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Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 53214-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

\_\_\_\_\_

STATE OF WASHINGTON,

Respondent,

v.

**GAYLON THIEFAULT,**

Petitioner.

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

The Honorable Ronald L. Castleberry

\_\_\_\_\_

PETITION FOR REVIEW

\_\_\_\_\_

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**A. IDENTITY OF PETITIONER**

Mr. Thieffault was the appellant in Court of Appeals No. 53214-6-I.

**B. COURT OF APPEALS DECISION**

Mr. Thieffault seeks review of the opinion affirming his sentence, attached as Appendix A. The denial of reconsideration is Appendix B.

**C. ISSUES PRESENTED FOR REVIEW**

- (1). Do the issues warrant review by the Court under RAP 13.4(b)?
- (2). Did trial counsel provide ineffective assistance if he agreed to the inclusion of his Montana conviction as a Washington strike offense?
- (3) Did Mr. Thieffault’s trial counsel merely fail to object to comparability, requiring remand under State v. Ford?
- (4) Does the judicial determination of comparability require a voluntary, knowing waiver of the right to a jury trial?
- (5). Does the defendant’s sentence violate the single subject rule?

**D. STATEMENT OF THE CASE**

Mr. Thieffault was sentenced to Life Without Parole following the trial court’s conclusion he had two prior “most serious offenses” including a Montana conviction for attempted robbery. CP 17-28. At Mr. Thieffault’s sentencing<sup>1</sup> on September 30, 2003, appellant’s counsel

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<sup>1</sup>The defendant’s sentencing on September 30, 2003 was on remand from a decision of the Court of Appeals reversing the defendant’s original “two-strikes” sentence imposed August 10, 2001. Supp. CP \_\_\_, Sub # 98.

indicated he understood the trial court had previously determined that the Montana and federal prior offenses were comparable to Washington “strike” offenses. RP 39. The court ruled the prior convictions were facially valid, comparable, and constituted two prior strikes. 9/30/03 at 41-42. The court stated it was “in fact finding” the prior foreign convictions were most serious offenses in Washington. 9/30/03 at 44-45.

## **E. ARGUMENT**

### **1. MR. THIEFAULT RAISES ISSUES THAT WARRANT REVIEW UNDER RAP 13.4(B).**

Mr. Thiefault argues herein that he was provided ineffective assistance of counsel and that his sentence violated this Court’s comparability decisions, the State Constitution, and the Sixth Amendment. These issues warrant review under RAP 13.4(b)(1) and (3).

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

Mr. Thiefault’s argument of ineffective assistance is premised on the idea that if his counsel agreed to the comparability of the Montana conviction he was deficient under the reasoning that it would preclude him from challenging the comparability issue on appeal (except in the more demanding context of an ineffective assistance claim). However, as further argued, if Mr. Thiefault’s counsel merely failed to object to the

comparability of the Montana offense, the trial court's erroneous comparability determination requires remand under the simple principle of State v. Ford that illegal sentences can be challenged on appeal if the defendant merely failed to object, rather than agreed to comparability.

Furthermore, Mr. Thieffault also argues that the comparability of foreign convictions, when dependent on the evaluation of the defendant's actual out-of-state conduct, is a matter that implicates the Sixth Amendment and Blakely v. Washington, and is thus an issue that cannot be waived by either mere agreement or failure to object, as the right to a jury trial on facts that increase a sentence is a right that requires a voluntary, knowledgeable waiver made after a warning as to the existence of that right.

As to ineffective assistance, the Court of Appeals agreed with several portions of Mr. Thieffault's argument that the Montana attempted robbery statutes that define the offense for which he was convicted in that foreign jurisdiction are broader in multiple respects than the Washington statutes defining this State's "strike" offense of attempted second degree robbery, and agreed that the sentencing documentation provided by the State failed to show the defendant pled guilty to facts establishing comparability of the defendant's foreign conduct to Washington attempted second degree robbery. Court of Appeals decision, at pp. 18-27.

However, the Court nevertheless stated that it was not reaching the question whether counsel was ineffective, and further, decided that Mr. Thieffault had not shown prejudice because he had not showed that if he had argued the issue the trial court would not have “given the State the opportunity to procure the Information or other appropriate materials” that would have shown the defendant’s Montana conduct matched the Washington definition of attempted second degree robbery. Court of Appeals decision, at pp. 27-28.

