69048-5

69048-5

NO. 69048-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LOUIS McGOWEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Once the court makes a threshold determination that there is a reason to doubt the defendant's competency, due process requires that it properly observe statutory procedures to determine competency. The trial court must appoint experts and order a competency hearing. Here, once the trial court found a reason to doubt McGowen's competency, it ordered a psychological evaluation and report, and then held a hearing. McGowen did not object to the court's consideration of the written report, nor did he summon the author to testify at the hearing. McGowen had no expert opinion of his own to contradict the State's report. Did the trial court properly follow the statutory procedures for determining competency?

2. This Court reviews a motion to discharge counsel for abuse of discretion. Although McGowen agreed with defense counsel's statement that McGowen wanted to "discharge counsel," McGowen's actual desires were unclear, as he made only ambiguous and bizarre statements including, "God is my lawyer from now on, I don't know no lawyer," and claimed not to understand basic things such as the nature of the charges. The court interpreted McGowen's statements to be a request to proceed *pro se*, and determined that McGowen had not unequivocally waived his right to counsel. Did the

trial court properly exercise its discretion to deny a motion to discharge counsel?

3. A prior conviction that without further elaboration evidences infirmities of a constitutional magnitude is invalid on its face and may not be used at a subsequent sentencing. It is the defendant's burden to prove that a prior conviction is constitutionally invalid on its face. The sentencing court found that McGowen was a persistent offender based in part on his prior 1993 King County robbery conviction. The offender score used to calculate McGowen's 1993 sentence included an earlier Colorado robbery conviction. There is nothing in the record that demonstrates McGowen's prior Colorado conviction was not factually comparable to a robbery in Washington. Moreover, McGowen failed to disclose the prior Colorado robbery at the time of his 1993 plea and affirmatively acknowledged that his sentence might increase if additional criminal history was discovered prior to sentencing. Has McGowen failed to establish that his 1993 robbery conviction is constitutionally invalid on its face?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On January 14, 2012, Appellant Louis McGowen was charged in the King County Superior Court with one count of Assault in the

Second Degree and two counts of Felony Harassment. CP 1-3. The State alleged that the crimes were ones of domestic violence, and that one of the harassment counts occurred while McGowen was armed with a deadly weapon, specifically, a knife. Id. Prior to trial, McGowen's attorneys informed the court that they were concerned about his competency. McGowen was sent to Western State Hospital for an evaluation, after which Judge Ronald Kessler found him competent to stand trial. CP 38-39, 354-58; 2RP 2-5.[1]

The information was amended to reflect three counts of second-degree assault and two counts of felony harassment. CP 41-44. The State alleged that all five counts were part of an "ongoing pattern of psychological, physical or sexual abuse of the victim, manifested by multiple incidents over a prolonged period of time." Id. The State further alleged that McGowen committed two of the charges while armed with a deadly weapon. CP 43.

A jury trial was held in front of Judge Kimberley Prochnau. During pretrial motions and jury selection, McGowen refused to wear street clothes, refused to acknowledge the court, placed earplugs in his ears, faced the wall, and ignored his attorneys. 5RP 11-13, 15, 40-41, 45-46; 8RP 8-11; 9RP 2-5. During jury selection, McGowen

[1] The State adopts McGowen's form of reference to the verbatim report of proceedings.

burst into a tirade. 9RP 67-70. Following the outburst, McGowen's lawyers asked that he be reevaluated for competency. 9RP 76-77, 89-90. The court signed an order for a second evaluation. CP 119-23; 10RP 56-58. On June 7, 2011, Judge Prochnau determined that McGowen was competent.[2] CP 124-25; 12RP 6-8.

After a new jury venire was assembled, McGowen continued to ignore the court and his attorneys, placed paper into his ears, and pretended to sleep. 13RP 21. Again during jury selection, McGowen burst into an angry rant about how he was "facing life in prison . . . for snatching [his] girlfriend's phone." 15RP 30. The court determined that McGowen's antics were strategic. 15RP 37-38. Because McGowen was unwilling to control his behavior in court, Judge Prochnau arranged for him to observe the proceedings from another courtroom. Id. Although he was repeatedly invited to return to court throughout the trial, McGowen chose to stay in the alternate viewing location. 16RP 21, 36-37; 17RP 3-4; 18RP 7; 19RP 4-5; 20RP 4, 73-76; 21RP 3-4, 89-90; 22RP 3; 23RP 28-29; 24RP 3, 122; 25RP 2-3; 26RP 4; 28RP 2-3; 30RP 2.

The jury found McGowen guilty of three counts of second-degree assault, one count of felony harassment, and one count of

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[2] Detailed facts surrounding the competency proceedings are outlined below in the argument section of the brief.

misdemeanor harassment. CP 190-91, 193-95. The jury concluded that McGowen committed count three, second-degree assault, while armed with a deadly weapon. CP 192. Following the verdict, the trial court held an additional proceeding relating to the aggravating factor alleged. 28RP 13-107. The jury determined that all four felonies counts were "aggravated domestic violence offenses." CP 196-99.

Prior to sentencing, McGowen filed a motion for a new trial, claiming trial irregularities and prosecutorial misconduct. CP 259-72; 30RP 5-8. McGowen's trial attorneys continued to represent him with respect to the motion for a new trial, but they were allowed to withdraw for purposes of sentencing.[3] 31RP 2-11. Judge Prochnau denied McGowen's motion for a new trial. 32RP 5-11.

At sentencing, the State alleged that McGowen was subject to the Persistent Offender Accountability Act ("POAA"), and asked for a sentence of life in prison without the possibility of release. CP 359-86. McGowen challenged his 1993 King County robbery conviction, arguing that it was constitutionally invalid on its face and could not serve as a predicate conviction for a persistent offender sentence. CP 281-88, 308-13. Judge Prochnau found that McGowen was a persistent offender and imposed a sentence of life in prison without the

[3] Because McGowen challenged the validity of one of his prior convictions, his trial counsel had a conflict of interest. 31RP 7.

possibility of release. CP 330, 333; 33RP 56-64. McGowen appeals. CP 340-51.

2. SUBSTANTIVE FACTS

Debra Barraza met McGowen in October of 2008 in Arizona. 16RP 38; 28RP 22. They became romantically involved and began living together. 16RP 38. In the beginning, they had dreams. 16RP 121. McGowen was studying to be a pastor, and they wanted to travel and share their faith in different countries. Id. McGowen told Barraza that he wanted to share his life with her. She wanted the same. Id.

However, not long into their relationship, McGowen began to physically abuse Barraza. 28RP 23-25. Even so, Barraza loved McGowen and made excuses for his behavior, hoping that he would change. 28RP 25. The couple lived with McGowen's mother in Colorado for a period of time. Id. While they were there, Barraza tried to leave, but McGowen assaulted her and took her money and phone. 28RP 26. Over the course of their stay with McGowen's family, the beatings slowly stopped. 28RP 26-27.

