

Supreme Court No. 77753-5
Court of Appeals No. 53214-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GAYLON THIEFAULT,

Petitioner.

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

The Honorable Ronald L. Castleberry

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES PRESENTED FOR DECISION

(1). Whether the defendant's right to a jury determination of facts increasing his sentence above that authorized by the jury's verdict was violated, when the trial court included a Montana attempted robbery conviction, obtained by plea, as a "strike" offense in the defendant's criminal history, based on the court's own finding, by a preponderance of the evidence, that the actual facts of the defendant's foreign conduct would justify conviction for attempted robbery in Washington,

- where the Montana offense of attempted robbery is defined more broadly than in Washington,

- where the defendant's Montana guilty plea did not admit to conduct satisfying the Washington definition of the offense, and

- where the record of sentencing in the present case does not demonstrate a knowing, voluntary waiver by the defendant of his right to jury determination of the facts necessary to show comparability.

(2). Whether the facts of the defendant's conduct in committing the foreign offense, when used to determine the comparability of a conviction under a broader foreign statute for purposes of imposing a Life Without Parole (LWOP) sentence following a jury trial conviction for second degree rape, are facts upon which the defendant has a right to jury determination,

or whether such facts involve merely either "the fact of a prior conviction," or mere sentencing factors for purposes of determining what sentence to impose within the range of punishment authorized by the jury's verdict.

(3). Whether the defendant's right to a jury determination of the facts necessary for determining the factual comparability of a foreign conviction can be waived by his counsel's failure to object, or agreement to, comparability, or whether the record must show a knowing, voluntary waiver of that right by the defendant.

(4). Whether second degree rape is a lesser offense within second degree rape aggravated by the Montana conviction, such that the violation of the defendant's right to a jury determination of factual comparability requires resentencing without inclusion of the Montana conviction, in accord with the defendant's protection against double jeopardy.

(5). In the alternative, if this Court concludes that it can presume waiver of the jury trial right by Mr. Thieffault based on a silent record,

(a) whether trial counsel provided ineffective assistance if he agreed to comparability of the Montana conviction; or

(b) whether counsel merely failed to object to comparability;

in either event requiring remand for resentencing, and another opportunity for the State to prove comparability, either to a jury, or to the court following an appropriate waiver by the defendant of his right to a jury.

(6). Whether the LWOP sentence violated the single subject rule.

(7). Whether the State was required to charge and prove the defendant's persistent offender status to a jury beyond a reasonable doubt.

B. STATEMENT OF THE CASE

Mr. Thieffault was originally sentenced to a LWOP sentence on August 10, 2001, following the trial court's determination that his prior Montana and federal convictions were comparable to Washington strike crimes, and the court's ruling that he was therefore a "persistent offender, both on the three-strike basis . . . or on the basis of the prior conviction of the prerequisite sexual offense." 8/10/01RP at 26-29. At this first sentencing, after the State's presentation of documentation from Thieffault's Montana and federal convictions, his counsel had stated, "I don't believe the court has any discretion about the sentence here." 8/10/01RP at 24.

Following reversal of that sentence,¹ Mr. Thieffault again proceeded to sentencing on September 30, 2003. 9/30/03RP at 37. At this sentencing

¹In an unpublished decision in State v. Thieffault, 2003 Wash. App. LEXIS 718, at p. 11, the Court held that Mr. Thieffault's sentence under the two-strike statute could not stand if it depended upon the federal conviction, because "[o]ne of Thieffault's prior offenses, a federal conviction for rape (aggravated sexual abuse), was not a listed offense

hearing, the trial court rejected new defense counsel's argument that the prior convictions were facially invalid on ground that they failed to evince that the defendant was represented by counsel. 9/30/03RP at 41-42. With regard to comparability, defense counsel indicated he understood the trial court had previously determined that the Montana and federal prior offenses were comparable to Washington "strike" offenses, and stated, "So I'm not making – raising that argument because my understanding is that it's already been determined." 9/30/03RP at 39. The trial court then again analyzed the foreign offenses, incorporating its analysis from the 2001 sentencing hearing (at which the court had found the elements of the foreign offenses identical and also stated it had read the "affidavit" from Montana). After concluding that the Montana and federal offenses were comparable to Washington strike offenses, the court imposed a "three-strikes" LWOP sentence. 9/30/03RP at 44-46; CP 17-28; see 8/10/01RP at 28.

On appeal, the Court of Appeals agreed with Mr. Thiefault's argument that the Montana attempted robbery statutes are broader in multiple respects than the Washington statutes defining this State's "strike" offense of attempted second robbery. Court of Appeals decision, at pp. 16-18 (Attached as Appendix A).

under the version of the two-strike statute in effect at the time of Thiefault's crime." (citing former RCW 9.94A.030(29)(b)(i-ii) (1999)).

In addition, the Court further agreed that the Montana judgment provided by the State failed to show that the defendant had pled guilty to facts establishing comparability of his foreign conduct to Washington attempted second degree robbery. Although an affidavit from the Montana prosecutor and a document entitled the “Motion for Leave to File Information” contained allegations that described conduct which would arguably amount to attempted robbery in Washington, the judgment failed to reference these documents. Instead, the judgment merely stated that the defendant pleaded guilty to an “Information,” a document which was not presented by the State at either the 2001 or 2003 sentencing hearings. Court of Appeals decision, at p. 19. (The plea documents from Montana are attached as Appendix B.).

However, the Court rejected Mr. Thieffault’s argument that his counsel at the September 30, 2003 sentencing was ineffective for failing to object to comparability of the Montana offense, reasoning that the Motion for Leave to File Information described conduct that would constitute robbery in Washington, and that Thieffault had not shown that, if his counsel had objected to comparability, “the court likely would not have given the State the opportunity to procure the Information or any other appropriate

materials,” which the Court of Appeals apparently assumed would contain facts showing comparability. Court of Appeals decision, at pp. 20-21.

The Court also held that Thieffault’s counsel had stipulated to comparability of the Montana conviction, precluding appellate review of the trial court’s comparability analysis and its inclusion of that conviction in his offender score. Court of Appeals decision, at pp. 21-22.

C. ARGUMENT

1. JUDICIAL DETERMINATION OF THE FACTUAL COMPARABILITY OF THE DEFENDANT’S OUT-OF-STATE CONDUCT UNDER A BROADER FOREIGN STATUTE VIOLATES THE SIXTH AMENDMENT WHERE THE DEFENDANT, AS HERE, WAS NOT ADVISED OF HIS RIGHT TO A JURY TRIAL ON THE FACTS NECESSARY FOR COMPARABILITY, NOR DID HE PLEAD GUILTY TO THE NECESSARY FACTS IN THE PRIOR PROCEEDING.

The comparability of a foreign conviction obtained pursuant to a plea of guilty under a broader foreign statute, where the defendant’s plea did not admit the facts showing comparability and thus comparability is dependent on the current sentencing court’s evaluation of the defendant’s unadmitted out-of-state conduct, is a matter that implicates the jury trial guarantee of the Sixth Amendment, and Fourteenth Amendment Due Process. It is thus an issue that could not be waived by Mr. Thieffault’s lawyer’s failure to object, or even agreement to comparability, because the

right to a jury trial on facts that increase a sentence above that authorized by the jury's verdict is a right that can only be waived by the defendant's voluntary, knowledgeable waiver made after a warning as to the existence of that right. The narrow construction accorded the "fact of prior conviction" exception to Apprendi does not apply to such fact-finding by a sentencing court.

Therefore, ultimately, this case does not depend on the question whether counsel's statement that he was "not . . . raising that argument" was a failure to object to comparability, or whether it was an agreement to comparability that constituted ineffective assistance of counsel. Mr. Thieffault's right to a jury determination of comparability facts was violated, and his LWOP sentence must be reversed and the case remanded for imposition of standard range sentence for second degree rape without inclusion of the Montana conviction.

(a). The defendant has a right to jury determination of facts increasing his sentence beyond the maximum authorized by the jury's verdict on his current offense, except for the fact of a prior conviction.

