

53214-6

53214-6

77753-5

No. 53214-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GAYLON THIEFAULT,

Appellant.

2014/03/18 11:14:37

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

The Honorable Ronald L. Castleberry

SUPPLEMENTAL BRIEF OF APPELLANT

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

1. MR. THIEFAULT’S TRIAL COUNSEL PROVIDED
INEFFECTIVE ASSISTANCE OF COUNSEL BY
WAIVING THE COMPARABILITY OF THE FOREIGN
OFFENSES. 4

2. IN THE ALTERNATIVE, DEFENSE COUNSEL’S
DEFICIENCY IN DECLINING TO CHALLENGE THE
PRIOR CONVICTIONS DID NOT WAIVE THE
LEGAL ISSUE OF THE COMPARABILITY OF THE
PRIOR OFFENSES WHERE THE TRIAL COURT
ENGAGED IN THE COMPARABILITY ANALYSIS. 20

E. CONCLUSION 23

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Bunting, 115 Wn.App. 135, 61 P.3d 375 (2003). 18

State v. Cameron, 80 Wn.App. 374, 909 P.2d 309 (1996). 6

State v. Duke, 77 Wn.App. 532, 892 P.2d 120 (1995) 7

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). 6,13

State v. Freeburg, 120 Wn.App. 192, 84 P.3d 292 (2004) 9

In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) 21,22

State v. Hunter, 116 Wn.App. 300, 65 P.3d 371 (2003) 21

State v. Kjorsvik, 117 Wn.2d 93, 110, 812 P.2d 86 (1991) 9

State v. Lockett, 73 Wn.App. 182, 869 P.2d 75, review denied, 124 Wn.2d 1015, 880 P.2d 1005 (1994). 7

State v. Morley, 134 Wn.2d 588, 606 P.2d 167 (1998). 7

State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004) 16,17

State v. Ross, ____ P.3d ____, 2004 WL 1793309 (2004). 5,21

STATUTES AND COURT RULES

RCW 9A.44.050 12

RCW 9A.44.050 12

RCW 9.94A.421 22

RCW 9.94A.360(3). 6

RCW 9A.56.190. 8

RCW 9A.28.020(1) 8,11

MCA 45-6-301.	9
MCA 45-5-501.	9,12
MCA 45-4-103.	9,11
MCA 45-6-301.	9
18 U.S.C. 2241(1a)	13
CrR 4.2(g).	22

UNITED STATES SUPREME COURT CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	16
<u>Blakely v. Washington</u> , 124 S. Ct. 2531 (2004)	18,19
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), <u>review denied</u> , 150 Wn.2d 1024 (2003). .	5,20

A. ASSIGNMENTS OF ERROR

1. The defendant's trial counsel provided ineffective assistance of counsel by waiving challenge to the trial court's inclusion of two prior foreign convictions as Washington strike offenses, requiring reversal of the defendant's sentence to Life Without Possibility of Parole.

2. If defendant's counsel was ineffective for waiving the issue of comparability, review is not precluded because the trial court undertook its own analysis of comparability and this analysis was erroneous, requiring reversal of the sentence to Life Without Possibility of Parole.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Thieffault's trial counsel provided deficient attorney performance at the September 30, 2003, re-sentencing hearing, by waiving challenge to the trial court's inclusion of two prior foreign convictions as Washington strike offenses.

2. Whether this deficient performance prejudiced Mr. Thieffault where the prior sentencing documentation was inadequate to show comparability of the defendant's conduct to Washington strike crimes, without looking to matters in the

sentencing record that had ever been proved beyond a reasonable doubt or admitted by the defendant.

3. Whether the trial court's own finding of comparability of the foreign offenses was erroneous, requiring reversal of the defendant's sentence to Life Without Possibility of Parole, even in the presence of express waiver by counsel on the record.

C. STATEMENT OF THE CASE

Mr. Thieffault was sentenced to a term of incarceration for Life Without Possibility of Parole, pursuant to the Persistent Offender Accountability Act ("Three Strikes"), following his current conviction for attempted second degree rape and the trial court's conclusion under Washington's Three Strikes law that the defendant was also guilty of two prior "most serious offenses" in the form of (1) a prior Montana conviction for attempted robbery and (2) a prior federal conviction for aggravated sexual assault. CP 17-28. The defendant's current sentence was imposed on re-sentencing following appeal.¹

¹The 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, for

In pre-sentencing briefing filed for the original sentencing hearing in 2001, the State offered as exhibits the following documentary evidence of the alleged prior convictions (filed August 10, 2001):

- **Montana Attempted Robbery Conviction by Plea**

“Motion for Leave to File Information” for ATTEMPT (Robbery) committed 12/13/83.