However, in the fall of 2009, the relationship deteriorated. 16RP 121. The couple moved to Seattle. 16RP 39. Barraza worked at Walgreens. 16RP 40. McGowen was unemployed. Id. On Barraza's birthday in October of 2009, McGowen promised that he

would take her out to celebrate. 16RP 116. Throughout the day, Barraza repeatedly asked McGowen about their plans. Id. McGowen became irritated at Barraza's pestering and slapped her across the face three times, causing her nose to bleed. Id. After that day, McGowen physically abused Barraza on a frequent basis, pulling her hair, kicking her in the stomach, and grabbing her by the throat. 16RP 117-18; 28RP 27. He continually threatened to kill her if she called the police. 16RP 118.

On December 26, 2009, Barraza received a phone call from her friend Tim Williamson. 16RP 40, 42. Barraza stepped out into the hallway to speak to him. 16RP 42. McGowen followed Barraza and asked who she was talking to. 16RP 45. He took the phone from her and began screaming at Williamson. 16RP 46. McGowen swore at Barraza and told her to go back inside the apartment. Id.

Barraza was frightened and did as McGowen said. 16RP 46. McGowen followed her into the bedroom while continuing to yell at Williamson on the phone. 16RP 48. McGowen hung up the phone and called Barraza a "fucking whore" and a "fucking bitch." 16RP 49. Barraza curled up on the bed in the fetal position. 16RP 50. McGowen left the bedroom, but returned moments later with a knife. 16RP 50-51. McGowen stood at the edge of the bed, swinging the knife back and forth, telling Barraza, "I'm going to cut you into fucking

pieces." 16RP 54, 56. He told her that if she "fucking made a sound or [if she] fucking cried or screamed, he'd fucking kill [her]." 16RP 57.

Barraza's cell phone began to ring and McGowen answered it. 16RP 59. It was Williamson, and McGowen told him that he would "meet him outside." 16RP 59. McGowen grabbed Barraza by her hair and dragged her outside. 16RP 59, 61. McGowen told Barraza to speak to Williamson on the phone and tell him to leave her alone, and that McGowen was her fiancé. 16RP 62. She did not speak into the phone, but she heard Williamson tell her to run away. 16RP 62-63. Barraza was unable to run away due to McGowen's hold on her hair. 16RP 64. After McGowen hung up on Williamson, he ordered Barraza to "get the fuck into the bedroom and stay there." 16RP 65. Barraza complied. 16RP 67.

While they had been outside on the street, McGowen saw a male and a female that he knew. 16RP 65. He invited them into the apartment after he ordered Barraza into the bedroom. 16RP 66. The couple came inside with McGowen and stayed in the living room while Barraza went to the bedroom like she was told. 16RP 69. Barraza heard them laughing in the living room. Id. After the couple left, McGowen entered the bedroom, ordered Barraza to stand up, called her a "fucking bitch," and told her that she belonged to him. 16RP 69-71. He grabbed Barraza by the neck, pushed her against the mattress

and squeezed her throat. 16RP 71, 74-75. Barraza had trouble breathing and felt dizzy. 16RP 76, 78.

McGowen continued to repeat the question "who am I," demanding that Barraza answer that he was her fiancé. 16RP 76-77. He told her, "Bitch, you better not fucking call the police or I'll fucking kill you." 16RP 103. Barraza told him to go ahead and kill her because a week earlier she had told her mother about McGowen's abuse and threats, and informed her that if she did not call one day, then McGowen had killed her. 16RP 104. McGowen let go of Barraza and walked away. Id.

Barraza grabbed her phone and wallet and left the apartment. 16RP 108. She went to the Walgreens where she worked. 16RP 109. She told her co-workers Ellen Tabudio and Brian Woerner that McGowen had pulled a knife on her and threatened to kill her. 16RP 112. At trial, Tabudlo testified that Barraza said that her boyfriend tried to kill her. 20RP 36-37. Woerner testified that Barraza told him that her boyfriend had threatened to choke her or break her neck. 19RP 17. Williamson helped Barraza pay for a motel room for the night. 16RP 113. However, the next day, having nowhere else to go, and having no money, Barraza returned to her apartment. 16RP 113-14. Also, Barraza still loved McGowen and wanted to believe his promises that he would not beat her again. 16RP 125-28.

She thought that the love they had once shared was strong enough for him to change. 16RP 127.

Several days later, on New Year's Eve, Barraza called McGowen several times to find out when he was coming home, so that they could go and watch the fireworks together. 18RP 101. McGowen never came home that night. Id. Early the next morning, Barraza left McGowen a message saying that their relationship was over, and that she was done being hurt by him. 18RP 102. When McGowen finally came home, he began yelling and screaming at Barraza, telling her that she had no right to call him and leave him a message like she had. Id. He hit her several times and pulled her hair, bloodying her lip and nose. 18RP 103.

By January 11, 2010, McGowen's friend "Tree" and his girlfriend Holly Doyle were living in the apartment with Barraza and McGowen. 16RP 129; 22RP 87. That day, Barraza and McGowen argued, and McGowen left the apartment. 16RP 129. Early the next morning, McGowen called Barraza and said that he needed to retrieve some papers. 16RP 131. She told him that he could not come to get them, because she did not want him there anymore. 16RP 132. She went back to sleep. Tree and Doyle were sleeping in the living room. 16RP 131-32.

Shortly thereafter, there was a bang on the apartment door. 16RP 132; 22RP 100. When Barraza asked who was there, she heard McGowen answer with an altered voice that he was her landlord. 16RP 133. When she refused to open the door, McGowen became angry, told her, "Bitch, let me fucking in," and began throwing his weight against the door. Id. Barraza told him that if he did not leave, she would call the police. 16RP 134. McGowen's demeanor instantly changed, and he became very sweet and loving, asking Barraza if he could just come in and get some clothes, promising not to hurt her. McGowen told Barraza that he loved her. 16RP 134; 22RP 104-05. Despite Doyle's warning to Barraza to not open the door, she did. 16RP 134; 22RP 103-05.

McGowen came "storming" in, screaming, cursing, and tearing things off the wall. 16RP 135; 22RP 105. McGowen yelled at Doyle and threatened her. 16RP 136; 22RP 106. McGowen hit Barraza on the back of her head, knocking her to the ground, and then began choking her with his arm around her neck. 16RP 138-39; 22RP 110-11. McGowen told Barraza, "I'm going to break your fucking neck, you fucking bitch." 16RP 142. See also 22RP 111 (Doyle testified that McGowen was calling Barraza a "dog" and a "bitch."). Doyle saw Barraza turn purple. 22RP 110, 117, 121.

Barraza yelled for Tree and Doyle to help her. 16RP 144; 22RP 116. Doyle told Tree to do something; Tree told McGowen to stop because, "It's not worth it," and, "You're a bigger person than that." 16RP 145; 22RP 119-20. McGowen did not let Barraza go, and instead continued to threaten to kill her and demand that she give him her phone. 16RP 145; 17RP 27. Eventually, McGowen managed to get Barraza's phone. 17RP 28. Tree managed to talk McGowen into letting Barraza go. 22RP 124. McGowen got up, but continued to scream and curse at Barraza. 17RP 29. He threw her phone onto the ground and broke it, and then left the apartment. 17RP 30.