The Sixth Amendment guarantees Mr. Thieffault the right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530

U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). Additionally, the Due Process Clause of the Fourteenth Amendment compels any fact which increases a sentence to a term beyond the maximum be submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 490 (citing Jones v. United States, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (opinion of Stevens, J.)). Such facts are indeed elements of the offense for which the defendant is ultimately punished. Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466, 475, 2006 U.S. LEXIS 5164 (2006).

The Supreme Court has narrowly excepted the “fact” of a prior conviction from those facts which must be submitted to a jury. Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). But beyond such a fact, a court’s ability to impose a sentence is limited to the maximum punishment for that offense reflected in the jury verdict alone. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004); State v. Hughes, 154 Wn.2d 118, 131, 110 P.3d 192 (2005). In this context, “statutory maximum” means “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely v.

Washington, 542 U.S. at 303-04. In the case of In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), this Court made clear that an LWOP sentence is punishment that is beyond the statutory maximum for the crime of attempted second degree rape for which Mr. Thiefault was sentenced in the present case. See Lavery, 154 Wn.2d at 256.

(b). Where a foreign conviction was obtained under a broader foreign statute, the right to a jury determination applies to facts establishing comparability of the defendant's actual conduct to a Washington crime. The “fact of prior conviction” exception to Almendarez-Torres v. United States and Blakely does not include facts necessary to show the comparability of offenses obtained under broader foreign statutes. Decisions following Almendarez-Torres v. United States have delimited the narrow bounds of the “fact of prior conviction” exception to the Sixth Amendment right to a jury trial. In Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court made clear that the exception does not include facts “about” a prior conviction. Shepard v. United States, 544 U.S. at 25.

In Shepard, the Court was interpreting the Armed Career Criminal Act (ACCA), which requires a minimum sentence of 15 years for any person found guilty of possession of a firearm if he has also been previously

convicted for three violent offenses, including “generic burglary,” defined as burglary of a building as opposed to a vehicle or vessel. Shepard v. United States, 544 U.S. at 15. The Court had previously held in Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990), that under the ACCA, a sentencing court could find that the defendant had a prior conviction for generic burglary only if he had been convicted under a burglary statute that defined burglary as generic burglary, or if the jury instructions in the previous case showed that the jury had been required to find burglary of a building in order to convict. Shepard, 544 U.S. at 15, 17 (citing Taylor, 495 U.S. at 602). In Shepard, the Court held that sentencing courts could not look to “police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary,” where the plea was under a non-generic burglary statute. Shepard, 544 U.S. at 15.

Although the Court’s decision strictly involved a construction of the ACCA, the Court strongly implied that its decision was rooted in defendant’s constitutional right to jury determination of facts increasing his sentence, where those facts had not been admitted by the defendant as part of the prior plea. The Court repeated its concern previously expressed in Taylor: “If the sentencing court were to conclude, from its own review of

the record, that the defendant [who was convicted under a nongeneric burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?” (Bracketed language supplied by Shepard.) Shepard, 544 U.S. at 24 (citing Taylor, at 601). Answering the question in the affirmative, the Court stated that the Taylor Court

anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant.

Shepard, 544 U.S. at 24 (citing Jones v. United States, 526 U.S. at 243, n. 6; Appendi v. New Jersey, 530 U.S. at 490). The Court indicated that this limitation of the scope of documents a sentencing court could examine in the absence of a waiver by the defendant at sentencing was necessary given the constraint that the Court interpret the ACCA in such a way as to “avoid serious risks of unconstitutionality.” Shepard, 544 U.S. at 25. The Court stated:

[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Appendi, to

say that Almendarez-Torres clearly authorizes a judge to resolve the dispute.

Shepard, 544 U.S. at 25.

Shepard establishes that to the extent that a sentencing judge may determine the factual comparability of a foreign conviction, this determination must be restricted to the facts admitted by the defendant in the foreign plea or found by a jury, unless there has been a “waiver of rights” by the defendant in the present proceeding. Shepard, 544 U.S. at 24. This is because, where the sentencing court seeks to include a prior offense in a defendant’s history and that conviction was obtained under a statute broader than that statutorily specified for inclusion in that history, the court is engaging in fact-finding from the bench when it looks to documents alleging the defendant’s actual foreign conduct, unless those facts have previously been established under due process safeguards such as proof to a jury or by admission of those facts as part of the prior valid guilty plea.

The present case is precisely analogous. When the trial court looked to facts contained in documents, including a “Motion for Leave to File Information,” that the defendant had not admitted as part of his guilty plea to the Montana offense, in order to determine if Mr. Thieffault’s actual conduct satisfied Washington attempted robbery, the court was engaging in

new fact-finding. The Court was not merely finding the “fact of” a prior conviction.

Similarly, this Court ruled in In re Personal Restraint of Lavery, 154 Wn.2d 249, 11 P.3d 837, 842 (2005), that the Almendarez-Torres “prior conviction” exception does not apply when an out-of-state crime is not identical to the Washington offense. In re Personal Restraint of Lavery, 154 Wn.2d at 256-58. Whether a prior offense exists is merely a question of the fact of a prior conviction if it was obtained under a Washington or identical foreign statute, but if a foreign offense was obtained under a broader statute, the sentencing court is doing more than merely deciding the fact of a prior conviction.

No additional safeguards [in the case of an identical statute] are required because a certified copy of a prior judgment and sentence is highly reliable evidence. While this is also true of foreign crimes that are identical on their face, it is not true for foreign crimes that are not facially identical.

Lavery, 154 Wn.2d at 256-57 (citing State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003)) .

Where the foreign conviction was obtained by plea, as in Mr. Thieffault’s case, the sentencing court may consider facts conceded by the defendant in his foreign guilty plea, but not facts not admitted by the defendant in that plea. Lavery, 154 Wn.2d at 258.

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. Lavery thus held that the defendant's prior federal robbery conviction was not comparable to Washington robbery where Lavery had "neither admitted nor stipulated to facts which established specific intent" to deprive, and such intent was necessary for the offense of Washington robbery. Lavery, at 258.

Also correctly decided in this context was State v. Bunting, 115 Wn. App. 135, 140-41, 61 P.3d 375 (2003), wherein a criminal defendant's prior offense was proffered in the form of his plea of guilty to armed robbery in Illinois under a statute broader than Washington's. State v. Bunting, 115 Wn. App. at 135. The Court ruled it would be improper to rely on the facts alleged in the Illinois complaint and the "official statement of facts" (similar to the affidavit of probable cause) to establish the element of specific intent to deprive that was necessary to make the offense comparable to armed robbery in Washington, because the allegations in these documents had not been proven or conceded by the defendant. State v. Bunting, 115 Wn. App. at 143.

The holdings of these cases make eminent sense, because a trial court faced with a defendant's prior conviction under a broader foreign statute, and which is thus tasked with determining whether his actual out-of-state conduct would merit guilt under a Washington criminal statute, is in effect holding a trial on factual comparability.

Where the State alleges that a defendant's criminal history contains out-of-state felony convictions, the SRA requires the State to prove the existence and comparability of those convictions. Former RCW 9.94A.360; State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements are identical, the foreign conviction may be included, without more, and the court in so concluding is answering a legal question. State v. Stockwell, 129 Wn. App. 230, 234, 118 P.3d 395 (2005) (citing Morley, at 606); Lavery, 154 Wn.2d at 255. But if the foreign statute is different or broader than the Washington statute, the sentencing court must look to the defendant's actual conduct in committing the foreign crime.

Lavery, 154 Wn.2d at 258. In such instance the sentencing court is asking a factual question. State v. Stockwell, 129 Wn. App. at 234.

Where a foreign statute is broader, the question of comparability of offenses involves far more than the mere fact of a prior conviction. If the defendant did not plead guilty in the prior proceeding to facts that would amount to the offense in Washington, comparability requires the trial court to find new facts that were never subjected to any of the prior due process safeguards that justify excepting such facts from the Apprendi rule.

Shepard, 544 U.S. at 24-26; Lavery, 154 Wn.2d at 257-58.

