Original

No. 35258-3-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD W. SAUNDERS,

Appellant.

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STATE OF WASHINGTON
BY ____
DEPUTY
COURT OF APPEALS
DIVISION II

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge James B. Sawyer II
Cause No. 06-1-00130-3

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in not allowing Saunders to withdraw his guilty plea to one counts of robbery in the first degree.
2. The trial court erred by ruling: (1) that Saunders' felony history from 1993 through 1998, and 1998 through 2005 failed to wash-out; and (2) improperly calculated his offender score [argued pro se by Saunders].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not allowing Saunders to withdraw his guilty plea to one count of robbery in the first degree when he knowingly, voluntarily and intelligently made that plea?
2. Was Saunders was denied effective assistance of counsel when he made the plea after he had: (a) discussed the merits of the case with his attorney, then (b) knowingly, intelligently and voluntarily made his plea with the knowledge that (c) he had additional criminal history that could be used at sentencing that might well (d) significantly increase the standard range of his sentence?

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3. Should any of Saunders' felony history from 1993 through 1998 and/or 1998 through 2005 have washed-out when he failed to remain crime-free for five consecutive years in the community during that time?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Change of Plea was transcribed separately, and will be referred to as "RP COP."

D. STATEMENT OF THE CASE

1. Procedural History

On March 31, 2006, Richard W. Saunders, the appellant, was identified in Mason County Superior Court. RP 1: 7-25. The trial court found that probable cause existed for one count of robbery in the first degree. RP 1: 13-16. Counsel was appointed for Saunders, and arraignment was scheduled for April 10, 2007. RP 1: 16-25. The State noted at this court appearance that Saunders had prior criminal history. RP 2: 5-6.

Saunders was arraigned on one count robbery in the first degree on April 10, 2006, and he entered a plea of not guilty. RP 4: 7-23. His

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omnibus and pretrial dates were scheduled for May 1, 2006 and May 15, 2006, respectively. RP 4: 22-24. On May 8, 2006, Saunders, with his attorney present, pled guilty as charged. RP COP 1: 8-11. Saunders declined to waive speedy sentencing, and it was scheduled for June 19, 2006. RP COP 10: 9-11.

On June 19, 2006, counsel for Saunders stated that his client wanted to hire a private attorney to handle the sentencing and/or withdrawal of his plea. RP 6: 14-18. Saunders waived speedy sentencing, and his case was continued until July 24, 2006. RP 7: 9-23. On July 24, 2006, it was noted that there was nothing in the court file to indicate that Saunders had either retained new counsel or filed a motion to withdraw his plea. RP 9: 1-4; 22-25. Prior to the hearing on July 24, 2006, the trial court had prepared a transcript [referenced here as RP COP] of the May 8, 2006, change of plea hearing "out of an abundance of caution" so that [a motion to withdraw that plea] could be "addressed in a timely manner." RP 9: 22-25; 10: 1.

Saunders next appeared before the trial court on July 31, 2006, and it noted that no motion to withdraw his plea had been filed. RP 12: 13-14, 19-20. Although mention was made by court appointed counsel that Saunders might retain new counsel, that attorney was not in court for

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Saunders on July 31, 2006. RP 11: 14-22. The trial court then continued sentencing to August 7, 2006.

On that date, the trial court noted it had not received a notice of appearance from new counsel that Saunders attorney said he had retained. RP 14: 9-22. Court-appointed counsel for Saunders stated that he had contacted the new attorney's office, and that they "indicated that [the new attorney] was coming in on this case." RP 16: 2-4. Court appointed counsel for Saunders also indicated that the new attorney "was not able to come to court today because he had a previous court commitment in another county." RP 16: 2-6. Saunders indicated the he had filed a pro se motion to withdraw his plea, and the trial court advised him to file any such motions through counsel. RP 16: 13-21. The trial court continued sentencing one week. RP 17: 7.