After McGowen left, Doyle called 911. 22RP 124. Barraza spoke to the operator and said that her "ex-boyfriend just came in and beat the shit out of me and tried to kill me." 17RP 57. She also stated that "[h]e grabbed me, he put his arm around me and twisted my neck and my jaw just kind of hurts." 17RP 58.

Barraza went to the hospital, where she was treated for a sore neck, throat and jaw. 17RP 34-36; 20RP 15. After her release from the hospital, she stayed overnight with a friend, Aiko Stanley. 17RP 60; 21RP 72. Barraza stayed in a safe house for a week after that. 17RP 61; 21RP 72. During that time, McGowen called her, said that he was sorry, said that he was going to leave town, and asked for money. 17RP 64, 68. He tried to get Barraza to call the Seattle Police

detective who was investigating the case and say that she had lied about what happened. 17RP 67. Barraza refused. 17RP 67-68.

C. ARGUMENT

1. McGOWEN'S RIGHT TO DUE PROCESS WAS PROTECTED WHEN THE COURT FOLLOWED THE PROPER STATUTORY PROCEDURES FOR FINDING HIM COMPETENT.

McGowen claims that the trial court violated his right to due process by not following the statutory procedures of RCW 10.77 before finding him competent to stand trial. However, McGowen cites no authority to support his claim that due process required the State's expert to testify at his competency hearing. McGowen had no expert opinion to contradict the State's written report, McGowen did not object to the court's consideration of the State's written report, and McGowen did not ask to examine the State's expert in court. The court followed proper statutory procedures to find McGowen competent.

a. Relevant Facts.

In December of 2010, prior to trial, McGowen's attorneys asked that McGowen be evaluated for competency. They were concerned about his ability to rationally assist them in his defense. 1RP 2. Counsel reported that McGowen told them that he would testify, but he refused to elaborate on what he would say, and he refused to go over the discovery or assess the evidence with them. 1RP 2-3. Defense counsel told the court that they had retained their own expert, but McGowen had refused to meet with him. 1RP 3. The court ordered a competency evaluation to be conducted at Western State Hospital. CP 354-58; 1RP 5.

McGowen refused to speak to the evaluators at Western State Hospital. CP 32; 2RP 3. He also refused to speak to Dr. McClung, the defense-retained expert. 2RP 3. The parties returned to court on February 14, 2011, where defense counsel stated on the record, "Given that we don't really have any expert evaluation from either the State or from our very own expert . . . we really can't address what is truly going on with Mr. McGowen, except for our true discomfort about proceeding to trial with somebody that seems so profoundly depressed he's unable to help us." 2RP 3-5. Counsel indicated that they "certainly can't agree that – sign off on an order agreeing that his competent given those circumstances." 2RP 4.

Judge Kessler attempted to engage McGowen in a colloquy, but McGowen answered, "I don't know" to a question regarding whether he knew what crimes he was charged with, and then refused to answer any further questions. 2RP 4. Judge Kessler found McGowen competent. 2RP 5. He based his conclusion in particular on Dr. Gagliardi's observation that although McGowen had refused to speak with the evaluators, he was observed by Western State Hospital staff to "interact normally with peers and some staff." 2RP 5; CP 33. Judge Kessler determined that McGowen's refusal to cooperate with his lawyers was wilful. 2RP 5.

Trial began in front of Judge Prochnau on April 6, 2011. 5RP 1-2. During pretrial motions, McGowen refused to face the court or to respond to its questions about the importance of wearing street clothes for trial. 5RP 11-12. Counsel for McGowen noted the difficulty that they had working with their client, but told the court that they had no new information regarding competency. 5RP 13. The prosecutor had obtained McGowen's jail phone calls, placed as recently as that same day, in which McGowen spoke lucidly and demonstrated no impairment. Id. Judge Prochnau noted that McGowen's behavior was "[p]erhaps strategic given the charges he's charged with and the potential consequences." 5RP 16-17.

Later that day, the court again addressed McGowen about changing out of his jail clothes for trial, but McGowen refused to answer. 5RP 40-41. However, the jail officer told the court that when he had taken McGowen to change clothing, McGowen had verbally stated that he did not want to. 5RP 45.

Then, while sitting in court on April 13, 2011, McGowen took earplugs out of his shirt pocket and placed them into his ears. 8RP 8-9. The jail officer motioned for McGowen to remove the earplugs, but McGowen stated, "No." 8RP 10. When court convened the next morning, McGowen wore earplugs again. 9RP 2. The jail officer approached and motioned for McGowen to take the earplugs out; McGowen initially started to take them out so that he could hear the officer, but then shook his head "no," and left them in. 9RP 2-3.

McGowen's attorneys again expressed their concern about his competency based on his refusal to communicate with them. 9RP 3-7. The State pointed out that McGowen's refusal to participate was nothing new, and that his demeanor in recent jail phone calls demonstrated a conscious decision not to participate or to assist his attorneys. 9RP 6-7. The court noted that McGowen had been found competent just two months earlier despite his refusal to assist his attorneys, and indicated that it would listen to McGowen's recent jail phone calls. 9RP 7-9.

That same morning during jury selection, three jurors expressed the viewpoint that despite the presumption of innocence, they would require the defense to disprove the charges. 9RP 65-67. In response to this discussion, McGowen launched into an angry outburst about how the State was "trying to take my life" and trying "to put me in prison for the rest of my life." 9RP 67. He stated, among other things, "Take the blood of the lamb in this courtroom." Id. The defendant rambled about how he had only been "helping this woman out," and now she was trying to send him to prison, and continued to make religious statements. 9RP 70.

Following McGowen's outburst, his lawyers renewed their concerns about his competency. 9RP 74-77. The State provided the court with McGowen's jail phone calls that included a call he had made as recently as three days earlier, on April 11, 2011. 9RP 79, 101; 10RP 27-28; Pretrial Ex. 3.

Defense counsel asked for a formal competency evaluation. 9RP 90. The prosecutor stated, "If the Court does not believe that the defense has made any showing that there is a competency issue, which is the State's position, then I think the Court needs to make a record of that and then we proceed as normal." 2RP 91. The court decided to permanently excuse the jury venire and recess for the

weekend, after which it would decide whether to order a second competency evaluation. 9RP 98, 102.

After the weekend recess, McGowen refused to come back to court. 10RP 2-3. Defense counsel stated that she still had concerns regarding his competency. 10RP 3. Counsel also indicated that her concerns could not be addressed without revealing privileged information, and asked the court to hear from her *in camera*. 10RP 3, 19. The court agreed, and sealed the transcript of the proceeding.[4] 10RP 20-25.

During the *in camera* hearing, counsel revealed that she had gone to see McGowen after his outburst the week before. As she approached his cell from a direction where he could not see her, she had observed him with his shirt over his head, rocking back and forth. He did not acknowledge her presence. 10RP 21-22. The next day when she went back to visit McGowen, she was able to have a 40-minute conversation with him and that he "did not remember his outburst in court." 10RP 22. McGowen told her that he remembered being in the courtroom and "praying to himself," and then the next thing he knew he was in a cell. 10RP 23. McGowen's attorney also informed the court that he continued to maintain that he had done

[4] The superior court later ordered the transcript unsealed for purposes of this appeal. CP 405-06.

nothing to Barraza, and that he still seemed unable to assist in his defense. 10RP 23. Counsel had told McGowen that she thought he should wear street clothes to trial, sit with counsel and assist them, but he told her that he would not. 10RP 24-25. Finally, counsel disclosed *in camera* that just that morning, when McGowen learned that the jail was going to require him to come to court, he stated that he was being "kidnapped" and refused to speak to counsel further. 10RP 23-24.