Accordingly, absent proof Mr. Thieffault's actual Montana conduct amounted to attempted robbery in Washington, as shown by documents containing facts that the defendant admitted by virtue of his guilty plea, the sentencing court in this case lacked authority to increase his sentence based on that offense. Here, the defendant pleaded guilty in Montana only to the charges specified in an "Information," which document was never provided at sentencing. His judgment did not indicate that he pleaded guilty to the facts contained in the other documents provided, and thus at most his plea only admitted guilt to the offense as defined in that State. But Montana attempted robbery is broader than the definition of the offense in Washington.

In such circumstances, the inclusion of the Montana offense could be justified only if, at a minimum, Mr. Thieffault executed a valid waiver of his jury trial right at the current sentencing, so as to authorize the court to look at, and believe or disbelieve, other documents from the Montana plea containing factual allegations.

(c). Mr. Thieffault did not validly waive the factual issues underlying the comparability of his prior convictions. Mr. Thieffault, at the present sentencing, never validly admitted the facts of the Montana offense that are necessary to render it comparable to attempted robbery in Washington, and his trial counsel's inaction or affirmative agreement does not amount to a constitutionally valid admission to those facts, because the defendant was not advised of his right to demand a jury trial on those facts.

Despite the Court of Appeals' agreement that the Montana attempted robbery statutes are broader than Washington's, and that the prior sentencing documentation failed to show Mr. Thieffault pled guilty to facts establishing comparability, the Court affirmed the determination of comparability, relying on State v. Hickman, 116 Wn. App. 902, 68 P.3d 1156 (2003), for the rule that a defendant who stipulates his out-of-state conviction is equivalent to a Washington offense has waived a later

challenge to the use of that conviction in calculating his offender score.”

Court of Appeals Decision, at p. 21 (citing Hickman, at 907).

The State will cite Blakely v. Washington for the proposition that the defendant ‘s counsel can simply acquiesce to factual comparability, without more. The Supreme Court in Blakely stated:

[N]othing prevents a defendant from waiving his Apprendi rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.

Blakely, 542 U.S. at 310. However, the critical point of Blakely v. Washington, Shepard, and Lavery, when read together with the plethora of cases setting out the requirements of a jury trial waiver, is that any such “stipulation” to facts or consent to judicial fact-finding in the context of factual comparability of a foreign offense must be a knowing, voluntary waiver of the defendant’s right to a jury trial, unless the necessary facts are ones that he knowingly and validly plead guilty to for purposes of the out-of-state plea. In the present case, neither requirement is satisfied.

First, as noted, the defendant did not plead guilty to facts establishing comparability when he plead guilty in Montana. Lavery, 154 Wn.2d at 258; State v. Bunting, 115 Wn. App. 135, 140-43.

Second, Mr. Thieffault did not waive his right to a jury trial so as to allow the current sentencing court to read the prosecutor's affidavit or the "Motion for Leave to File Information" and credit them as true. When the Blakely Court, in a case regarding the right to a jury trial on facts increasing sentence, says that a defendant can "stipulate" to facts increasing his sentence above the jury's verdict, the Court could have meant only one thing - that the defendant's stipulation to such facts must satisfy all the formal rigor of a valid guilty plea. The stipulation referred to in Blakely cannot be a mere unwarned waiver of challenge to, or agreement to, those facts; rather, such stipulation must satisfy all the formal rigor of a guilty plea entered following advisement of the defendant's Sixth Amendment right to jury proof. Such waiver is not present in this case.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent, Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and a guilty plea is not intelligently or voluntarily made unless the criminal defendant knows that he has a right to demand that a jury find the facts beyond a reasonable doubt. See State v. Thang, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002) ("Waiver is the voluntary relinquishment of a right") (citing BLACK'S LAW DICTIONARY 1574 (7th ed. 1999)). It must be shown by more than a silent record that the

defendant understood he had that jury right, or his admission to facts establishing guilt is constitutionally invalid. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); see, e.g., State v. Monroe, 126 Wn. App. 435, 441-42, 109 P.3d 449 (2005).

Despite the State of Washington's repeated, continued insistence in responsive briefs in criminal appeals that the defendant's naked, unwarned agreement to facts will satisfy the "stipulation" language in Blakely, certain decisions of the Court of Appeals have recognized that this is the only constitutionally possible meaning of that passage. Thus in State v. Hochhalter, 131 Wn. App. 506, 128 P.3d 104 (2006), involving the issue of community placement, the Court of Appeals dispenses with this argument:

The State . . . focus[es], apparently, on the Blakely Court's statement that the maximum sentence a judge may constitutionally impose is the maximum sentence that he or she "may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." When the Blakely Court said that, however, it was referring to the admissions that a defendant makes in conjunction with a waiver of his or her right to trial by jury. . . . Hence, the question here is not simply whether Hochhalter "admitted" or "acknowledged" [facts increasing his sentence]; it is whether he did that and knowingly, voluntarily, and intelligently waived his Sixth Amendment right to jury trial.

Hochhalter, 131 Wn. App. at 522-23. Hochhalter notes that Blakely's complete language refers to the procurement of "appropriate waivers" as being necessary before a defendant can admit facts increasing his sentence,

and correctly states that this means waivers given following the defendant being made aware that he possesses the Sixth Amendment right. (Emphasis added.) Hochhalter, 131 Wn. App. at 522-23 (citing Blakely, 543 U.S. at 310); see also State v. Monroe, 126 Wn. App. 435, 441-42, 109 P.3d 449 (2005).

Mr. Thieffault was never made aware in the present case that he had a right to a jury proceeding in which the State would be required to prove up Montana conduct equating to Washington attempted robbery. Therefore, his counsel's failure to challenge, or his agreement to, factual comparability was not a valid waiver of his right to a jury trial on those facts.

Thus, following Blakely, the case of State v. Hickman cannot be good law as to its proposition that a defendant who stipulates that his out-of-state conduct was equivalent to a Washington offense has waived challenge to use of that conviction at sentencing, absent a showing that the waiver was entered following advisement of his jury right.²

²For similar reasons, the cases of State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999) (defense attorney's inclusion of out-of-state convictions in defense's proffered offender score calculation allows them to be included without further proof of classification), and State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) ("defendant's affirmative acknowledgment that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements") are also problematic following Blakely in cases involving broader foreign statutes, because mere failure to object or naked agreement to facts does not satisfy the requirement of a knowing waiver of the right to a jury trial on facts that increase punishment.

Because this case involved proof of facts that increase the defendant's sentence and are thus "elements" which can be admitted only with the accompanying requirements of a valid guilty plea, Apprendi, rather than Hickman, applies, and Mr. Thiefault's counsel's inaction or agreement on the issue of factual comparability does not authorize inclusion of the Montana offense in Mr. Thiefault's offender score.

Finally, this conclusion cannot be avoided upon a contention that the trial court in this case was merely finding "sentencing factors." Where the defendant is found guilty of a crime and then sentenced based on that offense and additional facts, the sentence-increasing facts are functionally elements of a greater offense for which the defendant is ultimately punished. Harris v. United States, 536 U.S. 545, 557-58, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003) ("Apprendi [means] that those facts . . . are the elements of the crime for purposes of the constitutional analysis").

Our decision in Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (footnote omitted). Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. Id., at 483-484, 120 S. Ct. 2348, 147 L. Ed. 2d 435.

Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466, 475, 2006 U.S. LEXIS 5164 (2006) (citing Apprendi v. New Jersey).

(d). Mr. Thieffault's case must be remanded for resentencing without inclusion of the Montana conviction, in accord with the defendant's protection against double jeopardy. The Fifth Amendment's double jeopardy clause protects defendants from a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Where one offense is a lesser included offense with another crime, the two crimes are the same offense within the framework of double jeopardy analysis. State v. Linton, 156 Wn.2d 777, 791-92, 132 P.3d 127 (2006) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

Thus once Mr. Thieffault's current conviction for second degree rape became final, jeopardy on that offense terminated and a new prosecution for second degree rape aggravated by the alleged prior strike offense based on the Montana conviction is barred by double jeopardy. See State v. Linton, 156 Wn.2d at 791 (conviction for second degree assault barred a second prosecution for first degree assault) (citing Brown, 432 U.S. at 165)).