“Judgment” dated 4/5/84 imposing a suspended 5 year sentence, signed by the court and filed 4/12/84 for ATTEMPT (Robbery) stating defendant pled guilty on 3/14/84 and appeared at sentencing on 4/5/84.

“Judgment” finding violation of probation and revoking suspended sentence, following defendant’s 3/11/87 admission of violation, dated, signed and filed 4/8/1987.

- **Federal Rape Conviction by Plea**

“Indictment” for sexual act by use of force committed 9/28/91.

“Plea Agreement” for sexual intercourse through use of force, dated, signed and filed 7/12/93.

“Judgment in a Criminal Case” reflecting plea of guilty to and sentence for Rape (Aggravated Sexual Assault), dated 7/12/93 and signed and filed 7/15/93.

error of the trial court in counting the defendant’s prior convictions based on comparability analysis to Washington convictions, which was not permissible under the “two-strikes” law until later amendment of the statute. Supp. CP ___, Sub # 98.

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).

At Mr. Young's re-sentencing on September 30, 2003, appellant's counsel indicated he was not challenging the trial court's original sentencing determination that the Montana and federal offenses were comparable to Washington "strike" offenses. RP 39. The trial court ruled that the Montana attempted robbery conviction and the federal rape (aggravated sexual assault) conviction were facially valid and constituted two strike offenses, along with the defendant's current "strike" conviction as a third strike. 9/30/03 at 41-42. The court stated it was "in fact finding" that the prior convictions were most serious offenses in Washington. 9/30/03 at 44-45.

D. ARGUMENT

1. MR. THIEFAULT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY WAIVING THE COMPARABILITY OF THE FOREIGN OFFENSES.

Mr. Thiefault's trial counsel expressly stated he was not challenging the issue of the comparability of the

defendant's foreign offenses. RP 39; see State v. Ross, ____ P.3d ____, 2004 WL 1793309 (2004). Mr. Thiefault argues that this was deficient attorney performance because the elements of the foreign offenses are not the same as the Washington offenses to which they were held analogous, and that he was prejudiced by this deficiency because the conviction documentation does not show facts that were either admitted, or proved to a jury, that demonstrated comparability.

First, defense counsel was ineffective for waiving the issue of comparability because the elements of the foreign statutes under which Mr. Thiefault was convicted are not the same as the elements of the Washington crimes. On appeal, to prevail on a claim of ineffective assistance of counsel, the appellant is required to show both deficient performance at trial and "resulting prejudice." See State v. Kruger, 116 Wn.App. 685, 693, 67 P.3d 1147 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)), review denied, 150 Wn.2d 1024 (2003).

In establishing the defendant's criminal history for sentencing purposes, an out-of-state conviction may not be used to increase the defendant's offender score unless the State proves that the conviction would be a felony under Washington law. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The sentencing court is therefore required to classify out-of-state and federal convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.360(3).

To determine whether out-of-state convictions qualify as most serious offenses under Washington law, a "comparability" analysis is conducted. The goal is to match the out-of-state crime to the comparable Washington crime and "to treat [the defendant] convicted outside the state as if he or she had been convicted in Washington." State v. Cameron, 80 Wn.App. 374, 378, 909 P.2d 309 (1996).

To make this determination whether a prior out-of-state or federal conviction is comparable to a Washington conviction, the sentencing court must first analyze the elements of the out-of-state offense compared to the elements of the Washington offense proffered by the State

as comparable. State v. Morley, 134 Wn.2d 588, 605-06, 606 P.2d 167 (1998). Then, if necessary, the Court will look to the defendant's conduct in the earlier offense:

To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.

(Emphasis added.) (Citations omitted.) Ford, 137 Wn.2d at 479; State v. Duke, 77 Wn.App. 532, 535, 892 P.2d 120 (1995); State v. Lockett, 73 Wn.App. 182, 187-88, 869 P.2d 75, review denied, 124 Wn.2d 1015, 880 P.2d 1005 (1994).