Mr. Thieffault asks this Court to determine counsel was ineffective to his prejudice, in violation of the Sixth Amendment. 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).

The Court of Appeals turned first to the question of the comparability of the Montana offense. Court of Appeals decision, at p. 18. The Court noted that if a foreign criminal statute is broader than the Washington statute, the court may look at the conduct underlying the crime to determine whether the conduct would have violated the Washington statute. State v. Mutch, 87 Wn. App. 433, 437, 942 P.2d 1018 (1997).

But 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, 171-74, 84 P.3d 935 (2004) (applying principles of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

And in convictions obtained by plea, as here, the State may consider facts conceded by the defendant in his guilty plea, but not facts not admitted by the defendant's reference to them in his plea or by his plea "to" documents containing them. See State v. Bunting, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003).

These principles of Ortega and Bunting spring from the same well as Apprendi, supra, and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and apply in the context of this case where the method of evaluating the comparability of the prior foreign conviction requires looking to the defendant's foreign conduct and thus entails a process of factual comparability, as opposed to the legal comparability of comparison of the statutes. See State v. Stockwell, 2005 Wash. App. LEXIS 2098 (August 23, 2005), at p. 6. (citing Personal Restraint of Lavery, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005) (analyzing legal and factual comparability in a two part test to determine whether foreign convictions are comparable to Washington strike offenses under the POAA)). Apprendi and Blakely establish that the Sixth Amendment is violated where a judge, by a preponderance of the evidence, rather than a

jury, under the beyond a reasonable doubt standard, determines facts that increase the punishment to which the defendant is subjected.

Here, the Montana comparability question is not a legal issue amenable to judicial decision not implicating the right to a jury. The Montana and the Washington statutes at issue are not comparable. The Court of Appeals correctly ruled that Montana robbery is broader than Washington's statute for multiple reasons, explained fully in the Court's decision. Decision, at pp. 22-25.

Because the elements of the Montana crime are broader than Washington's, a court 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. Mutch, 87 Wn. App. at 437. As the Court of Appeals recognized in agreement with Mr. Thieffault's contentions on appeal, 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. Decision, at pp. 25-26. As the Court of Appeals stated,

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.

Court of Appeals decision, at pp. 26-27.

Despite the legal differences between Montana and Washington robbery, the Court of Appeals found no prejudice in counsel's statement that he believed the comparability question was already determined by the trial court. Decision, at p. 27 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). The Court stated that "[I]n order to meet his burden [of prejudice], 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." The Court ruled that Thieffault had not done this because

Thiefault 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, Thiefault has not shown prejudice.

Court of Appeals decision, at p. 28. The Court was incorrect in this analysis, however, because the circumstances of Mr. Thiefault's sentencing showed that the State had twice sought to obtain all the possible documentation of Mr. Thiefault'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. Supp. CP \_\_\_, Sub # 71 (State's Sentencing Brief, Appendices A and C; see also State's Sentencing Exhibit A (Supp. CP \_\_\_, Sub # 111, Exhibit list, 9/30/03). 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. And nothing indicates that the missing "Information" would contain anything more than an allegation that the defendant violated the Montana statutes or anything close to the detailed information about

the alleged facts that was provided in the other documents, which were not referenced in the defendant's plea or judgment. Mr. Thieffault's burden to show prejudice caused by his attorney's deficient performance is satisfied in these circumstances. The United States Supreme Court has defined the likelihood of prejudice required to prevail on an ineffective assistance claim as "a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694. Here, the circumstances of the prior proceedings and the State's repeated inability to obtain the missing documentation should undermine this Court's confidence that such documentation could have been produced had Mr. Thieffault's counsel not simply accepted the court's prior ruling on comparability of the Montana offense.

The Court of Appeals also stated that since no prejudice was shown by Mr. Thieffault, the Court "need not address whether his attorney's performance was deficient." Decision, at p. 28. But defense counsel was deficient, if counsel affirmatively agreed to the comparability of the defendant's foreign offenses, because he thus would waive the issue under then applicable law, see State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (citing State v. Ford, 137 Wn.2d 472, 483 n. 5, 973 P.2d 452 (1999)). This would be deficient attorney performance because the elements of the foreign offenses are not the same as the Washington

offenses to which they were held analogous, yet the trial court erroneously held at the original sentencing, and then again at the second sentencing hearing, that the statutes were comparable, and the existing Montana documentation was inadequate to show that Mr. Thieffault pled guilty to facts that could be used to alternatively show his out-of-state conduct, under the restrictions of State v. Bunting, a case decided on January 21, 2003, prior to the time of this failure by counsel at the second sentencing. 8/10/2001 at 27-28; 9/30/2003 at 39.