Here, Mr. Thiefaul's current offense is a lesser offense within an aggravated greater crime of his current offense "plus" the additional fact of his prior Montana crime. This concept was succinctly stated in Ring:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

Ring v. Arizona, 536 U.S. 584, 605, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The Ring concept was subsequently reiterated when the United States Supreme Court considered whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death. Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Justice Scalia explained Ring and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a greater offense.'" That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances."

(Emphasis added.) (Internal citations omitted.) Sattazahn, 537 U.S. at 111. The Court went on to find "no principled reason to distinguish" what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. Id. This reasoning requires reviewing courts

to conclude that Blakely, which reconceptualizes the constitutional meaning of “offense” and “elements” and thus affects double jeopardy jurisprudence, means that on remand Mr. Thieffault may not be subjected to a LWOP sentence that is based on his Montana conviction.

2. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IF HE AGREED TO COMPARABILITY OF THE MONTANA OFFENSE.

Despite the legal differences between Montana and Washington robbery, and the absence of facts admitted by the defendant in connection with the prior plea that would show factual comparability, the Court of Appeals found no prejudice in counsel’s statement that he believed the comparability question was already determined by the trial court. Court of Appeals Decision, at p. 27 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). The Court stated that

Thieffault has not shown that, if his counsel had argued that the elements of the crimes were not comparable and that the sentencing court was not entitled to rely on the Motion for Leave to File Information and the Judgment, the court likely would not have given the State the opportunity to procure the Information or any other appropriate materials. Thus, Thieffault has not shown prejudice.

Court of Appeals decision, at p. 28. The Court of Appeals was incorrect in this analysis, however, because the circumstances of Mr. Thieffault’s sentencing showed that the State had sought to obtain all the possible

documentation of Mr. Thieffault's Montana conviction, and never managed to obtain the missing "Information" that is referred to in the defendant's Montana plea. In pre-sentencing briefing filed for the original sentencing hearing in 2001, and later for the subsequent re-sentencing, the State had two opportunities to provide the "Information" but never provided it or indicated that it had been obtainable from the Montana courts.

Furthermore, the State admitted at the second sentencing that the provided documentation was "all of the information that was sent to [the Snohomish County prosecutor] from Montana." 9/30/2003 at 40.

Mr. Thieffault's burden to show prejudice is satisfied in these circumstances. The United States Supreme Court has defined the likelihood of prejudice required to prevail on an ineffective assistance claim under the Sixth Amendment as "a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). On the documents presented to the sentencing court, there was no showing of factual comparability, and Mr. Thieffault's counsel should have pointed out this deficiency. The question whether the State might be able to ultimately produce the missing Montana Information is a question that arises on remand.

**3. THE DEFENDANT'S COUNSEL MERELY
FAILED TO OBJECT TO COMPARABILITY OF
THE MONTANA CONVICTION.**

Mr. Thieffault relies on the arguments presented in his petition for review in support of this issue.

**4. THE STATE WAS REQUIRED TO CHARGE
AND PROVE MR. THIEFFAULT'S ALLEGED
PERSISTENT OFFENDER STATUS TO A JURY
BEYOND A REASONABLE DOUBT.**

Mr. Thieffault relies on the arguments presented in his petition for review in support of this issue.

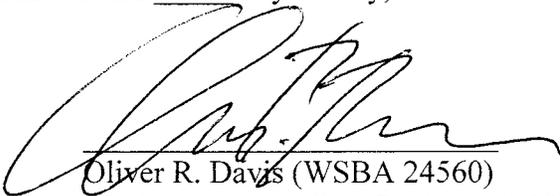
**5. THE DEFENDANT'S SENTENCE UNDER THE THREE
STRIKES LAW VIOLATED THE SINGLE SUBJECT RULE
OF THE STATE CONSTITUTION.**

Mr. Thieffault relies on the arguments presented in his petition for review in support of this issue.

D. CONCLUSION

Mr. Thieffault requests this Court remand his case for resentencing to a standard range sentence without inclusion of the Montana conviction.

Respectfully submitted this 31 day of July, 2006.



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	NO. 53214-6-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
GAYLON LEE THIEFAULT,)	
)	
Appellant.)	FILED: August 1, 2005
)	

APPELWICK, J. – Gaylon Thiefault contests the life sentence he received under the Persistent Offender Accountability Act (POAA). After his conviction for attempted second degree rape, the sentencing court determined that Thiefault’s prior Montana attempted robbery conviction and prior federal aggravated sexual assault conviction were comparable to Washington “strike” crimes and that the convictions counted as “strikes” for the purposes of the POAA. Thiefault’s counsel did not object to the comparability analysis. Thiefault claims that his prior convictions were facially invalid because they did not indicate representation by and presence of counsel. Thiefault also claims that his attorney provided ineffective assistance because he waived objection to the court’s finding that the prior convictions were comparable. We remand for correction of two scrivener’s errors and affirm on all other claims.

FACTS

Gaylon Thiefault was convicted of indecent liberties with forcible compulsion and attempted second degree rape. At sentencing, the State noted

that Thiefault had a prior Montana attempted robbery conviction and a prior federal aggravated sexual assault conviction. The State asked the court to compare those prior convictions with Washington crimes and find that they were "strikes." The State asked that the court classify Thiefault as a persistent offender under both the two-strikes law and the three-strikes law, and sentence him to life imprisonment. Thiefault's counsel waived objection to this classification, stating that she did not believe the court had any discretion as to the sentence.

The sentencing court found that Thiefault's prior Montana conviction was comparable to the Washington offense of attempted second degree robbery. The court also found that the federal conviction was comparable to the Washington offense of second degree rape. The court found that Thiefault was a persistent offender under both the two-strikes law and the three-strikes law, and sentenced him to life in prison without the possibility of parole.

Thiefault appealed to this court on several grounds. State v. Thiefault, noted at 116 Wn. App. 1059; 2003 WL 21001019 (2003). He claimed that his convictions for indecent liberties and attempted second degree rape violated double jeopardy. Thiefault, 2003 WL 21001019 at *1. He also claimed that his federal conviction could not be counted under the two-strikes law. Thiefault,

2003 WL 21001019 at *4. We agreed with Thiefault on both counts,¹ dismissed the indecent liberties conviction, and remanded for re-sentencing. Thiefault, 2003 WL 21001019 at *3-*4.

At re-sentencing, Thiefault was represented by a different attorney, who waived objection to the comparability of the prior offenses because he understood the issue had already been determined. Instead, Thiefault's attorney contested the facial validity of the prior convictions. The court rejected this argument. The court incorporated its comparability findings from the prior sentencing hearing and found Thiefault to be a persistent offender. Thiefault was sentenced to life in prison with no possibility of parole under the three-strikes law. Thiefault appeals.

ANALYSIS

I. Facial Validity of Thiefault's Prior Convictions

Thiefault asserts that the documentation offered to prove his prior two convictions indicates neither the presence of his attorney nor Thiefault's waiver of counsel. Thus, Thiefault claims, his prior convictions are facially invalid, and his life sentence under the Persistent Offender Accountability Act (POAA) must be

¹ Thiefault also raised several other challenges that we rejected. Thiefault, 2003 WL 21001019 at *4.

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reversed.²

The State does not have the burden to prove the constitutional validity of a prior conviction before it can be used in sentencing. State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986). But a prior conviction that is constitutionally invalid on its face may not be considered. Ammons, 105 Wn.2d at 187-88. "Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Ammons, 105 Wn.2d at 188. The conviction must affirmatively show that the defendant's rights were violated. State v. Gimarelli, 105 Wn. App. 370, 375, 20 P.3d 430 (2001).

Thiefault's Montana attempted robbery conviction is not constitutionally invalid on its face. The judgment from that conviction contains the following relevant passages:

The Defendant was arraigned on the 14th day of March, 1984

The Defendant was thereafter represented by Charles H. Recht and on the 14th day of March, 1984, entered a plea of guilty to the above criminal charge.

The Defendant appeared on the 5th day of April, 1984, and was asked if he had any legal cause to show why sentence and judgment of the Court should not be imposed at that time, and the Defendant replied in the negative.