Counsel was ineffective for waiving the issue of the comparability of the prior foreign offenses where the elements are not the same and the conviction documentation does not show facts that were either admitted, or proved to a jury, that demonstrated comparability.

The crimes of attempted robbery in Washington and Montana have different elements. Washington attempted robbery is defined by two statutes which provide 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. A person is guilty in Washington of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a "substantial step" toward the commission of that crime. RCW 9A.28.020(1).

However, the definition of robbery in Montana is as follows:

A person commits the offense of robbery if in the course of committing a theft he (a) inflicts bodily injury upon another; (2) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or (3) commits or threatens immediately to commit any felony other than theft.

MCA 45-5-501. The definition of “attempt” in Montana is as follows:

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. In addition, in Washington the specific intent to steal is a non-statutory element of robbery. State v. Freeburg, 120 Wn.App. 192, 1978, 84 P.3d 292 (2004), citing State v. Kjorsvik, 117 Wn.2d 93, 110, 812 P.2d 86 (1991) (intent to steal is a nonstatutory element of robbery in Washington). However, in Montana, although the definition of robbery requires the defendant to be in the course of committing a theft, “theft” in that state is committed under a range of circumstances, not limited to a taking with specific intent to deprive, including where any such circumstances are combined with purposefully and knowingly obtaining or exerting unauthorized control over property of an owner.²

MCA 45-6-301.

²Under the Montana criminal code, theft is defined as follows:

(1) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when the person purposely or knowingly obtains by threat or deception control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when the person purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(4) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over any part of any public assistance provided under Title 52 or 53 by a state or county agency, regardless of the original source of assistance, by means of:

(a) a knowingly false statement, representation, or impersonation; or

(b) a fraudulent scheme or device.

(5) A person commits the offense of theft when the person purposely or knowingly obtains or exerts or helps another obtain or exert unauthorized control over any part of any benefits provided under Title 39, chapter 71 or 72, by means of:

(a) a knowingly false statement, representation, or impersonation; or

(b) deception or other fraudulent action.

In addition to the multiple variegated ways in which the definition of theft in Montana is broader than Washington's non-statutory robbery element of intent to steal, the facial differences in the two state's attempted robbery statutes themselves begin with the fact that Montana's attempt statute is broader than Washington's. In Washington, a person is guilty of an attempt only if he commits a substantial step toward the commission of that crime. RCW 9A.28.020(1). In Montana, however, the law merely requires that a person do "any act toward the commission" of such offense. MCA 45-4-103. In addition, attempted robbery in Washington requires proof of an attempt to take "personal property from the person of another or in his presence against his will," and "[s]uch force

(6) (a) A person commits the offense of theft when the person purposely or knowingly commits insurance fraud as provided in 33-1-1202 or 33-1-1302; or

(b) purposely or knowingly diverts or misappropriates insurance premiums as provided in 33-17-1102.

(7) A person commits the offense of theft of property by embezzlement when, with the purpose to deprive the owner of the property, the person:

(a) purposely or knowingly obtains or exerts unauthorized control over property of the person's employer or over property entrusted to the person; or

(b) purposely or knowingly obtains by deception control over property of the person's employer or over property entrusted to the person.

or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.” RCW 9A.56.190. But in Montana, a person can commit robbery merely by attempting theft, and either causing “fear of injury,” or threatening injury or a felony “in the course of” committing the theft or attempted theft. MCA 45-5-501. Montana’s crime of attempted robbery is significantly broader than Washington’s.

With regard to the federal offense alleged to be comparable to Washington’s second degree rape, RCW 9A.44.050(1)(a) provides that second degree rape occurs when a person engages in sexual intercourse with another by forcible compulsion. The term forcible compulsion is defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6). In contrast, the federal offense of “aggravated sexual abuse” of which Mr. Thiefault was previously convicted, defines the offense in one

statute, which indicates that merely an “attempt” to commit a “sexual act” against another establishes guilt:

Whoever . . . knowingly causes another person to engage in a sexual act
(1) by using force against that other person; or
(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;
or attempts to do so, shall be [convicted] under this title.

18 U.S.C. 2241(1a). The federal aggravated sexual assault statute is significantly broader than Washington’s strike offense of second degree rape.