Because Mr. Thieffault established on appeal both deficient attorney performance and resulting prejudice, his claim of ineffective assistance should prevail if his counsel agreed to comparability.

**3. IN ANY EVENT, THE DEFENDANT'S COUNSEL FAILED TO OBJECT TO, RATHER THAN AGREED TO, THE COMPARABILITY OF THE MONTANA CONVICTION, ALLOWING MR. THIEFFAULT TO CHALLENGE THE TRIAL COURT'S ERRONEOUS COMPARABILITY DETERMINATION ON APPEAL.**

If Mr. Thieffault's counsel merely failed to object to the comparability of the Montana offense, the trial court's erroneous comparability determination requires remand under the simple principle of State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999), that illegal sentences can be challenged on appeal if the defendant merely failed to object to comparability, rather than agreed to comparability. Ford, at 482-

83 and n. 5. As Mr. Thieffault argued in his briefing to the Court of Appeals, the trial court in fact engaged in comparability analysis at the second sentencing hearing. Supplemental Brief of Appellant, at 21-22; 9/30/2003 at 44-45. Mr. Thieffault's counsel's statement that he believed the court had previously determined the comparability issue, and that he was thus not raising the issue again, was merely a failure to object to comparability. 9/30/2003 at 39. As a consequence, given the Court of Appeals' agreement that the Montana and Washington statutes are not comparable, the trial court erred and Mr. Thieffault is entitled to reversal of his sentence and remand under Ford.

Finally, however, a greater remedy is available to Mr. Thieffault, because the sentencing court's inclusion of the Montana offense violated his right to a jury trial, which is a right that cannot be waived by either his counsel's agreement or failure to object to comparability, and this was error that cannot be harmless, requiring reversal of the comparability determination, and therefore the "three-strikes" sentence, for remand and entry of a standard range sentence for the current offense.

**4. JUDICIAL DETERMINATION OF THE FACTUAL COMPARABILITY OF THE DEFENDANT'S OUT-OF-STATE CONDUCT 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.**

Despite its agreement that the Montana statutes are broader, and that the prior sentencing documentation failed to show the defendant 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." Decision, at p. 21 (citing Hickman, at 907). The Court stated, "Thiefault has provided no reason why a comparability analysis prevents application of the Hickman rule." Decision, at p. 22.

Undersigned counsel also argued in the Supplemental Brief of Appellant and the Supplemental Reply Brief of Appellant that the inclusion of the Montana offense was error regardless of trial counsel's inaction, because following Apprendi v. New Jersey, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), State v. Bunting, 115 Wn. App. 135, 61 P.3d 375 (2003), and to a lesser degree

the case of State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), no court could legally include the offense in Mr. Thieffault's score even if trial counsel failed to challenge or agreed to the inclusion of the offense, because there had been no valid, knowing waiver by the defendant of his right to a jury trial on the necessary comparability facts of the out-of-state offense, and there had been no guilty plea to those necessary facts at the time of the Montana plea. Supplemental Brief of Appellant, at pp. 16-22; Supplemental Reply Brief of Appellant, at pp. 4-5; Motion to Reconsider, at pp. 2-17. These arguments were initially raised in the context of Mr. Thieffault's ineffective assistance claim, but they were raised also as a part of his argument that the inclusion of the Montana offense could not be justified "when looking to only those facts that were admitted by the defendant or proved beyond a reasonable doubt." Supplemental Brief of Appellant, at p. 22. As Blakely states the proposition in the affirmative,

[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, 124 S. Ct. at 2541. However, the critical point of the applicability of Apprendi v. New Jersey and Blakely v. Washington, State v. Bunting, and the cases setting out the requirements of a jury trial waiver, is that these cases, when all read together and in the context of

comparability of foreign offenses, mean that (1) the defendant's "stipulation" must be a knowing waiver of his right to a jury trial on facts that are necessary to show the factual comparability of a foreign offense, or (2) those facts must have been ones that he knowingly and validly plead guilty to when he plead guilty to the foreign offense in the prior proceeding. In the present case, neither requirement is satisfied.