² We note that an issue that could have been raised on a first appeal may not be raised on a second appeal. State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). Thiefault has produced no evidence to suggest that he could not have raised this facial invalidity issue on his first appeal. However, considering the seriousness of the punishment Thiefault faces, we exercise our discretion to consider his facial invalidity claim.

The court then imposed its judgment and sentence. Thiefault argues that because the document does not state that defense counsel appeared at sentencing, only that Thiefault did, the conviction is facially invalid. However, the judgment states that Thiefault was "thereafter" represented by counsel. The implication of this statement is that counsel represented Thiefault at all of the following crucial points in the proceedings. Further, the document does not show on its face that constitutional safeguards were not provided. See State v. Bemby, 46 Wn. App. 288, 291, 730 P.2d 115 (1986).³

Thiefault's federal conviction is also not constitutionally invalid on its face. His plea agreement specifically states that he is represented by his attorney, Michael Nance. The judgment lists Michael Nance as Thiefault's attorney. Although Thiefault concedes that the plea agreement shows he was represented, he argues that the judgment fails to show his counsel was present. However, the judgment does not indicate on its face that Thiefault's counsel was not present. Indeed, the fact that Michael Nance represented Thiefault for the plea agreement and that Nance's name is listed on the judgment indicates Nance was present at the crucial stages in the proceedings. Thiefault has not shown that his prior convictions were facially invalid.

³ Thiefault also asserts that the judgment finding a probation violation and revoking his suspended sentence was constitutionally invalid on its face. However, this judgment was not considered by the court in determining Thiefault's POAA status—only the attempted robbery conviction and the federal rape conviction were considered. Thus, the panel need not consider the parole violation.

To support his argument, Thiefault cites the cases of Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and State v. Marsh, 47 Wn. App. 291, 734 P.2d 545 (1987). Thiefault claims that these two cases establish that convictions that fail to show representation and presence of counsel are facially invalid.

Burgett is distinguishable. The State had introduced two versions of the same prior conviction. One stated that the defendant had appeared "in proper person and without Counsel," and one stated that the defendant had appeared "in proper person." Burgett, 389 U.S. at 112. The trial court excluded the first version of the conviction, but allowed the second version. Burgett, 389 U.S. at 112-13. The Court held: "the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible." Burgett, 389 U.S. at 114-15. In Burgett, evidence affirmatively indicated that counsel had not been present; here, both the Montana and federal conviction documents imply that counsel was present, and there is no affirmative evidence to contradict this implication. Thus, Burgett is factually distinguishable.

Marsh is similarly distinguishable. The judgments and sentences offered to establish the defendant's prior convictions "indicated neither the presence of an attorney representing Marsh nor his waiver of counsel." Marsh, 47 Wn. App.

at 292. The court cited Burgett and found that, because the convictions did not reflect representation or waiver, they were deficient on their face. Marsh, 47 Wn. App. at 294. But the convictions at issue here do indicate that Thiefault was represented by counsel, as Thiefault's attorney was named on both judgments. Thus, Thiefault has not shown that his prior convictions are facially invalid.

II. Due Process Challenge

Thiefault argues that both the United States and Washington Constitutions require that the prosecution prove to a jury beyond a reasonable doubt that he is a persistent offender. Because he was found to be a persistent offender only by a preponderance of the evidence and through a judicial hearing, Thiefault claims his rights were violated. Specifically, Thiefault argues that both federal and Washington cases require that any fact that increases the penalty for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt.

"Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent appeal." Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). Reconsideration of the identical legal issue will be granted where the prior holding is clearly erroneous and the application of the doctrine would create manifest injustice. Folsom, 111 Wn.2d at 264.

In our earlier unpublished opinion, we upheld Thiefault's double jeopardy challenge and his challenge to the use of his federal conviction for two-strike purposes. Thiefault, 2003 WL 21001019. But we rejected Thiefault's other challenges in a footnote, which stated in pertinent part:

[Thiefault] also argues that by finding him a persistent offender without proof beyond a reasonable doubt or trial by jury, the trial court violated the Fifth and Sixth Amendments to the United States Constitution. The Washington Supreme Court recently rejected this argument in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001).

Thiefault, 2003 WL 21001019, at *4, n.7. This holding was not clearly erroneous because Wheeler still controls. Further, Thiefault has not demonstrated that any manifest injustice will occur if we do not re-address his claim. Thus, the law of the case doctrine controls.

III. Single Subject Requirement

In his statement of additional grounds for review, Thiefault notes that the POAA was the product of Initiative 593. He claims that Initiative 593 violates the single subject requirement of article II, section 19 of the Washington Constitution, because a portion of the initiative relates to individuals who are not persistent offenders. Accordingly, Thiefault asserts, the initiative is void and his sentence, as a product of the initiative, is also void.⁴

⁴ As noted above, an issue that could have been raised on a first appeal may not be raised on a second appeal. Sauve, 100 Wn.2d at 87. Thiefault has produced no evidence to suggest that he could not have raised the issue of constitutionality under the single subject rule on his first appeal. However, due to the seriousness of the punishment that Thiefault faces, we exercise our discretion to consider this claim.

Thiefault's argument is foreclosed by State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996). Like Thiefault, Thorne claimed that Initiative 593 violates article II, section 19 of the Washington Constitution "because it contains two distinct subjects: (1) provisions for life imprisonment for three-time 'persistent offenders' convicted of most serious offenses, and (2) provisions making certain other offenders ineligible during mandatory minimum terms for any form of early release." Thorne, 129 Wn.2d at 757. In response, the Court noted the principle that if the part of the initiative at issue is contained in the scope of the title of the initiative, then that part must stand. Thorne, 129 Wn.2d at 758. The Court noted the ballot title of Initiative 593: "Shall criminals who are convicted of 'most serious offenses' on three occasions be sentenced to life in prison without parole?" Thorne, 129 Wn.2d at 757. Accordingly, the Court held that "[t]he ballot title to Initiative 593 contains only one subject, persistent offenders; hence, any provisions in the law which relate to that subject are valid under article II, section 19." Thorne, 129 Wn.2d at 758. Since Thiefault is challenging the provisions of the initiative that relate to persistent offenders, under Thorne his challenge fails.

Thiefault claims that Initiative 593 is voided in its entirety by State v. Cloud, 95 Wn. App. 606, 976 P.2d 649 (1999). The Cloud court held that the provision of Initiative 593 that made certain offenders ineligible for early release violated article II, section 19 of the Washington Constitution because it was unrelated to the ballot title of the initiative. Cloud, 95 Wn. App. at 655-56.

Thiefault claims that Initiative 593 must accordingly be stricken in its entirety, as it is possible that neither subject of the initiative would have had sufficient support standing alone.

The cases that Thiefault cites for this proposition, City of Burien v. Kiga, 144 Wn.2d 819, 31 P.3d 659 (2001), and Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 11 P.3d 762, 27 P.3d 608 (2000), are distinguishable. The Kiga Court noted: "When an initiative embodies two unrelated subjects, it is impossible for the court to assess whether each subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided." Kiga, 144 Wn.2d at 825. Amalgamated Transit held similarly. Amalgamated Transit, 142 Wn.2d at 216. The case that both Kiga and Amalgamated Transit cited for this proposition is Power, Inc. v. Huntley, 39 Wn.2d 191, 235 P.2d 173 (1951). But Huntley limited its holding to circumstances where both the title and the body of the initiative contained two subjects stating: "When an act contains two unrelated subjects in the title and in the act, the whole act is void, as the court cannot choose between the two." Huntley, 39 Wn.2d at 204. Both Kiga and Amalgamated Transit concerned initiatives that had general titles and several subjects. Kiga, 144 Wn.2d at 825-27; Amalgamated Transit, 142 Wn.2d at 216-17. In contrast to Kiga, Amalgamated Transit, and Huntley, Initiative 593's ballot title contains a single subject. We conclude that Kiga, Amalgamated Transit, and Huntley are not

controlling here. Instead, the analysis used in Thorne and Cloud controls. Thieffault's argument fails.