After the *in camera* hearing, the court heard testimony from a jail officer who had recently interacted with McGowen. 10RP 39-42. The officer had no problem communicating with McGowen and observed him communicating normally with other people in the unit. 10RP 42-43. Judge Prochnau indicated that McGowen's behavior may well be a "pattern of malingering," but acknowledged that significant weight was to be given to defense counsel's opinion. 10RP 56-57. The court ordered a second competency evaluation. CP 119-23; 10RP 57.

McGowen again refused to participate in the competency evaluation. CP 129; 11RP 4. Even so, Dr. Gagliardi determined that McGowen did not exhibit sufficient evidence of a mental impairment that would render him unable to understand the proceedings or to assist counsel. CP 130. Specifically, Dr. Gagliardi listened to McGowen's recent jail phone calls, reviewed the transcript of his

outburst in court, reviewed his prior Western State Hospital records, and considered the recent 24-hour observations of McGowen at Western State,[5] to conclude that there was insufficient evidence that McGowen suffered from an acute major mental disorder. CP 129-30.

On June 7, 2011, the parties convened for a competency hearing in front of Judge Prochnau. 12RP 2. Defense counsel stated her belief that "although [McGowen] may be all right in a fairly controlled environment . . . when he is in the stress of a trial, he doesn't really manage stress all that well." 12RP 3-4. McGowen's attorney stated that she did not have an expert opinion to contradict Dr. Gagliardi's report, and indicated that she "[did not] know what else to do except to voice that I still have [competency concerns]." 12RP 4. She did not object to the court's consideration of Dr. Gagliardi's report, nor did she ask to examine Dr. Gagliardi either in-person or by telephone.

In response, the prosecutor argued that there was no showing that McGowen was incompetent and that his outburst in court itself demonstrated that he understood the nature of the proceedings and also described a defense that he could easily communicate to his attorneys if he wanted to. 12RP 5-6. When the prosecutor pointed out

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[5] Staff observed no psychotic symptoms and no symptoms of an acute mood disorder. CP 129. McGowen had angry outbursts that appeared volitional rather than caused by a mental disorder. Id.

that McGowen simply refused to cooperate with anyone, McGowen stated, "That's cause I ain't got nothing. . . . I am very competent." 12RP 6.

After reviewing Dr. Gagliardi's reports, listening to McGowen's jail phone calls, and hearing from the parties, the court determined that McGowen was competent. CP 124-25; 12RP 6-8.

b. The Court Followed Proper Statutory Procedures To Find McGowen Competent.

A defendant is incompetent if he "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14); State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). The constitutional right to a fair trial prevents an incompetent defendant from being convicted. Pate v. Robinson, 383 U.S. 375, 378, 386 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Due process requires that state procedures be adequate to prevent the conviction of an incompetent defendant. Drope v. Missouri, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). In Washington, an "incompetent person" may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050; State v. Heddrick, 166 Wn.2d 898, 903-04, 215 P.3d 201 (2009).

Once the court makes a threshold determination that there is a reason to doubt the defendant's competency, it has an obligation to employ the statutory procedures of RCW 10.77 to determine competency. City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985); Lord, 117 Wn.2d at 901. The failure to properly observe these statutory procedures is a denial of due process. Heddrick, 166 Wn.2d at 904 (citing State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979)). In pertinent part, RCW 10.77.060(1)(a) provides that:

> Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a). The expert's report and recommendation must be provided to the court. RCW 10.77.065(1)(a)(i).

Therefore, in order to protect a defendant's right to due process, when there is a reason to doubt a defendant's competency, "[T]he trial court must appoint experts and order a formal competency hearing." State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001) abrogated on other grounds by State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012).

The trial court properly followed these statutory procedures for determining competency once it found a reason to doubt McGowen's competency. The court ordered that a psychological evaluation be performed and that a report regarding McGowen's mental condition be provided.[6] CP 119-23. Following receipt of the report, the court held a hearing on McGowen's competency. 12RP 2-8. The court reviewed Dr. Gagliardi's reports from December 11, 2010 and May 22, 2011. CP 31-36, 127-31; 12RP 3, 6. It considered recent telephone calls made by McGowen from the jail. 12RP 7-8; Pretrial Ex. 3. It had the opportunity to observe McGowen's appearance and conduct in court. 12RP 7. It heard argument from the parties. 12RP 3-6. At the conclusion of the hearing, the court exercised its discretion to determine that McGowen was competent. 12RP 6-8. The court entered formal written findings of fact and conclusions of law. CP 119-23. In sum, McGowen's right to due process was protected by the court's adherence to the statutory procedures found in RCW 10.77.

McGowen cites to no authority for his claim that a more extensive competency hearing with testimony from Dr. Gagliardi was necessary to meet constitutional safeguards. The Due Process

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[6] McGowen specifically waived the requirement of two evaluators. CP 122. The statutory requirement that two experts be appointed to examine a defendant may be waived by counsel. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978).

Clause does not require the State to adopt a procedure simply because that procedure may produce results more favorable to the defendant. Medina v. California, 505 U.S. 437, 451, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). The Supreme Court has explained:

> [A] state procedure "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

Id. at 451 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). Due process requires only the most basic procedural safeguards; "more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch." Medina, 505 U.S. at 453 (quoting Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)).

Here, no expert had reached a conclusion contrary to Dr. Gagliardi's, and McGowen makes no compelling argument that testimony from Dr. Gagliardi would have added anything under the circumstances of his case.[7] McGowen refused to be interviewed and objective observation revealed no evidence that he suffered from a mental impairment that would render him incompetent. CP 129-30. Indeed, at the competency hearing itself, defense counsel

[7] McGowen's trial counsel appears to have acknowledged as much at the competency hearing. Noting that McGowen had refused to be interviewed by the defense expert, counsel stated, "I don't know what else to do except to voice that I still have [competency] concern[s]." 12RP 4.

acknowledged that "we don't have an expert opinion" to contradict a finding of competency. 12RP 4. McGowen's argument, that due process required Dr. Gagliardi's testimony at his competency hearing, is unsupported by any persuasive authority.[8]

Moreover, even if due process required testimony from Dr. Gagliardi, McGowen waived such a challenge when he neither objected to the court's proceeding on the basis of the written report nor called Dr. Gagliardi to testify himself. See State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985) (defendant who does not object to the State's reliance on reports in lieu of live testimony at a probation revocation hearing has waived a due process challenge on appeal).

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[8] McGowen cites to State v. Brooks, 16 Wn. App. 535, 557 P.2d 362 (1977), Israel, 19 Wn. App. at 775, Marshall, 144 Wn.2d at 273, and Pate v. Robinson, 383 U.S. at 377. None of those cases hold that due process requires testimony at a competency hearing.