First, Mr. Thiefault, at the present sentencing, never validly admitted the facts of the Montana offense that are necessary to render it comparable to second degree 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. Concisely put, the 'stipulation' referred to in Blakely cannot be a mere waiver of challenge to, or agreement to, those facts; rather, such waiver or agreement must satisfy the formal rigor of a guilty plea entered following advisement of the defendant's Sixth Amendment right to jury proof.

Sentence-increasing facts are elements. 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"). Harris, 536 U.S. at 557-58. Therefore, for example, when the Blakely Court says that a defendant,

whose jury did not find the sentencing facts proffered as supporting an increase in his sentence, can still be so punished by an exceptional sentence if he “stipulates” to those facts, the Court could have meant only one thing - that the defendant’s “admission” of such facts must satisfy all the formal rigor of a valid guilty plea. 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 those facts beyond a reasonable doubt. See State v. Thang, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002). 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).

Just as facts that aggravate a criminal offense for purposes of an exceptional sentence are “elements” that must be either proved to a jury or admitted following a warning of the jury trial right, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192, 205 (2005), facts necessary to establish the comparability of foreign offenses under broader out-of-state statutes must

also be facts that increase punishment, and must surely be subject to the same requirements of Blakely of a valid, knowing jury trial waiver.

Mr. Thieffault was never made aware in the present case that he had a right to a jury trial 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 comparability was not a valid waiver of Mr. Thieffault's right to a jury trial on those facts.

Thus, following Blakely, the case of State v. Hickman cannot be good law in so far as its proposition that "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," Hickman, at 907, absent a showing that the stipulation was entered following advisement of the jury right.<sup>2</sup> When Mr. Thieffault was sentenced, Blakely had not been issued by the United States Supreme Court. Mr. Thieffault could not have knowingly waived his right to jury fact-finding of the necessary comparability facts when Washington law

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<sup>2</sup>For 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, because agreement to sentence-increasing facts does not satisfy the requirement of a knowing waiver of the right to a jury trial on facts that increase punishment.

did not recognize that he possessed this right. State v. Harris, 123 Wn. App. 906, 920-21, 99 P.3d 902 (2004).

Second, as argued extensively herein and agreed to by the Court of Appeals, none of the Montana court documents, that contain the allegations of the defendant's Montana conduct are included or referenced in his judgment on the Montana charge. Thus there was no guilty plea to such adequate facts in the prior proceeding, because the defendant's judgment only indicates he plead guilty to the offense in Montana, which is not legally comparable to attempted robbery in Washington. See also United States v. Shepard, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1254, 1262, 161 L.Ed.2d 205 (2005) ("the 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 [ v. United States, 526 U.S. 227, 243, n. 6, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)] and Apprendi, to say that Almendarez-Torres [ v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998)] clearly authorizes a judge to resolve the dispute").

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, Blakely, rather than Hickman, applies, and Mr. Thiefault's counsel's inaction on the issue of factual comparability does not authorize inclusion of the Montana offense in Mr. Thiefault's offender score. The violation of his right to a jury trial can never be harmless, and requires reversal without a second opportunity for the State to prove the factual issue. State v. Hughes, supra.

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

Mr. Thiefault contends the increase in his punishment to mandatory life imprisonment without the possibility of parole requires the full panoply of procedural due process protections on the persistent offender charge. In United States v. Jones, 526 U.S. 227, 248-50, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) and Almendarez-Torres v. U.S., 523 U.S. 224, 230, 140 L.Ed.2d 350, 118 S.Ct. 1219, 1235-37 (1998), the Supreme Court reasoned recidivism was not an element of the crime which it enhanced because recidivism was a "traditional, if not the most traditional, basis for a sentencing court's increasing an offender's

sentence” and because it did not relate to the commission of the crime.

See Almendarez-Torres, 523 U.S. at 230, 244-45.

But in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362, 147 L.Ed. 2d. 435 (2000), the Court abandoned the legal reasoning which it relied upon in Jones and Almendarez-Torres. Instead, the Court concluded an “enhancement” is in fact an element which must be proved beyond a reasonable doubt to the trier of fact if it “increase[s] the prescribed range of penalties to which a criminal defendant is exposed.” Apprendi, 120 S.Ct. at 2363. In doing so the plurality declined to expressly overrule Almendarez-Torres “[e]ven though it is arguable Almendarez-Torres was incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested.” (Footnote omitted.) Apprendi, 120 S.Ct. at 2362. The concurring opinion of Justice Thomas stated that the attempt in Almendarez-Torres to distinguish between traditional and nontraditional enhancements was erroneous, and instead the proper test is “[i]f a fact is by law the basis for imposing or increasing punishment . . . it is an element.” Apprendi, 120 S.Ct. at 2379. “[F]rom this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.” Id. Thus, five Justices on the Supreme Court were of the belief that, applying the holding of Apprendi, recidivism must be proved to the jury under the Sixth