If the elements of the foreign and Washington offenses are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, the court must look into the record of the out-of-state convictions to determine whether the defendant's conduct would have violated the comparable Washington offenses. Ford, 137 Wn.2d at 479. Here, the trial court record includes the State’s sentencing brief and sentencing exhibits. These do not show that there had been facts proved beyond a reasonable doubt or admitted that indicate that the

defendant's conduct underlying the foreign convictions could constitute the strike offenses of attempted second degree robbery and second degree rape under Washington law. The only judgment that was presented pertaining to the attempted robbery in Montana, and was provided as an exhibit at re-sentencing on that prior offense, was the judgment revoking the defendant's suspended sentence on the crime, and in any event, this document does not list the elements of the offense of attempted robbery or state any facts about the incident. State's Sentencing Exhibit A (Supp. CP ___, Sub # 111, Exhibit list, 9/30/03). A copy of the original judgment was included as an attachment to the original sentencing memorandum, and that judgment does not include the facts of the offense. The judgment does not reference the affidavit of probable cause, but it notes the defendant entered a plea of guilty to the charges in the information that was filed against him on December 22, 1983. Although the State's motion to file the information, dated December 21, 1983, was included as a copied attachment to the sentencing memorandum, no copy of the December 22 information was attached, and neither

judgment incorporates or references the motion to file the information or any other document so as to admit its facts, or references the absent information. Supp. CP ____, Sub # 71 (State's Sentencing Brief, Appendices A). And of course, because the case involved a plea, there is no indication of any jury verdict establishing these facts beyond a reasonable doubt.

As to the federal conviction, the sentencing exhibits of September 30, 2003 do not include a certified judgment or any documentation from the federal conviction. State's Sentencing Exhibit A (Supp. CP ____, Sub # 111, Exhibit list, 9/30/03). The sentencing memorandum includes an indictment, a plea agreement, and a judgment. The plea agreement does admit the factual allegations in the indictment's charge that he knowingly caused another individual to engage in sexual intercourse with him through the use of force, which Mr. Thieffault argues does not establish "forcible compulsion." Supp. CP ____, Sub # 71.

The sentencing court cannot rely on information about the foreign convictions not proved beyond a reasonable doubt or admitted by the defendant. As a consequence, if

the facts in the record of the defendant's foreign convictions that are necessary to establish the comparability of the prior crimes to Washington offenses, were not proved or admitted, the comparability of the foreign convictions fails. Mr. Thiefault therefore has an effective and fair remedy on appeal in this case for his trial counsel's failure to challenge the facial difference in the elements of the Montana, federal, and the Washington offenses, which constituted ineffective assistance to his prejudice.

First, the Washington Court of Appeals (Division 3) in State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (decided February 17, 2004), applied Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to preclude a trial court from finding additional facts, not inhering in a foreign jury verdict, by a preponderance of the evidence, and using those facts to conclude that a defendant's foreign conviction was comparable to a Washington offense for offender score purposes.

The Court of Appeals held that Apprendi would be violated by a trial court's engaging in fact-finding to find facts rendering the defendant's conduct in committing a foreign

conviction comparable to a Washington offense, where those facts were not inherent in the foreign jury's verdict of guilt. State v. Ortega, 120 Wn. App. at 171-73. In Ortega, the foreign sexual offense jury verdict at issue did not specify anything further than that the victim's age was under 17 years, while Washington's strike offense of first degree child molestation requires the child victim be under the age of 12 years, and the Court of Appeals ruled that the trial court properly refused to hear and weigh evidence from a Texas administrative official to the effect that the Texas victim was in fact aged 10 years at the time of the crime. State v. Ortega, 120 Wn. App. at 171-73. The Ortega court stated that a jury verdict is highly reliable evidence of the facts of a prior conviction, but went on to state that where further necessary facts to render a defendant's foreign conduct comparable to a Washington offense do not appear in the "indictment, judgment, jury instructions, or verdict," there has been no proof of those facts beyond a reasonable doubt to a jury, and further fact-finding by the current sentencing court under the preponderance standard violates the constitutional rule of Appendi. State v. Ortega, 120 Wn. App. at 172; see

also State v. Bunting, 115 Wn.App. 135, 140-41, 61 P.3d 375 (2003).

Similarly in Bunting, 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 the complaint and "official statement" had not been proven or conceded by the defendant. State v. Bunting, 115 Wn.App. at 143.

