prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document - UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range and that any out-of-state or foreign conviction(s) is the equivalent of a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range. The defendant further stipulates and agrees he/she has read or has had the contents of the document read to him/her and he/she understands and agrees with the entirety of the contents of this document. (DEFENDANT'S INITIALS J.P.)

( ) The defendant committed the current offense while on community placement/community custody at the time of the offense. RCW 9.94A.525

Date: \_\_\_\_\_

Leslie Lee Pittman  
\_\_\_\_\_  
LESLIE LEE PITTMAN  
Defendant

Date: 6-12-14

David S. Loebach  
\_\_\_\_\_  
DAVID S. LOEBACH  
Lawyer for Defendant

3925  
WSBA #

Date: 6-12-14

George W. Gagnon, III  
\_\_\_\_\_  
GEORGE W. GAGNON, III  
Deputy Prosecuting Attorney

28768  
WSBA #

FILED

JUN 13 2014

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )

Plaintiff, )

v. )

LESLIE LEE PITTMAN )  
WM 06/23/67 )

Defendant(s). )

No. 13-1-02147-2

PA# 13-9-49366-0

RPT# 002-13-0196915

RCW 69.50.4013(1)-F (#56640)

UNDERSTANDING OF DEFENDANT'S  
CRIMINAL HISTORY

(ST)

Pursuant to CrR 4.2 (e) the parties set out the following:

1.4 PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY  
(RCW 9.94A.525):

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
EVADE ARREST (F)	021709		A	TRAVIS CO, TX	061509
UNAUTH USE MV	021709		A	TRAVIS CO, TX	061509
<del>CREDIT CARD ABUSE</del>	081008		A	TRAVIS CO, TX	100108
UNAUTH USE MV	102607		A	TRAVIS CO, TX	120507
ASSAULT 3	071799		A	MADISON CO, TX	061900
FORGERY	012396		A	MADISON CO, TX	061196
DANG DRUGS	021092	DRUG	A	TARRANT CO, TX	022592
THEFT OF PPTY	102890		A	TARRANT CO, TX	031591
FAIL STOP/RENDER AID	102890		A	TARRANT CO, TX	031591
EVADE ARREST	101807	MISD.	A	TRAVIS CO, TX	102407
POSS DANG DRUG	062707	MISD.	A	TRAVIS CO, TX	070307
POSS MARIJUANA	053007	MISD.	A	TRAVIS CO, TX	060607
EVADE ARREST	022505	MISD.	A	TRAVIS CO, TX	030305
CRIM TRESPASS	022505	MISD.	A	TRAVIS CO, TX	030305
RESIST ARREST	072799	ARREST MISD.	A	TARRANT CO, TX	012000

obj. Not  
Washington  
Compatible

350

( ) Prior convictions counted as one offense in determining offender score (RCW 9.94A.525(5)): \_\_\_\_\_

1.4(a) This statement of Prosecutor's Understanding of Defendant's Criminal History is based upon present information known to the Prosecutor and does not limit the use of additional criminal history if later ascertained.

1.5

Defendant's understanding and agreement that his/her criminal conviction history is set forth above in this document. Defendant affirmatively agrees that the State has proven, by a preponderance of the evidence, defendant's prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document - UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range and that any out-of-state or foreign conviction(s) is the equivalent of a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range. The defendant further stipulates and agrees he/she has read or has had the contents of the document read to him/her and he/she understands and agrees with the entirety of the contents of this document. (DEFENDANT'S INITIALS

*LLP*

( ) The defendant committed the current offense while on community placement/community custody at the time of the offense. RCW 9.94A.525

Date: \_\_\_\_\_

*Leslie Lee Pittman*  
\_\_\_\_\_  
LESLIE LEE PITTMAN  
Defendant

Date: 6-12-14

*David S. Loebach*  
\_\_\_\_\_  
DAVID S. LOEBACH  
Lawyer for Defendant

38125  
WSBA #

Date: 6-12-14

*George W. Gagnon, III*  
\_\_\_\_\_  
GEORGE W. GAGNON, III  
Deputy Prosecuting Attorney

28768  
WSBA #



# WASHINGTON APPELLATE PROJECT

February 19, 2019 - 4:33 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36034-2  
**Appellate Court Case Title:** State of Washington v. Leslie Lee Pittman  
**Superior Court Case Number:** 16-1-03718-7

### The following documents have been uploaded:

- 360342\_Briefs\_20190219163157D3881302\_7851.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.021919-06.pdf*

### A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- greg@washapp.org
- scpaappeals@spokanecounty.org

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Kate Huber - Email: katehuber@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20190219163157D3881302**