Brooks held that the defendant had waived a challenge to the court's failure to follow the statutory mandate to appoint two experts when he presented two experts of his own choosing. 16 Wn. App. at 538. Alternatively, Brooks determined that the trial court had complied with the purpose and intent of RCW 10.77.060 "because the defendant received a full competency hearing." Id. Although the two experts both testified at the competency hearing in Brooks, the appellate court did not hold or imply that such testimony was required by due process, and in any event the two experts had rendered contradictory opinions.

In Israel, the defendant properly waived evaluation by any expert at all. 19 Wn. App. at 775. In finding her competent, the court conducted a colloquy with the defendant and heard from the attorneys. Id. In affirming, this Court determined that the trial court had conducted an evidentiary hearing sufficient to satisfy due process. Id. at 777-78.

In both Marshall, 144 Wn.2d at 279-80, and Pate, 383 U.S. at 385, the trial court denied the defendant a competency hearing despite being presented with significant evidence of incompetency. To the contrary here, the trial court determined that McGowen was competent only after ordering an evaluation and holding a competency hearing.

McGowen appears to concede that such a waiver is possible, as he did not assign error to Judge Kessler's February 2011 determination of competency. McGowen's attorneys had also contested competency at that time; however, they had more explicitly agreed that the court could base its findings on the written report. See 2RP 4 (prosecutor stated that defense counsel had informed her off the record that "they would ask the court to read the report," and defense counsel did not object to this characterization of their conversation). McGowen's failure to assign error to Judge Kessler's finding implicitly acknowledges that expert testimony, if required, may be waived. McGowen did not request testimony nor did he object to Judge Prochnau's reliance on Dr. Gagliardi's written report, and as such he has waived a due process challenge to the court's procedure.

c. Even If This Court Determines That The Trial Court Was Required To Hear Testimony, Remand For A Retrospective Competency Hearing Is Appropriate.

Finally, even if this Court concludes that the trial court's failure to hear testimony from Dr. Gagliardi deprived McGowen of due process, the proper remedy is remand for the trial court to retrospectively decide whether McGowen was competent at the time of trial. If McGowen was competent, his conviction should be affirmed. United States v. Renfroe, 825 F.2d 763, 768 (3rd Cir. 1987).

Retroactive competency determinations "are permissible whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." Moran v. Godinez, 57 F.3d 690, 696 (9th Cir. 1994). Such a determination is possible when "the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." Reynolds v. Norris, 86 F.3d 796, 802 (8th Cir. 1996). Factors to consider when assessing whether a meaningful determination is possible include the passage of time, the availability of contemporaneous medical evidence, statements of the defendant in the trial record, and the availability of individuals who interacted with the defendant at the relevant time. McGregor v. Gibson, 248 F.3d 946, 962-63 (10th Cir. 2001) (quoting Clayton v. Gibson, 199 F.3d 1162, 1169 (10th Cir. 2001)). While the passage of time is a significant factor, contemporaneous medical reports "greatly increase the chance for an accurate retrospective evaluation of a defendant's competence." Moran, 57 F.3d at 690 (citations omitted).

Washington courts likewise have held that if a meaningful hearing could be accomplished despite the passage of time, the appellate court should remand for a retrospective determination of competency. State v. Wright, 19 Wn. App. 381, 575 P.2d 740 (1978);

In re Young, 8 Wn. App. 276, 278, 505 P.2d 824, 825 (1973). Although this Court has recently determined that retrospective competency evaluations are permissible, it first required that the trial court determine that such a hearing was feasible. State v. P.E.T., 174 Wn. App. 590, 605-07, 300 P.3d 456 (2013).

Here, McGowen's only complaint is that the court did not hear formal testimony from Dr. Gagliardi. However, McGowen refused to be interviewed by Dr. Gagliardi (as well as his own expert). CP 128-29; 12RP 4. Thus, Dr. Gagliardi's findings were based solely on the objective evidence in the record. There was no contrary expert opinion to rebut Dr. Gagliardi's conclusions. As noted above, McGowen makes no convincing argument that Dr. Gagliardi's testimony would have added anything meaningful to the determination of competency. Nonetheless, because Dr. Gagliardi authored a report at the time, he could easily provide testimony on remand about the objective evidence of McGowen's competency. Additionally, McGowen's contemporaneous jail phone conversations are part of the record. There is no doubt that the trial court could conduct a meaningful retrospective hearing on competency.

Moreover, due to the nature of the alleged error (failure to take Dr. Gagliardi's testimony) in light of McGowen's refusal to cooperate with the evaluation, there is no basis to conclude that the trial court is

in a better position than this Court to make the determination that a meaningful retrospective hearing is possible. Thus, if this Court determines that due process required Dr. Gagliardi's testimony at the competency hearing, this Court should remand for the trial court to hold a retrospective competency hearing that includes Dr. Gagliardi's testimony.

2. THE TRIAL COURT PROPERLY DENIED McGOWEN'S MOTION TO "DISCHARGE" COUNSEL.

McGowen argues that "[t]he trial court abused its discretion in failing to appoint new counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown in communication." Brf. of App. at 24. But McGowen never asked for a new lawyer to represent him. Rather, he made an ambiguous request to "discharge" counsel without any further elaboration as to whether he was requesting new counsel or requesting that he be allowed to represent himself. The trial court properly denied McGowen's vague motion to "discharge" counsel. Moreover, even if the court was required to inquire further, McGowen has failed to establish that he had any valid reason to replace his appointed counsel. Thus any failure of the trial court to adequately inquire was harmless.

a. Relevant Facts.

Judge Kessler held a hearing on McGowen's competency on February 11, 2011. 2RP 2. Immediately following the court's finding of competency, the following exchange occurred on the record:

> MR. ADAIR: Do you still want us to be your lawyers?
>
> MR. McGOWEN: No.
>
> MR. ADAIR: Do you want to make that (indiscernible) up to the Judge?
>
> MR. McGOWEN: God is my lawyer from now on. I don't know no lawyer.
>
> MR. ADAIR: All right.
>
> MR. McGOWEN: God represent me.
>
> MR. ADAIR: I believe Mr. McGowen is making a pro se motion to discharge counsel at this time.
>
> MR. McGOWEN: That's right.
>
> THE COURT: All right. Well, the Court cannot, if Mr. McClung [sic] won't even tell me what he's charged with –
>
> MS. McCOY: Mr. McGowen.
>
> THE COURT: Mr. McGowen, I'm sorry, won't even tell me what he's charged with—
>
> MR. McGOWEN: I don't know what I'm charged with.
>
> THE COURT: All right. Well, I don't believe that and –
>
> MR. McGOWEN: Yeah, well, I don't understand. I don't know what I'm charged with; and that's the truth.

> THE COURT: Do you understand the maximum penalty for the crimes you're charged with is 10 years in jail?
>
> Mr. McGOWEN: No, I don't understand that either.
>
> THE COURT: Yeah, okay. Well, I don't find a knowing, voluntary and intelligent waiver of counsel. Having found the defendant is acting willfully, I don't –
>
> MR. McGOWEN: That's not the problem. I'm not saying that I'm incompetent; I'm very competent. I'm ready to go to trial and I know that the people that's representing me don't have my best interest. So I'm not incompetent; that's not the problem. I understand very well what's going on. I don't want these people representing me. God is my representative.
>
> THE COURT: All right. I don't find that – I still don't find that this is a knowing, voluntary and intelligent waiver of counsel.