IV. Unlawful Restraint

In his additional grounds for review, Thieffault claims that he is unlawfully restrained pursuant to RAP 16.4. Specifically, Thieffault asserts he is unlawfully restrained under RAP 16.4(c)(2) because his sentence violates article II, section 19 of the Washington Constitution. Thieffault also contends he is unlawfully restrained under RAP 16.4(c)(4) and RCW 10.73.100(6), as Cloud represents a significant change in the law.

RAP 16.4 provides grounds for a petitioner to challenge his or her restraint, and states, in relevant part:

(c) The restraint must be unlawful for one or more of the following reasons:

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6) mirrors the language in RAP 16.4(c)(4), stating that the one year time limit for collateral attacks is not applicable when there has been a

significant change in the law and either the legislature or a court has provided the change be retroactive.

As we hold that the POAA is not unconstitutional under the single subject rule, we accordingly find that Thiefault is not unlawfully restrained under RAP 16.4(c)(2).

For several reasons, we also find that Thiefault is not unlawfully restrained under RAP 16.4(c)(4) and RCW 10.73.100(6). The first reason is that Thorne controls this case; thus, Cloud does not represent a significant change in the law pursuant to RAP 16.4(c)(4). Further, Thiefault was sentenced in 2003 for a crime that occurred in 2001. Cloud was decided in 1999; thus, if Cloud was a significant change in the law, it would have been in existence at the time of Thiefault's sentencing. The case law indicates that RAP 16.4(c)(4) and RCW 10.73.100(6) are intended to apply to changes in the law that occur after the petitioner's conviction and/or sentence.⁵ Thus, Thiefault's claim fails.

V. Ineffective Assistance of Counsel

Thiefault claims that his trial counsel at the second sentencing hearing was ineffective for not challenging the issue of the comparability of Thiefault's foreign offenses. Thiefault asserts that the elements of the Montana and federal statutes under which he was convicted are not the same as the elements of the

⁵ See, e.g., In re Smith, 117 Wn. App. 846, 73 P.3d 386 (2003) (case representing a significant change in the law was decided after petitioner's conviction became final); In re Crabtree, 141 Wn.2d 577, 579, 9 P.3d 814 (2000) (intervening change in the law occurred after petitioner's personal restraint petitions had been rejected by the Court of Appeals but before the Supreme Court had granted review).

Washington crimes. And, Thieffault argues, the record does not contain information, proved beyond a reasonable doubt, indicating that Thieffault's acts underlying the foreign convictions would count as strikes under the POAA. Thus, Thieffault claims, his trial counsel was deficient and Thieffault was prejudiced as a result.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show two things: (1) that his or her lawyer's performance was so deficient that the lawyer was not functioning as "counsel" for Sixth Amendment purposes, and (2) that there is a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A. Comparability of Prior Offenses

We first determine whether Thieffault's counsel's waiver of a challenge to the comparability of the offenses likely prejudiced the proceedings. In order to do this, we must determine whether Thieffault's prior convictions are comparable to Washington offenses that count as "strikes."

Convictions from other jurisdictions count as "most serious offenses" for the purposes of the POAA if they are comparable to Washington's "most serious offenses." RCW 9.94A.030(28)(u). To determine if the foreign conviction is comparable, the court must first compare the elements of the foreign crime to the

elements of the Washington crime. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the foreign criminal statute is broader than the Washington statute, the court may look at the conduct underlying the crime, as evidenced in the indictment or information, to determine whether the conduct would have violated the Washington statute. State v. Mutch, 87 Wn. App. 433, 437, 942 P.2d 1018 (1997). A sentencing court may not consider facts about the underlying conduct that were not found by a trier of fact beyond a reasonable doubt. State v. Ortega, 120 Wn. App. 165, 174, 84 P.3d 935 (2004). The State may consider facts conceded by the defendant in his guilty plea. See State v. Bunting, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003).

1. Federal Conviction

Thiefault asserts that his federal conviction for aggravated sexual abuse is not comparable to second degree rape in Washington. He notes that second degree rape requires forcible sexual intercourse, while aggravated sexual abuse requires merely a forcible sexual act or an attempt to commit a forcible sexual act. The State concedes that the federal crime is broader, but contends that Thiefault's conduct would have constituted second degree rape in Washington.

The documents submitted to show Thiefault's federal conviction establish that he admitted to facts establishing conduct that would constitute second degree rape in Washington. The plea agreement states that Thiefault agreed to plead guilty to the indictment, which charges that "he knowingly caus[ed another]

individual to engage in sexual intercourse with him through the use of force". This conduct would violate Washington's law prohibiting second degree rape. RCW 9A.44.050(1)(a). Thus, Thiefault's challenge to the comparability of the federal crime fails. Accordingly, he cannot show that his counsel was ineffective with respect to the waiver of any objection to the comparability of the federal crime.

2. Montana Conviction

Thiefault claims that the crimes of attempted robbery in Montana and Washington have different elements. Specifically, he claims that the Montana definition of "attempt" is broader than the Washington definition. He also claims that, while Washington law requires a specific intent to steal, theft can be committed under a wider variety of circumstances under Montana law.

RCW 9A.28.020(1) provides that "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." Montana law provides that "[a] person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense." MCA 45-4-103(1). Thiefault argues that a "substantial step" is narrower than "any act towards."

An analysis of Montana case law interpreting its attempt statute reveals that Thieffault is incorrect. The Montana Supreme Court has interpreted its attempt statute as requiring an overt act that reaches

“far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.” In addition . . . “there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.”

State v. Ribera, 183 Mont. 1, 11, 597 P.2d 1164 (1979) (quoting State v. Rains, 53 Mont. 424, 164 P. 540 (1917)). If anything, this interpretation of Montana’s attempt statute is narrower than Washington’s requirement of a “substantial step,” which is defined as an act that is strongly corroborative of the actor’s criminal purpose. See State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978). Further, Montana courts have held permissible “to convict” jury instructions for attempt that require the jury to find that the defendant took a material step towards the commission of the offense. See, e.g., State v. Russell, 307 Mont. 322, 327, 37 P.3d 678 (2001); State v. Martin, 305 Mont. 123, 127-28, 23 P.3d 216 (2001); State v. Johnstone, 244 Mont. 450, 457-59, 798 P.2d 978 (1990).

But the attempt statutes make up only part of the crimes charged. The elements of the attempt statutes must be read together with the elements of the robbery statutes. Washington defines robbery as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. Montana defines robbery as follows:

(1) A person commits the offense of robbery if in the course of committing a theft, the person:

- (a) inflicts bodily injury upon another;
- (b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or
- (c) commits or threatens immediately to commit any felony other than theft.

(3) "In the course of committing a theft", as used in this section, includes acts that occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

MCA 45-5-401. Montana's statute is broader because injury or threat of injury to person or property is not required – a person can commit robbery by committing theft while committing or threatening to commit any felony other than theft. Bribery of an official is a felony in Montana, so an individual could be convicted of robbery if he obtained property of another by threatening to bribe a public official. MCA 45-2-101(22) and MCA 45-1-201(1) (defining "felony"); MCA 45-7-101 (bribery statute). But Washington's statute requires injury or threatened injury to

a person or property; thus, threat of bribery would not turn a taking into a robbery in Washington. Thus, Montana's robbery statute is broader than Washington's.

Thiefault points out that MCA 45-5-401(3) indicates that one can commit robbery in the attempt to commit a theft. Washington's robbery statute requires that the offender actually take property of another. Thus, because it includes an attempt provision, Montana's robbery statute is broader than Washington's robbery statute. However, Thiefault was charged with attempted robbery, not robbery, and his offense was compared to the Washington crime of attempted second degree robbery. Since attempt is an element in both of the crimes, this distinction is not dispositive in this case.

Thiefault also claims that the Montana robbery statute is broader because it requires the offender to be in the course of committing a theft, and the Montana theft statute can be violated with a lesser mens rea than the Washington robbery statute. Thiefault is correct. At the time of his Montana conviction, an individual in Montana could be convicted of theft if he or she purposely or knowingly obtained or exerted unauthorized control over public assistance. MCA 45-6-301(4). While the other ways of committing theft in the statute specifically require the purpose of depriving the owner, this way does not require intent to deprive. MCA 45-6-301(4). Thus, the Montana crime of robbery is broader than the Washington crime of robbery.