Saunders was next before the trial court on August 14, 2006, and it noted that a notice of appearance had not been filed by new counsel. RP 18: 16-17. The trial court agreed to recall Saunders' case later that day so that he might have an opportunity to talk with his new attorney. RP 19: 16-19. At 4:30 PM, Saunders' case was recalled, and the trial court noted that it had "not seen or heard from" the new attorney Saunders "indicate[d]" he had retained. RP 20: 15-17. The case was continued one

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week so that Saunders could have the attorney he said he had retained to appear on his behalf. RP 23: 7-10.

On August 21, 2006, the trial court noted that Saunders had "been given multiple weeks...to get his new attorney on board," but that this lawyer "ha[d] never appeared on [Saunders'] behalf." RP 26: 5-9. The trial court stated that court appointed counsel remained the attorney of record for Saunders, who indicated that he (Saunders) would argue his motion to withdraw the plea pro se. RP 25: 16-18; 26: 10-14.

Following a lengthy exchange between Saunders and the trial court during which Saunders was found in contempt of court, his motion to withdraw his guilty plea was denied. RP 26-57 (*motion to withdraw plea denied at* RP 38: 15-23; *contempt of court at* RP 40: 25; 41: 1-2). The standard range of sentence based on Saunders' offender score on the charge of robbery in the first degree was determined to be 129-171 months. RP 41-49. After hearing from Saunders, the trial court imposed 171 months as both the maximum and minimum sentence, as well as 30 additional days for Saunders' in-court contempt. RP 53: 12; 54: 3-6. The trial court advised Saunders of how to facilitate the processing any possible appeal that he might want to file. RP 55-57.

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2. Statement of Facts

On May 8, 2006, Saunders appeared with his court appointed attorney to change his plea on the charge of robbery in the first degree. RP COP 1: 1-14. In response to the trial court's inquiry, Saunders stated that he had read the change of plea form "in its entirety" and discussed that crime with his attorney. RP COP 1: 24-25; 2: 1-5. Regarding the calculation of Saunders' offender score, counsel for Saunders stated:

> There is California history; we don't know what it is at [this] point. We've explored it. From the information we have, we can't tell what it is. But, the ascertainable history from [Washington] is one. RP COP 3: 4-7.

Saunders was informed by the trial court that with an offender score of one, the standard range sentence would be "36 to 48 months incarceration." RP COP 2: 10-14.

The State then informed the trial court that according to Saunders' Triple I, Saunders' offender score could be "as many as seven." RP COP 3: 8-13. Counsel for Saunders stated that he had "explained that with [his] client." RP COP 3: 14. When the trial court asked the State to calculate Saunders' standard range sentence on the robbery first degree with an offender score of seven, the response was, "87 to 116 months." RP COP 3: 17-19. Saunders stated that he understood this. RP COP 3: 20-21. The trial court then expressly told Saunders:

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> [This] doesn't mean that when we come back to sentencing, if there is additional criminal history, that it won't be calculated and an appropriate standard range dealt with...If [the State] comes in with the appropriate proof of your prior criminal history...then your standard range would be at the higher range. It would not be at a lower range, and you would be sentenced appropriately.
> RP COP 3: 22-25; 4: 1-2, 7-13.

Counsel for Saunders informed the trial court that he had "explained [this]" to his client. RP COP 4: 14-15. The trial court then stated that it wanted to "make sure on the record" that Saunders understood how his standard range might change pending a final determination of his offender score, to which he replied, "Yeah." RP COP 4: 16-19. Providing Saunders with the following scenario, the trial court then informed him:

> So, you come in here on the day of sentencing and the prosecutor comes in with their certified copies that show that this is your criminal history. It's not going to be a basis for you to say, hold it, I was planning on a 36-48 month stay with the Department of Corrections. I'm not prepared for that; I should be allowed to withdraw my plea. Do you understand that?"
> RP COP 4: 20-25; 5: 1.