2RP 5-7.

Later, on April 1, 2011, McGowen appeared in front of Judge Theresa Doyle to address several pretrial motions. 4RP 1-2. At the conclusion of the hearing, defense counsel told the court that McGowen should have the opportunity "either to see if he wanted to have replacement counsel or [if] he wanted to represent himself." 4RP 8. Judge Doyle asked McGowen if he wished to address the court, but McGowen refused to speak. 4RP 9.

Then, on April 6, 2011, after being assigned to Judge Prochnau for trial, defense counsel again asked the court to give McGowen another opportunity to make "a motion to represent himself or to

discharge us." 5RP 14. When Judge Prochnau asked McGowen whether he would "like to say anything about that," McGowen refused to look at the court or to answer. 5RP 15.

b. McGowen Never Made A Motion For Substitution Of Counsel, And Therefore The Trial Court Was Not Required To Inquire Further Into The Alleged Conflict Between McGowen And His Lawyers.

On appeal, McGowen characterizes his motion below as a request to substitute counsel, and claims that Judge Kessler improperly treated it as a request to proceed *pro se*. He cites to cases discussing what constitutes an adequate inquiry into the nature and extent of the conflict between client and counsel when a defendant requests a new appointed lawyer. However, because McGowen's vague statements cannot be construed as asking for the appointment of a new lawyer, his argument and supporting authority is inapposite.

When the parties were in court following a competency determination, defense counsel asked McGowen if he still wanted them to represent him. 2RP 5. McGowen said "no" and "God is my lawyer from now on." 2RP 5-6. Although McGowen initially agreed with defense counsel's belief that he was making a "motion to discharge counsel," McGowen never requested a new lawyer. Rather, he made statements to the effect that he did not "want these people" representing him because "God was his representative." 2RP 7. In

the absence of a request for a new appointed lawyer, Judge Kessler had no obligation to inquire into the nature and extent of any alleged conflict between McGowen and his attorneys.

Moreover, even though McGowen's statements were not a clear request to proceed *pro so* either, Judge Kessler reasonably interpreted them as such. As God was not a viable option, and in light of McGowen's statement, "God is my lawyer from now on, I don't know no lawyer," Judge Kessler's attempt to determine whether McGowen was making a knowing and intelligent decision to waive counsel was reasonable and appropriate.[9] In fact, McGowen's statement, "I don't know no lawyer," plainly suggested that he was not asking for a different lawyer. And when Judge Kessler began to conduct a colloquy with McGowen to determine whether he wished to represent himself, McGowen's lawyers said nothing. They did not speak up to

[9] McGowen concedes that his statements did not amount to an unequivocal request to proceed *pro se*. See Brf. of App. at 26.

indicate their belief that McGowen wanted new counsel appointed, nor did they inform Judge Kessler that he had misconstrued McGowen's statements. This strongly suggests that they did not believe McGowen was requesting new counsel any more than Judge Kessler did.

Finally, given two explicit, additional opportunities at later dates, in front of different judges, to request a substitution of counsel, McGowen said nothing and remained silent. 4RP 9; 5RP 14-15. This is simply further evidence that he did not wish to have a new lawyer. Because McGowen did not request that the court appoint new counsel, the trial court did not err when it did not inquire into the attorney-client relationship between McGowen and his lawyers.

c. Even If The Trial Court Should Have Inquired Further, Reversal Or Remand Is Unnecessary.

Reversal is unnecessary even if this Court determines that Judge Kessler should have inquired further. McGowen articulated no basis for a substitution of counsel other than his general statement that counsel "don't have my best interest." 2RP 7. The general loss of confidence alone is not sufficient to warrant the substitution of counsel. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Moreover, it is well-settled that a defendant is not entitled to demand a

reassignment of counsel on the basis of a breakdown in communications when he simply refuses to cooperate with his attorney. State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). Judge Kessler specifically determined (and the record amply supports) that McGowen's refusal to assist his attorneys was willful. 2RP 5, 6. On appeal, McGowen fails to allege any material reason for new counsel that would have been elicited had the court inquired further. See State v. Sinclair, 46 Wn. App. 433, 436-37, 730 P.2d 742 (1986). And, given two explicit, additional opportunities at later dates, in front of different judges, to request a substitution of counsel, McGowen did not request a new lawyer, but instead refused to speak at all. 4RP 9; 5RP 14-15. Judge Kessler's failure to inquire further was harmless.

In support of his argument that reversal is necessary, McGowen cites to United States v. Nguyen, 262 F.3d 998 (9th Cir. 2001), and United States v. Moore, 159 F.3d 1154 (9th Cir. 1998). However, in those cases, reversal was based on an analysis of three factors: the timeliness of the motion, the adequacy of the trial court's inquiry, and the extent of the conflict. Nguyen, 262 F.3d at 1004-05; Moore, 159 F.3d at 1158-59. In both cases, all three factors weighed

toward reversal; reversal was not based on the failure to adequately inquire alone.[10]

Even if this Court determines that Judge Kessler should have conducted further inquiry, reversal is unwarranted where McGowen failed to state any basis for substitution of counsel, makes no showing on appeal that any material reason for new counsel would have been revealed with further inquiry, and where he turned down two subsequent opportunities to move for new counsel.

3. THE TRIAL COURT PROPERLY DETERMINED THAT McGOWEN'S 1993 KING COUNTY ROBBERY CONVICTION WAS CONSTITUTIONALLY VALID ON ITS FACE.

The trial court found that McGowen was a "persistent offender" and sentenced him to life in prison without the possibility of release. CP 330, 333. Judge Prochnau found that he had two prior convictions for most serious offenses—a 1993 second-degree robbery conviction under King County cause number 93-1-04409-3, and a second-degree

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[10] Alternatively, McGowen asks this Court to remand for a hearing to determine "the nature and extent of the conflict," and whether that conflict deprived McGowen of his right to effective assistance. Brf. of App. at 29. The only authority he cites in support of such a remedy is a federal habeas case out of California, Schell v. Witek, where the court did not rule on the defendant's motion to substitute counsel because defendant was not present in court when it was made, and defense counsel erroneously told her client that the motion had been denied. 218 F.3d 1017, 1021 (9th Cir. 2000). Here, McGowen was present in court, was allowed to speak, and was given two later opportunities to renew his motion prior to the start of his trial, both of which he rejected. Remand on these facts would be inappropriate.

robbery conviction under King County cause number 97-1-01315-8. CP 330.

McGowen challenges his persistent offender sentence. He argues that the judgment and sentence for his 1993 King County robbery is constitutionally "invalid on its face," and that it cannot count as a prior qualifying offense under the persistent offender sentencing statute. Specifically, McGowen claims that: (1) the Colorado robbery is not comparable to a felony offense in Washington, (2) the State is "collaterally estopped" from arguing otherwise, (3) because the Colorado robbery is not comparable to a felony offense in Washington, its inclusion in his 1993 offender score rendered the judgment and sentence facially invalid. He also contends that his plea was involuntary. These arguments are meritless, and the court properly sentenced McGowen as a persistent offender.