Because the elements of the Montana crime are broader than Washington's, we must determine whether Thieffault's underlying conduct nonetheless satisfied Washington's statute. If the foreign statute is broader or different, courts may look "at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute." Morley, 134 Wn.2d at 606, (quoting Mutch, 87 Wn. App. at 437). The materials from Thieffault's Montana conviction are a Motion for Leave to File Information, an affidavit from the prosecutor, and the Judgment. Thieffault's conduct is described in the Motion for Leave to File Information and the affidavit. The Judgment does not contain any facts about Thieffault's underlying conduct. The Judgment states that a criminal Information was filed on December 22, 1983, charging Thieffault with attempted felony and a misdemeanor, that Thieffault received the Information, and that he pleaded guilty to the above criminal charges. But the Information is not included in the record – only the Motion for Leave to File Information. Thieffault pleaded guilty to the Information, not the Motion for Leave to File Information. Without a showing that the conduct was identical to the Information, he cannot be presumed to have conceded the facts contained in the Motion for Leave to File Information. Thus, on the facts before us, we cannot conclude that the crimes are comparable.

3. Prejudice to Thieffault

We next determine whether there is a reasonable probability that Thieffault was prejudiced by his counsel's concession that the Montana crime was comparable. Thieffault can establish prejudice if he shows that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In order to meet his burden, Thieffault must provide some evidence to suggest that, if the correct charging documents were obtained, there is a reasonable probability that the underlying facts he pleaded guilty to would not satisfy the equivalent Washington crime.

Thieffault has not done this. The Motion for Leave to File Information accused Thieffault of trying to steal cash from a store while armed with a gun and threatening a store employee. This conduct would fit under a Washington charge of attempted robbery because Thieffault took a substantial step towards using threat of force to take personal property of another. Thieffault has not shown that, if his counsel had argued that the elements of the crimes were not comparable and that the sentencing court was not entitled to rely on the Motion for Leave to File Information and the Judgment, the court likely would not have given the State the opportunity to procure the Information or any other appropriate materials. Thus, Thieffault has not shown prejudice. As Thieffault has not prevailed on the prejudice prong, he cannot prevail on his claim of ineffective

assistance. We need not address whether his attorney's performance was deficient.

VII. Review of the Sentencing Court's Comparability Analysis

Thiefault claims in the alternative that, if his counsel was not ineffective, then his counsel's waiver of a challenge to the comparability does not preclude this court from reviewing the sentencing court's comparability analysis. Thiefault claims that the sentencing court's comparability analysis was in error and he was improperly classified under the POAA.

Thiefault is incorrect. "[A] defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score." State v. Hickman, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003). This argument also precludes a defendant from later challenging the use of the conviction to determine his POAA status. Thus, as Thiefault's counsel was not ineffective by waiving a challenge to the comparability of the prior convictions, Thiefault may not challenge on appeal the POAA determination and the sentence based on those convictions.

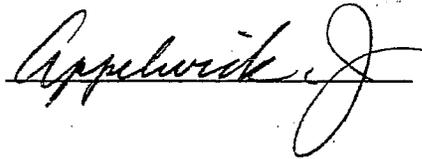
Thiefault acknowledges the case law applying the principle from Hickman. However, he claims those cases are distinguishable because the sentencing court accepted the defendant's stipulation and did not engage in a comparability analysis, whereas here, the court conducted a comparability analysis despite

Thiefault's stipulation. Even if we were to accept this distinction as accurate,⁶ Thiefault has provided no reason why a comparability analysis prevents application of the Hickman rule.

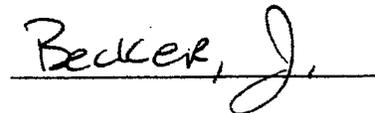
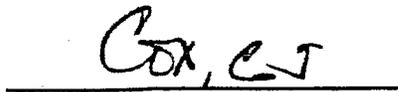
VIII. Scrivener's Errors

Thiefault has identified two scrivener's errors in the judgment and sentence: the Montana offense is referred to as armed robbery instead of attempted robbery, and the sentencing date of the federal offense is incorrect. Thiefault notes that, while there is no prejudice, the errors require remand for correction. The State concedes the errors and notes that the Judgment and Sentence may be returned to the superior court for correction. The State separately requests that we grant the superior court the authority to correct the errors under RAP 7.2(b) and (e) and RAP 9.10. We direct that the errors be corrected. See State v. Moten, 95 Wn. App. 927, 928-29, 976 P.2d 1286 (1999).

We remand for correction of the scrivener's error, and affirm on all other claims.



WE CONCUR:



⁶ At the 2003 hearing, the sentencing court incorporated its prior comparability analysis by reference; thus, it is likely inaccurate to say that the court conducted a de novo comparability analysis.

Appendix B

APPENDIX A - p. 7

1 and UNAUTHORIZED USE OF A MOTOR VEHICLE, a Misdemeanor, in violation of Section
2 45-6-308, M.C.A.

3 2. That the Defendant is adjudged to be a nondangerous offender for
4 purposes of parole.

5 3. That the Defendant shall be imprisoned in the State Prison at Deer
6 Lodge, Montana, for a period of five (5) years on the Felony Attempt charge,
7 and he shall be imprisoned in the Ravalli County Jail in Hamilton, Montana,
8 for a period of six (6) months on the Misdemeanor Unauthorized Use of a Motor
9 Vehicle charge, said sentences to run concurrently and to be suspended on
10 the following conditions:

11 (a) That the Defendant is placed under the supervision of the
12 Adult Probation and Parole Division of the Department of Institutions of
13 the State of Montana and will obey all rules of probation;

14 (b) That the Defendant will obey all city, county, state and
15 federal laws;

16 (c) That the Defendant will serve one hundred (100) days in
17 the Ravalli County Jail and will receive credit for 45 days previously served;

18 (d) That within one week from the Defendant's release from jail,
19 he is to enter and complete an in-patient alcohol treatment program as agreed
20 upon between the Defendant and his probation officer;

21 (e) That the Defendant will not consume any alcoholic beverages,
22 nor will he enter any establishment where the primary source of income is
23 the sale of alcoholic beverages;

24 (f) That the Defendant will not contact Ole's Country Store,
25 nor will he contact the victim, David Greenfield;

26 (g) That the Defendant will submit to tests of his breath or
27 bodily fluids for the presence of alcohol if his probation officer has probable
28 cause to believe that he has violated that provision of his probation;

29 (h) That the Defendant will obtain any alcohol, drug or mental
30 health counseling as deemed necessary by his probation officer;

31 (i) That the Defendant will pay restitution to the Ravalli County
32 Clerk of Court within one year from the date of this Judgment. In order

APPENDIX A-p.

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to help implement the payment of restitution, the weapon used in the commission of the crime, which is currently being held in evidence, is to be sold within thirty (30) days and the proceeds are to be used to apply to restitution. The weapon is not to be sold to any family member, and the sale is to be accomplished with the assistance of his probation officer. The total amount of restitution to be paid is \$120.00.

The reasons for the sentence are: The Defendant's history of alcohol abuse, recommendations in the report of Dr. Will Stratford, the serious nature of the offense, and the fact that a firearm was used.

The Defendant is remanded to the Sheriff of Ravalli County to commence the serving of his sentence.

DONE IN OPEN COURT the 5th day of April, 1984.

DATED this 12TH day of April, 1984.

John S. Henson
DISTRICT JUDGE

STATE OF MONTANA }
COUNTY OF RAVALLI } ss.
I, DEBBIE HARMON, Clerk of the District Court of the Twenty-First Judicial District of the State of Montana, in and for the County of Ravalli, do hereby certify this instrument to be a full, true and correct copy of the original as the same appears in the file and records of this office.

WITNESS MY HAND and the Seal of this Court.
this 12th day of March 2001
DEBBIE HARMON, Clerk, By Debbie Harmon
Deputy

APPENDIX A-p.9

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF RAVALLI

No. CR 83-108

STATE OF MONTANA,

Plaintiff,

-vs-

GAYLON LEE THIEFAULT,

Defendant.