In response to the trial court's question, Saunders replied, "Uh-hum." RP COP 5: 1-2. The trial court then told Saunders:

> "[W]hat I want is, I want to be certain that you understand where you are, where you can be, and the potential outcomes, right?"
> RP COP 5: 3-6.

To which Saunders said, "Right." RP COP 5: 6. Making sure that he understood that the State would recommend a standard range sentence,

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"whatever that standard range would be," Saunders stated, "[y]eah," and responded identically when asked if he felt "satisfied that [he] had [had] enough time to talk with [his] lawyer." RP COP 5: 7-18.

Following this exchange, the trial court then told Saunders:

> You understand, of course, that if you have any hesitancy about the entry of this plea, [that] all you have to do is say, stop, I don't want to go through with this, let's go on to trial. Right? RP COP 5: 18-22.

To that inquiry, Saunders replied, "Right." RP COP 5: 23. Saunders also responded in the affirmative when the trial court asked if he was "comfortable proceeding with [his] plea...Even though he may not know exactly what [his] criminal history [would] be." RP COP 6: 13. The trial court then determined through an exchange with Saunders that Saunders' statement was sufficient to support his guilty plea on the charge of robbery in the first degree. RP COP 6-9 (*acceptance of plea at* RP COP 9: 10-16).

The State then informed the court that it needed adequate time to properly document Saunders' out of state criminal history. RP COP 10: 2-5. Counsel for Saunders stated he was unwilling to "waive any speedy sentencing," and the trial court set sentencing for June 19, 2006. RP COP 10: 9-10.

Arguing pro se on his motion to withdraw his guilty plea at the hearing on August 21, 2006, Saunders made the following statement:

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> [His defense attorney] [H]ad come to [him] and said, okay...check this out; the district attorney is on vacation. How about I can get you—we can try to get this deal for three years or for 36 months to 48 months. Okay, since he is on vacation and didn't know-they don't know what your offender score is...the only thing they knew was [that] I had...one point...He told me that...he would get me the deal for one point for 36 to 48 months...That is the reason why I even agreed with [defense counsel]. RP 31: 8-17.

Regarding his prior criminal history, Saunders stated that his attorney told him that although, "most likely [the State] won't get it, and if they do, most of it [will] probably wash." RP 32: 1-3. When the trial court calculated Saunders' offender score at 10, it determined that a sentencing date of July 21, 1993 and a new offense date of July 20, 1998, cost him six points, as those offenses missed being washed-out by "a day." RP 46: 6-19.

3. Summary of Argument

The trial court did not err when it declined to allow Saunders to withdraw his guilty plea because he knowingly, voluntarily and intelligently entered it. The record demonstrates the trial court fully informed Saunders of how his sentencing might be affected by his prior criminal history, and gave him ample opportunity to withdraw his plea until that history could be verified.

Saunders also received effective assistance of counsel, as his attorney knew that his client could be sentenced to a higher standard range

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if the State properly documented his prior criminal history. Counsel for Saunders simply took a calculated risk by trying to have his client sentenced before the State could properly document this history and lost.

Lastly, Saunders' pro se argument in his RAP 10.10 statement of additional grounds for review that his felony history from 1993 through 1998 should wash is without merit, because he failed to remain crime-free in the community for five full years.

The judgment and sentence of the trial court is correct and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY DENYING SAUNDERS' MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE SAUNDERS KNOWINLGY, VOLUNTARILY AND INTELLIGENTLY MADE THAT PLEA.

The trial court did not err by denying Saunders' motion to withdraw his guilty plea because Saunders knowingly, voluntarily and intelligently made that plea.

A trial court's denial of a motion to withdraw a plea is reviewed for an abuse of discretion. *State v. Moon*, 108 Wash.App. 59, 61-62, 29 P.3d 734 (2001); *see State v. Jamison*, 105 Wash.App. 572, 589-90, 20

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P.3d 1010 (2001). A court abuses its discretion if its decision is based on clearly untenable or manifestly unreasonable grounds. *Jamison* at 590.