Subsequently, in Blakely v. Washington, 124 S. Ct. 2531 (2004), the United States Supreme Court ruled that facts increasing the defendant's punishment and time of incarceration beyond the bare jury verdict may not be used to increase the defendant's punishment where those facts were not "reflected in the jury verdict or admitted by the defendant" and applied this principle to a case involving

enhancement of punishment by means of a statutory scheme allowing Washington trial courts to find aggravating facts by a preponderance of the evidence and to use those facts to increase the defendant's sentence. (Emphasis added.) Blakely v. Washington, 124 S.Ct. at 2537.

In the present case, the record of the defendant's prior foreign convictions, which were entered on the basis of pleas of guilty, indicates that the defendant pled guilty to attempted second degree robbery in Montana and aggravated sexual assault in the Western District of Washington. However, because the plea documentation in the form of the judgments merely states that the defendant pled guilty to the named offenses, but does not indicate that the defendant had agreed to use of the other documentation in the form of the affidavit or affidavit(s) of probable cause or motion to file the information to establish the facts under the guilty plea, the judgments alone do not attest to adequate facts to show that the defendant engaged in conduct that would amount to second degree robbery and second degree rape under Washington law. A trial court following a proper objection to the comparability of the elements of these

offenses to Washington offenses would not, under these cases, be permitted to look to these documents to determine factual comparability. Defense counsel's failure to challenge the comparability of the foreign convictions was deficient attorney performance, and prejudiced the outcome of his Three Strikes sentencing hearing.

Because both "prongs" of the Strickland v. Washington ineffective assistance test are satisfied, including the critical prong of "resulting prejudice," reversal of the defendant's sentence is required for the deficient and prejudicial waiver of the issue of the comparability of Mr. Thieffault's prior strike history. See State v. Kruger, 116 Wn.App. at 693.

2. IN THE ALTERNATIVE, DEFENSE COUNSEL'S DEFICIENCY IN DECLINING TO CHALLENGE THE PRIOR CONVICTIONS DID NOT WAIVE THE LEGAL ISSUE OF THE COMPARABILITY OF THE PRIOR OFFENSES WHERE THE TRIAL COURT ENGAGED IN THE COMPARABILITY ANALYSIS.

Mr. Thieffault's trial counsel at re-sentencing stated he was expressly not challenging the issue of the comparability of the defendant's foreign offenses. RP 39. The Supreme

Court has very recently ruled that a defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived challenge to the use of that conviction in calculating his offender score. State v. Ross, ___ P.3d ___, 2004 WL 1793309 (Aug 12, 2004) (affirming State v. Hunter, 116 Wn.App. 300, 301-02, 65 P.3d 371, 372-73 (2003) (holding that a defendant can waive the right to appeal the determination of comparability because "[n]othing in [In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)] supports the proposition that the sentencing court must undertake a comparability determination despite the defendant's affirmative agreement with the State's classification.")).

However, the trial courts in the Ross case and the companion case involving petitioner Hunter did not analyze the comparability of the prior foreign offenses following the defendants' waiver of the issue. State v. Ross, 2004 WL 1793309, at p. 1. Here the trial court, regardless of whether it was obligated to do so or not under the Supreme Court's recent Ross decision, engaged in comparability analysis when it stated it was "in fact finding" that the prior convictions were most serious offenses in Washington. 9/30/03 at 44-

45. The Court in so doing acted consistent with the rule that a sentence must be based on a correctly calculated offender score in order to not be a miscarriage of justice. In re Goodwin, 146 Wn.2d at 876-77 (citing RCW 9.94A.421 and CrR 4.2(g)). Mr. Thiefault argues, relying on his analysis in Part D.1, supra, that no reasonable court could conclude that the defendant's prior Montana and federal offenses were legally and factually comparable to Washington "most serious offenses," when looking to only those facts that were admitted by the defendant or proved beyond a reasonable doubt. See Blakely v. Washington, supra; State v. Ortega, supra; State v. Bunting, supra. Although the defendant expressly "waived" the issue of comparability of the foreign offenses, this deficient attorney performance should not preclude this Court from reviewing the trial court's own de novo comparability decision and ruling including the offenses as Washington strike crimes. For the reasons argued in Part D.1 above, Mr. Thiefault's Montana and federal offenses were not comparable to Washington strike offenses and the defendant was improperly classified as a "Three Strikes" persistent offender.

E. CONCLUSION

Based on the foregoing supplemental brief, and on appellant's opening brief, Mr. Thieffault respectfully requests that this Court reverse his judgment and sentence.

DATED this 13 day of August, 2004.



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