MOTION FOR LEAVE TO FILE

INFORMATION

FILED

CR - 83-108/1

DEC 21 1983

MARGARET A. STELLING CLERK
BY Mary J. Stelling DEPUTY

Robert B. Brown, County Attorney of Ravalli County, moves the Court for leave to file Information charging the Defendant, GAYLON LEE THIEFAULT, with committing the crimes of ATTEMPT (Robbery), a Felony, in violation of Section 45-4-103, M.C.A., and UNAUTHORIZED USE OF A MOTOR VEHICLE, a Misdemeanor, in violation of Section 45-6-308, M.C.A., committed in Ravalli County, Montana, as follows:

CHARGE I - ATTEMPT (Robbery), a Felony, Section 45-4-103, M.C.A.:

The Court is informed that on or about the 13th day of December, 1983, the Defendant, GAYLON LEE THIEFAULT, did purposely or knowingly perform an act toward the commission of the crime of Robbery, a Felony, with the purpose to commit that offense by, in the course of committing the theft of cash, purposely or knowingly attempting to put Delbert David Greenfield, an Ole's Store employee, in fear of immediate bodily injury, by entering Ole's Country Store wearing a nylon stocking mask and holding a .44 magnum handgun, which was in violation of the above statute and against the peace and dignity of the State of Montana.

CHARGE II - UNAUTHORIZED USE OF A MOTOR VEHICLE, a Misdemeanor, Section 45-6-308, M.C.A.:

The Court is informed that on or about the 13th day of December, 1983, the Defendant, GAYLON LEE THIEFAULT, did purposely or knowingly operate a motor-propelled vehicle, to-wit: a snowmobile, belonging to Monty White, without his consent, which was in violation of the above statute and against the peace and dignity of the State of Montana.

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That attached hereto and made a part hereof is the Affidavit of Margaret A. Tonon, Deputy County Attorney for Ravalli County, Mt., which sets forth facts showing sufficient cause to believe that the Defendant is guilty of the crime as charged herein.

DATED this 21st day of December, 1983.

ROBERT B. BROWN, Ravalli County Attorney

Robert B. Brown
Attorney for the State of Montana

1 his right front coat pocket. The stocking had one leg missing and it was
2 taken into evidence.

3 IV.

4 When other back-up officers arrived, a search of Ole's Country Store
5 was undertaken. At about 1:55 a.m., Sheriff Dye found a .44 magnum stuck
6 in a box, and a little after 2:00 a.m., Officer Lykins and Sheriff Dye found
7 a nylon stocking which apparently had been used by the Defendant as a mask,
8 having been placed over his head. The stocking was located in the southwest
9 corner of the store in the walk-in cooler.

10 V.

11 Officers continued investigating the scene and did observe out the
12 back of Ole's Country Store tracks leading to a snowmobile which was parked
13 to the rear of Ole's Country Store. The snowmobile they observed was a Yamaha,
14 Serial No. 8V0-011726 (1984). City Officers had earlier received a call from
15 the Best Western Motel, which is to the north of Ole's Country Store, from
16 an individual stating that one of his snowmobiles had been taken. This report,
17 which had been received earlier, correlated to the snowmobile found to the
18 rear of Ole's Country Store.

19 VI.

20 City officers, in conducting further investigation surrounding the
21 circumstances of the attempted robbery, learned that the Defendant, GAYLON
22 LEE THIEFAULT, had been playing poker earlier in the evening at the Signal
23 Bar and had been in the company of Rusty Doebler. The dealer and bartender
24 at the Signal Bar stated that the Defendant, GAYLON LEE THIEFAULT, had come
25 into the game with \$150.00, which he lost, and had been carried by the dealer
26 for another \$350.00, losing approximately \$500.00. He left the game at approxi-
27 mately 1:00 a.m. and did not return.

28 VII.

29 Thereafter, in further investigation, City Officer Allan Auch interviewed
30 Russell Doebler concerning his activities on the evening of December 12 and
31 early morning hours of December 13, 1983. In the course of the interview,
32 Doebler stated that he had been with the Defendant, GAYLON LEE THIEFAULT, both

APPENDIX A - p. 5

1 at Bruce's Bar and the Rainbow Bar, and had ended up at the Signal Bar in
2 a poker game. Doebler stated that Thiefault said that he lost at least \$250.00,
3 and that when they left the game and started walking uptown, he talked about
4 robbing Ole's Country Store. The Defendant apparently stated that he was
5 going to rob the store that night. The two of them went to the Fairway IGA
6 to warm up and to buy a couple of candy bars. Doebler stated that the Defendant
7 at the same time stole a package of pantyhose. Doebler stated that the Defendant
8 told him that he was going to use the pantyhose as a mask so that people would
9 not recognize him. Doebler stated that he told the Defendant that he did
10 not want anything to do with it and then left, picking up a ride with Tal
11 Campbell and Dave Morasko, who brought him to his home at approximately 1:30
12 a.m. In addition, Doebler was asked about his knowledge of the Defendant's
13 ownership of a gun. He stated that he did not see a gun on the Defendant,
14 but did have personal knowledge that the Defendant owned a .44 magnum chrome
15 plated Blackhawk. The weapon which was found in the store and taken into
16 evidence was a Ruger Super Blackhawk .44 magnum handgun, Serial No. 84-76538.
17 Also found were four unfired rounds of .44 Remington ammunition.

VIII.

19 On December 13, 1983, an interview was held with Delbert David Greenfield,
20 the clerk at Ole's Country Store. During the course of the interview, he
21 stated that he was working at Ole's Country Store and was the only one in
22 the establishment at the time that the Defendant entered the store. He was
23 the only one on duty and was the only one in the store. He was in the back
24 of the store stocking shelves and heard what he initially thought was a "pop"
25 and thought that it was probably either a gun or a firecracker. He then heard
26 one of the cooler doors open and then smelled gunsmoke. He looked up and
27 saw a man with a stocking mask like pantyhose over his face. He saw the man
28 move toward the front of the store. He walked toward the back door, opened
29 it and waited for a few seconds. He ran down the alley and went across the
30 street to the Fairway Market, from where he called the police. When asked what
31 he felt when he observed the man with a stocking over his face, he said that
32 as far as he could see, the store was being robbed. He left in order to alert

APPENDIX A - p. 5

1 police and to get out before anything physically happened to him. Greenfield
2 further stated that after the incident was over and the individual had been
3 apprehended, he went over to the cash register and observed that something
4 was wrong. He stated that they have a system which has an alarm which will
5 light if one of the wrong keys is pushed. When that happens, the till will
6 lock and an alarm light will go on. He stated that someone had attempted
7 to push a button to open the register because the alarm light was on when
8 he observed the till and he knew that it had not been on when he left to go
9 stock shelves.

IX.

11 After the Defendant was arrested, he was advised of his Miranda rights
12 by the arresting officer, and after being placed in the patrol car he was
13 again advised of his rights by Chief Gordon Klippenstein. He was transported
14 to the courthouse and was questioned by officers. During the questioning,
15 he specifically requested to speak to Sheriff Dale Dye and attempted to explain
16 why he was in Ole's Country Store with a handgun. During the course of his
17 statement to Sheriff Dye, he admitted stealing the pantyhose from Fairway
18 Market but gave no explanation as to why he did that. Further in the statement,
19 he admitted taking a snowmobile which he found in the vicinity of Ole's Country
20 Store and which was identified as that belonging to Monty White of Butte,
21 Mt.

Margaret A. Jenson

SUBSCRIBED AND SWORN TO before me this 21st day of December, 1983.

Haron Jenson
Notary Public for the State of Montana
Residing at Hamilton, Mt.
My Commission expires 1-22-85

(SEAL)

STATE PUBLISHING CO. HELENA, MONT.

31 STATE OF MONTANA }
32 COUNTY OF RAVALLI } ss.
I, DEBBIE HARMON, Clerk of the District Court of the
Twenty-First Judicial District of the State of Montana,
in and for the County of Ravalli, do hereby certify this
instrument to be a full, true and correct copy of the
original as the same appears in the file and records
of this office.
WITNESS MY HAND and the Seal of this Court.
this 12th day of March 2001
DEBBIE HARMON, Clerk, By Debbie Harmon
Deputy