Amendment if the prior conviction will increase the sentence imposed. Justices Thomas and Scalia were ready to reach such a conclusion in Appendi, and Mr. Thieffault argues that if and when the right case is presented to the Court, it will rule that recidivism is a fact that must be proved to a jury.

The Washington State Constitution also requires that the stated due process protections be afforded the three strikes defendant. The Washington Supreme Court long ago recognized that the right to an information alleging grounds for sentence enhancement, and the right to a jury determination based on proof beyond a reasonable doubt of those allegations, are guaranteed by the Washington State Constitution. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). As recently as 1986, the Court recognized the existence of these rights when the sentence to be imposed exceeds the statutory maximum. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). This Court should reject State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), as wrongly decided, because there, instead of following long established precedent, the majority of the Court treated sentencing of a persistent offender as a new concept and views a sentence of Life Without Possibility of Parole as just another line of the Sentencing Reform Act of 1981 (SRA) grid, despite the fact that such a

sentence exceeds the statutory maximum available for any class C or B felony. In reaching its result, the majority failed to acknowledge that the Court had previously found that the right to a jury trial under the Washington State Constitution is not coextensive with the federal right, State v. Hobble, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995), and failed to acknowledge, distinguish or specifically overrule the Furth decision which specifically addressed the right to an information and a jury trial before a court could impose an enhanced sentence based on prior convictions.

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

The Supreme Court of Washington has ruled that the provision of the "Three Strikes" initiative (Initiative 593) making first-time offenders ineligible for early release violates the single-subject rule of article II, section 19 of the State Constitution and may not be enforced. State v. Cloud, 95 Wn. App. 606, 976 P.2d 649 (1999). Mr. Thieffault argues that RCW 9.94A.120(4) (now recodified at RCW 9.94A.505), which was adopted as part of Initiative 593, the Persistent Offender Accountability Act, also violates article II, section 19 of the Washington Constitution in its entirety. Initiative 593 made certain offenders ineligible for early release, and provided for persistent offender classification and sentencing to life without possibility of parole. Initiative 593's ballot title stated:

"Shall criminals who are convicted of 'most serious offenses' on three occasions be sentenced to life in prison without parole?" See State v. Thorne, 129 Wn.2d 736, 757, 921 P.2d 514 (1996).

Article II, section 19 provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." The requirement of not embracing more than one subject is the "single subject rule." In State v. Cloud, 95 Wn. App. at 618, this Court of Appeals reasoned that because Initiative 593's title contained only one subject -- persistent offenders -- the provisions of the initiative that are unrelated to that subject are invalid. The Cloud Court thus held that the provisions of RCW 9.94A.120(4) relating to early release violated article II, section 19. Cloud, 95 Wn. App. at 618. However, the remedy for a violation of the single subject rule is to strike the Initiative in its entirety. City of Burien v. Kiga, 144 Wn.2d 819, 822, 828, 31 P.3d 659 (2001), Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 207, 11 P.3d 762 (2000). This would include those portions establishing the persistent offender sentencing scheme that was applied to Mr. Thieffault in the present case. The single subject requirement seeks to prevent grouping of incompatible measures, in addition to preventing the pushing through of unpopular legislation by attaching it to popular or necessary legislation.

Power, Inc. v. Huntley, 39 Wn.2d 191, 198, 235 P.2d 173 (1951). A challenger need not prove that the initiative in question would have failed if properly described, but need only show a possibility of failure.

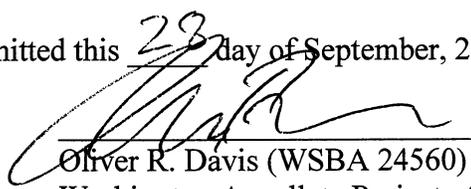
Amalgamated Transit Union Local 587 v. State, 142 Wn.2d at 212 n. 5. In the present case, the entirety of Initiative 593 as enacted must be declared void because it is impossible to know if either subject contained in the Initiative would have had sufficient democratic support standing alone.