Due process requires that a defendant's guilty plea be knowing, voluntarily and intelligent. *In re Pers. Restraint of Isadore*, 151 Wash.2d 294, 297, 88 P.3d 390 (2004); *see Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wash.2d 258, 266, 36 P.3d 1005 (2001). A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences. *Isadore* at 297; *see State v. Miller*, 110 Wash.2d 528, 531, 756 P.2d 122 (1988). A defendant, [however], need not be informed of all possible consequences of his plea, but must be informed of all [the] direct consequences. *Id* at 298; *see State v. Ross*, 129 Wash.2d 279, 284, 916 P.2d 405 (1996), *citing State v. Barton*, 93 Wash. 2d. 301, 305, 609 P.2d 1353 (1980).

A defendant must understand the sentencing consequences for a guilty plea to be valid. *Wood v. Morris*, 87 Wash.2d 501, 503, 554 P.2d 1032 (1976). A strong public interest supports enforcement of plea agreements that are voluntarily and intelligently made. *Moon* at 62.

Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice. *State v. Paul*, 103 Wash.App.487, 494, 12 P.3d 1036 (2000). A manifest injustice is an

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injustice that is obvious, directly observable, overt, [and] not obscure. *Id*; *see State v. Saas*, 118 Wash.2d. 37, 42, 820 P.2d 505 (1991); *State v. Branch*, 129 Wash.2d 635, 641, 919 P.2d 1228 (1996). A manifest injustice occurs only when: (1) the defendant has been denied effective assistance of counsel; (2) the plea was not ratified by the defendant or the defendant's agent; (3) the plea was involuntary; or (4) the plea agreement was not kept by the State. *Id.*

The facts of *Paul* are analogous to Saunders's case because defendant Paul, like Saunders, pled guilty without knowing precisely what his offender score and/or standard range would be, and then sought to withdraw his plea. Like Saunders, Paul had out of state criminal history from California. *Paul* at 489-491. Paul pled guilty to charges in Cowlitz County before he was sentenced on separate charges in Lewis County. *Id* at 492. Because Paul was convicted in Cowlitz County before being sentenced in Lewis County, Paul's convictions from Cowlitz County became part of his criminal history for the purposes of sentencing in Lewis County. *Id.*

Paul moved to withdraw his plea in Lewis County because he anticipated facing a lower standard range sentence in Lewis County. *Id.* Specifically, Paul testified in Lewis County that before he entered his plea there that:

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> (1) defense counsel had explained two or three different [sentences] that [he] could get, including a sentencing within the 57 to 75 month range;
> (2) He knew [that] the State was going to recommend 75 months;
> (3) He knew there was a dispute as to the correct sentencing range;
> (4) He was told by defense counsel he [p]ossibly wouldn't get [75 months]; and
> (5) He knew the sentencing judge could go beyond the State's recommendation up to life in prison. *Id at 492.*

On appeal, the Court in *Paul* found that the trial court did not err by denying his motion to withdraw his plea because:

> Paul did not detrimentally rely on the prosecutor's calculation of the sentencing range; he was hoping the prosecutor's calculation was incorrect. *Id* at 495.

These facts are quite similar to those in Saunders' case, in that Saunders and his attorney hoped that the State would be unable to properly calculated his offender score. As Saunders candidly testified before the trial court, his attorney said to him:

> Check this out; the district attorney is on vacation…Okay, since he is on vacation and didn't know-they don't know what your offender score is… [Defense counsel] told me that…he would get me the deal for one point for 36 to 48 months…
> RP 31: 8-17.

Prior to entering into his plea, the trial court carefully advised Saunders of his rights, especially with regards to how his standard range might be affected pending an accurate determination of his offender score

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at sentencing. The colloquy between Saunders and the trial court detailed above shows that Saunders made his plea knowingly, voluntarily and intelligently. The trial court did not, as Saunders asserts in his brief, "attempt to insulate the plea from later attack" though this exchange, but rather tried to ensure that he made an intelligent decision. (Appellant's Brief 5).