A "persistent offender" is one who has been convicted of a most serious offense, and has previously "been convicted as an offender on at least two separate occasions," of most serious offenses. RCW 9.94A.030(37)(a)(i)(ii). If a defendant is found to be a persistent offender, he shall be sentenced to a term of total confinement for life without the possibility of release. RCW 9.94A.570.

In State v. Ammons, the court held that the State does not have the affirmative burden of proving the constitutional validity of a prior

conviction before it can be used in a sentencing proceeding. 105 Wn.2d 175, 187, 713 P.2d 719, amended, 105 Wn.2d 175, 718 P.2d 796 (1986). However, in so holding, the court noted that "a prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered. . . . Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Id. at 187-88 (citations omitted, emphasis added). It is the defendant's burden to prove that a prior conviction is constitutionally invalid on its face. State v. Thompson, 143 Wn. App. 861, 866, 181 P.3d 858 (2008).

Ammons recognized that requiring the State to prove the constitutional validity of prior convictions at a sentencing hearing would amount to the sentencing turning into an "appellate review of all prior convictions." 105 Wn.2d at 188. Such a challenge "unduly and unjustifiably overburden[s] the sentencing court." Id. Ammons also recognized that a defendant was not without recourse, citing "established avenues of challenge provided for post-conviction relief," and noting that if successful through such appropriate channels, a defendant could "be resentenced without the unconstitutional conviction being considered." Id.

After Ammons was decided, the legislature enacted RCW 10.73.090 and 10.73.100, which establish (with enumerated exceptions) the time limit for a defendant to collaterally attack a final judgment. One of the enumerated exceptions is for facially invalid judgment and sentences. RCW 10.73.090; In re Pers. Restraint of Adams, 178 Wn.2d 417, 424, 309 P.3d 451 (2013). Since enactment of this statutory time-bar for collateral attacks, numerous cases have discussed its use of the term "valid on its face." Although arising in a different context, these cases are instructive here, where McGowen challenges the facial validity of a prior conviction found by the sentencing court to constitute a qualifying offense in his current persistent offender sentence.

According to this line of cases, a judgment and sentence is valid on its face unless it evidences an error without further elaboration. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). Even if there is an obvious error on the face of the judgment and sentence itself, it is not automatically rendered invalid; a judgment is invalid only if the court has exceeded its authority in entering it. In re Pers. Restraint of Coats, 173 Wn.2d 123, 143, 267 P.3d 324 (2011). "[T]he general rule is that a judgment and sentence is not valid on its face if the trial judge actually exercised authority

(statutory or otherwise) it did not have." In re Pers. Restraint of Scott, 173 Wn.2d 911, 917, 271 P.3d 218 (2012).

a. McGowen Has Failed To Establish That His 1993 Offender Score Is Incorrect.

It is not apparent from the face of the judgment and sentence or the documents of the plea that the 1993 sentencing court miscalculated McGowen's offender score by including points for his prior Colorado robbery conviction. As such, his 1993 sentence is not facially invalid.

McGowen contends that the State is collaterally estopped from arguing the comparability of the Colorado robbery conviction due to the holding in his last case, State v. McGowen, 95 Wn. App. 1072, 1999 WL 364058 (1999) (unpublished). However, not only does his argument rely on an erroneous reading of McGowen, it is flatly contradicted by relevant statutory authority.

During McGowen's 1997 sentencing for robbery, the State alleged that he was a persistent offender based upon his prior 1993 King County robbery and his prior Colorado robbery. The trial court determined that the State had failed to prove that the Colorado robbery was comparable to a Washington robbery, thus finding that McGowen did not have two prior predicate convictions for a persistent offender sentence. McGowen, 1999 WL 364058 at *6. The Court of

Appeals affirmed the trial court's rationale that robbery in Colorado is not legally comparable to a Washington robbery because it lacks the element of "intent to steal." Id. at *7. Notably, the court did not determine that McGowen's Colorado robbery did not factually compare to a Washington robbery; it merely held that the State had failed to present adequate proof that it did:

> The only evidence the State produced at sentencing was an unsworn probation officer's report about McGowen's Colorado conviction. It did not present any transcripts of McGowen's plea or sentencing hearings or a certified copy of his plea form. The trial court had no reliable information about McGowen's actual conduct while committing the Colorado robbery, and it properly refused to rely on the Colorado probation report.

Id. Therefore, because the unpublished opinion does not conclusively establish that McGowen's Colorado robbery conviction is factually incomparable to a Washington robbery, it also does not establish that his 1993 sentence is facially invalid.[11]

Additionally, McGowen ignores relevant statutory language specifically permitting the State to argue comparability in the instant case. In 2008, the legislature amended the SRA to further "ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon

[11] This is even assuming that the 1997 unpublished opinion is considered part of the "face" of the 1993 conviction, a point the State does not concede.

resentencing." Laws of 2008, ch. 231, § 1. Included in the adopted changes was:

> The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. . . . Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Laws of 2008, ch. 231, § 3 (currently codified as RCW 9.94A.525(22)) (emphasis added). McGowen's argument that the State is collaterally estopped from asserting the factual comparability of his Colorado robbery conviction must be rejected based on the above statutory provision.

Moreover, whether McGowen's Colorado robbery conviction is actually comparable or not is irrelevant. The pertinent question is whether non-comparability is apparent from the face of the sentence. Without considerable clarity, many cases have discussed what documents can be considered when determining whether a judgment and sentence is "valid on its face." One of the consolidated defendants in Ammons challenged the validity of a prior conviction at his persistent offender sentencing, claiming that the plea form did not show that he had been made aware of his right to remain silent, that it failed to outline certain elements of the crime, and that it failed to

inform him of other consequences of pleading guilty. Ammons, 105 Wn.2d at 189. The court rejected his claim, concluding that such determinations could not be made from the face of the guilty plea form itself, and that the defendant was required to pursue a challenge to the prior conviction through the "usual channels for relief." Id. Ammons himself argued that the jury instructions used in his prior trial violated his constitutional rights. Id. The court refused to consider the jury instructions, stating that Ammons "appears to raise valid challenges but the validity cannot be determined facially. The trial court would have to go behind the verdict and sentence and judgment to make such a determination. We hold this should not be done." Id.

More recently, in Coats, the court noted that it had previously referenced "charging documents, verdicts, and plea statements of defendants on plea of guilty" to determine whether a judgment is facially invalid. 173 Wn.2d at 140. Then, the court held in In re Pers. Restraint of Carrier that: "Our precedent should not be read to impose a bright-line rule or an exhaustive list of documents that we may consider in determining whether a judgment and sentence is 'valid on its face.' Rather, it permits consideration of documents that bear on the trial court's authority to impose a valid judgment and sentence." 173 Wn.2d 791, 800, 272 P.3d 209 (2012).