City of Burien v. Kiga, 144 W.2d at 828. Because Mr. Thieffault was sentenced to life without possibility of parole under an unconstitutional law, this Court should we remand for imposition of a standard range sentence. See Cloud, 95 Wn. App. at 618.

**F. CONCLUSION**

Based on the foregoing, Mr. Thieffault respectfully requests this Court accept review.

Respectfully submitted this <sup>23</sup> day of September, 2005.

  
Oliver R. Davis (WSBA 24560)  
Washington Appellate Project - 91052  
Attorneys for Petitioner.

RECEIVED  
SEP 28 2005  


Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name  Date SEP 28 2005

Done in Seattle, Washington

## **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

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that Thieffault 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 Thieffault as a persistent offender under both the two-strikes law and the three-strikes law, and sentence him to life imprisonment. Thieffault'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 Thieffault'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 Thieffault 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.

Thieffault appealed to this court on several grounds. State v. Thieffault, 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. Thieffault, 2003 WL 21001019 at \*1. He also claimed that his federal conviction could not be counted under the two-strikes law. Thieffault,

2003 WL 21001019 at \*4. We agreed with Thieffault on both counts,<sup>1</sup> dismissed the indecent liberties conviction, and remanded for re-sentencing. Thieffault, 2003 WL 21001019 at \*3-\*4.

At re-sentencing, Thieffault 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, Thieffault'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 Thieffault to be a persistent offender. Thieffault was sentenced to life in prison with no possibility of parole under the three-strikes law. Thieffault appeals.

## **ANALYSIS**

### **I. Facial Validity of Thieffault's Prior Convictions**

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

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<sup>1</sup> Thieffault also raised several other challenges that we rejected. Thieffault, 2003 WL 21001019 at \*4.

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reversed.<sup>2</sup>

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.

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<sup>2</sup> 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. Thieffault argues that because the document does not state that defense counsel appeared at sentencing, only that Thieffault did, the conviction is facially invalid. However, the judgment states that Thieffault was “thereafter” represented by counsel. The implication of this statement is that counsel represented Thieffault 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).<sup>3</sup>

Thieffault’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 Thieffault’s attorney. Although Thieffault 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 Thieffault’s counsel was not present. Indeed, the fact that Michael Nance represented Thieffault 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. Thieffault has not shown that his prior convictions were facially invalid.

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<sup>3</sup> Thieffault 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 Thieffault’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.<sup>4</sup>

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<sup>4</sup> 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 Thieffault is not unlawfully restrained under RAP 16.4(c)(2).

For several reasons, we also find that Thieffault 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, Thieffault 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 Thieffault'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.<sup>5</sup> Thus, Thieffault's claim fails.

#### **V. Ineffective Assistance of Counsel**

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

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<sup>5</sup> 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 Thiefault'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 Thiefault's Montana conviction are a Motion for Leave to File Information, an affidavit from the prosecutor, and the Judgment. Thiefault's conduct is described in the Motion for Leave to File Information and the affidavit. The Judgment does not contain any facts about Thiefault's underlying conduct. The Judgment states that a criminal Information was filed on December 22, 1983, charging Thiefault with attempted felony and a misdemeanor, that Thiefault 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. Thiefault 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 Thiefault

We next determine whether there is a reasonable probability that Thiefault was prejudiced by his counsel's concession that the Montana crime was comparable. Thiefault 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, Thiefault 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.

Thiefault has not done this. The Motion for Leave to File Information accused Thiefault 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 Thiefault took a substantial step towards using threat of force to take personal property of another. Thiefault 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, Thiefault has not shown prejudice. As Thiefault 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

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

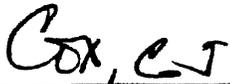
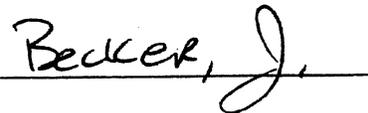
**VIII. Scrivener's Errors**

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:

  
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<sup>6</sup> 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**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 GAYLON LEE THIEFAULT, )  
 )  
 Appellant. )

NO. 53214-6-I

**RECEIVED**

DIVISION ONE

AUG 31 2005

**ORDER DENYING MOTION  
FOR RECONSIDERATION**

Washington Appellate Project

FILED: August 1, 2005

The appellant, Gaylon Thiefault, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 30<sup>th</sup> day of August, 2005.

FOR THE COURT:

  
\_\_\_\_\_  
Judge