Here, factual comparability of McGowen's Colorado robbery conviction cannot be determined from the "face" of his 1993 Washington robbery. There is simply nothing in the charging documents, the plea agreement, the plea statement, or the judgment and sentence that demonstrates that the Colorado conviction is not factually comparable.[12] Nothing in the record presents a reason to doubt the factual comparability of McGowen's Colorado robbery conviction. See In re Pers. Restraint of Rowland, 149 Wn. App. 496, 204 P.3d 953 (2009) (comparability of foreign convictions not apparent from the judgment and sentence and related documents) and In re Pers. Restraint of Banks, 149 Wn. App. 513, 204 P.3d 260 (2009) (same). McGowen failed to prove that the 1993 sentencing court miscalculated his offender score by including the Colorado robbery.[13]

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[12] If McGowen "must resort to external documents in the hope of rendering his judgment and sentence invalid, then the judgment and sentence cannot be invalid on its face." In re Pers. Restraint of Clark, 168 Wn.2d 581, 588, 230 P.3d 156 (2010). In fact, the only thing McGowen points to in support of his argument that the Colorado robbery is not comparable, is the unpublished opinion in his last case, which, as noted above, does not conclusively establish such a proposition. McGowen provided nothing to the sentencing court that undermined the facial validity of the 1993 judgment and sentence.

[13] Even if McGowen could prove a miscalculated offender score, such an error is not a "constitutional infirmity" that would disqualify it from serving as a valid predicate offense for his current persistent offender sentence. See 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.") (emphasis added). Simply put, McGowen's claim that the Colorado robbery conviction is not comparable to a Washington robbery is a claim of statutory error, and is nonconstitutional in nature. See In re Pers. Restraint of Carter, 172 Wn.2d 917, 933, 263 P.3d 1241 (2011).

b. Even If McGowen's 1993 Robbery Sentence Is Based On A Miscalculated Offender Score, His 1993 Robbery Conviction Is Facially Valid.

McGowen broadly frames the issue to be whether his 1993 King County robbery judgment and sentence is facially invalid. Citing to In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), he states, "A miscalculated offender score evident on the face of a judgment and sentence renders it invalid." Brf. of App. at 31 (emphasis added). However, McGowen's statement of the issue and his characterization of Goodwin are imprecise. A correct statement of Goodwin's holding is that a sentence that is based on a miscalculated offender score is facially invalid. 146 Wn.2d at 876. In such a circumstance, it is the sentence that is invalid, not the judgment.

McGowen's argument fails to appreciate this significant distinction. The facial validity of McGowen's prior sentence is not particularly relevant. In the context of a challenge to a persistent offender sentence, the validity of the prior conviction is the pertinent question. See RCW 9.94A.030(37)(a)(i),(ii) (a "persistent offender" is one who has been convicted on a least two prior occasions of a most serious offense). See also State v. Berry, 141 Wn.2d 121, 131, 5 P.3d 658 (2000) (comparability analysis of out-of-state convictions for purposes of a persistent offender sentence focuses on the conviction and the elements of the offense, not on the sentencing).

Therefore, even if McGowen could demonstrate that his sentence is facially invalid because the court miscalculated his offender score, he cannot show that the judgment, i.e., the conviction, without further elaboration, evidences infirmities of a constitutional magnitude—a necessary prerequisite to its disqualification as a predicate offense for his persistent offender sentence. Ammons, 105 Wn.2d at 187-88.

Additionally, McGowen's argument that his 1993 plea was constitutionally infirm is unconvincing. Due process requires that a guilty plea be entered knowingly, intelligently, and voluntarily. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). An involuntary plea constitutes a manifest injustice. Id. A plea may be involuntary when it is based on a mutual mistake regarding the offender score or standard sentencing range. State v. Codiga, 162 Wn.2d 912, 925, 175 P.3d 1082 (2008). However, where the defendant fails to disclose criminal history to the State, he assumes the risk that it will be discovered prior to sentencing and used to increase his offender score and standard sentencing range. Id. at 929-30. In such an instance, there is no manifest injustice necessitating withdrawal of the plea. Id.

At the time of his plea, McGowen certified that he agreed that the State's understanding of his criminal history was "accurate and complete." Sentencing Ex. 3. McGowen failed to disclose his

Colorado convictions. Id. Further, at the time of his plea, McGowen affirmatively agreed that:

> if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase.

Sentencing Ex. 2, at pg. 2. Due process was not offended when McGowen failed to disclose his criminal history and knowingly, intelligently, and voluntarily entered a plea with the understanding that his sentencing range could increase should the State discover his omission. See Codiga, 162 Wn.2d at 930. Whether or not the sentencing court later scored the Colorado robbery conviction correctly is irrelevant to whether McGowen's plea was voluntary, when the only person who was aware of the conviction at the time of the plea was McGowen himself.

McGowen contends that the voluntariness of a plea must always be determined by reference to the actual sentence imposed.[14] But that is clearly not the case where, as here, McGowen failed to disclose his prior convictions and assumed the risk that they would be

[14] McGowen argues, "[T]he sentence that was actually imposed could never comport with an accurate representation of the direct sentencing consequences because the court exceeded its authority in including the Colorado robbery conviction in the offender score." Brf. of App. at 38.

discovered prior to sentencing.[15] McGowen's argument that his plea was involuntary simply because the 1993 sentencing court included his Colorado robbery conviction in his offender score must be rejected. Therefore, even if McGowen could show that his offender score in the 1993 robbery was miscalculated, he has not demonstrated that his 1993 robbery conviction was constitutionally infirm without further elaboration.

Finally, if McGowen were to file a collateral attack and successfully challenge his 1993 robbery offender score, he would not be able to overturn the conviction. Assuming he was able to convince a court that his sentence was facially invalid because his offender score improperly included the Colorado conviction (an unlikely proposition) the most he would be entitled to would be resentencing without the Colorado conviction being included in his offender score. See Adams, 178 Wn.2d at 424-25 (exception for facially invalid judgments allows a personal restraint petitioner to seek relief beyond the one-year time limit "only for the defect that renders the judgment not valid on its face" and does not trigger a new one-year time limit to bring otherwise time-barred claim). A claim that McGowen's 1993

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[15] Although perhaps inarticulate in this portion of its ruling, the trial court correctly understood that in this context, where the plea itself was based on sentencing information that was accurate at the time of the plea, and where McGowen was responsible for any inaccurate information, he assumed the risk that his ultimate sentence would be different. 30RP 60.

robbery plea was involuntary would be time-barred if collaterally challenged. The fact that McGowen would not be able to overturn his 1993 conviction in a collateral attack only bolsters the conclusion that he has not established its facial validity here, in his POAA sentencing.

McGowen has failed to meet his burden to prove that his 1993 King County robbery conviction is constitutionally invalid on its face. The sentencing court properly found him to be a persistent offender.

D. CONCLUSION

The State respectfully requests that this Court affirm the trial court's proper adherence to statutory procedures when finding McGowen competent, affirm the trial court's proper exercise of discretion in denying McGowen's motion to discharge counsel, and affirm the trial court's finding that McGowen is a persistent offender.

DATED this 25th day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. LOUIS MCGOWEN, Cause No. 69048-5 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 25 day of February, 2014

Name
Done in Seattle, Washington