As the Court reasoned in *Paul*, "[the defendant] made such a voluntary and intelligence choice...among the alternative choices of action open...There was no manifest injustice." *Id* at 498. Similarly, no manifest injustice occurred in Saunders' case, as he, like Paul, took a calculated risk that failed to resolve in his favor. As the trial court in Saunders' case accurately reasoned:

> Mr. Saunders, there is no basis...to allow the withdrawal of the plea in this case. We were very thorough; we gave you more than adequate opportunity to know what the potentials were with respect to your upcoming potential sentence. You indicated clearly on the record that understanding. The [trial court] urged you that if you had any hesitancy, whatsoever, to simply say, let's go to trial. You didn't ask for that; you rolled the dice; you're here to day for sentencing. RP 38: 15-23.

A manifest injustice did not occur when the trial court denied Saunders' motion to withdraw his plea, because Saunders knowingly, voluntarily and intelligently made it with effective assistance from court appointed counsel.

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2. SAUNDERS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE: (1) DEFENSE COUNSEL'S REPRESENTATION DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS BASED ON CONSIDERATION OF ALL THE CIRCUMSTANCES; AND (2) SAUNDERS WAS NOT PREJUDICED BY THIS REPRESENTATION.

Saunders was not denied effective assistance of counsel because: (1) defense counsel's representation did not fall below an objective standard of reasonableness based on consideration of all the circumstances; and (2) Saunders was not prejudiced by this representation.

An attorney "actively" represents a defendant when he [or she] enters an appearance on behalf of a criminal defendant, consults with him [or her] for the purpose of preparing a defense investigates his [or her] case...confers with co-counsel on strategy [and/or] offers the defendant legal advice. *Dorsey v. King County*, 151 Wash.App. 664, 672, 754 P.2d 1255 (1988).

To demonstrate ineffective assistance of counsel, a defendant who enters a plea of guilty must satisfy a two-part test established by the United States Supreme Court in *Strickland v. Washington*, [that was] adopted by [the Washington State Supreme Court] in *State v. Jeffries*. *State v. Oseguera Acevedo*, 137 Wash.2d 179, 198, 970 P.2d 299 (1999); *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

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674 (1984); *State v. Jeffries*, 105 Wash.2d 398, 418, 717 P.2d 722 (1986). A defendant must first show that defense counsel's performance was deficient. *Id.*

To satisfy the "performance" part of the test, [the] defendant must prove that defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *Id.* To satisfy the "prejudice" part of the test, a defendant must prove defense counsel's deficient performance prejudiced the defendant, showing there is a reasonable probability that, but for [defense] counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Id* at 198-199.

Under the *Strickland* test, even if counsel's performance is deemed deficient, the defendant must show prejudice: a reasonable probability that, but for counsel's unprofessional errors, [the] defendant would not have pleaded guilty and would have insisted on going to trial. *State v. Stowe*, 71 Wash.App. 182, 188, 858 P.2d 267 (1993); *see Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 370, 88 L.Ed. 203 (1985); *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. The voluntary nature of a defendant's guilty plea is not automatically

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destroyed because of erroneous advice by counsel. *McMann v. Richardson*, 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1449, 25 L.Ed. 763, 773 (1970).

The facts of *Stowe* are partially analogous to Saunders' case, in that they involve a defendant who sought to withdraw his plea based on ineffective assistance of counsel. In *Stowe*, the defendant was a member of the United States Army who entered into an *Alford* plea in Pierce County Superior Court on the advice of his attorney. *Stowe* at 185. Stowe's attorney erroneously informed him that if he entered into an *Alford* plea, he (Stowe) could probably remain in the Army. *Id.* Prior to telling his client this, Stowe had maintained his innocence, and refused to enter into any kind of plea agreement, no matter how attractive, unless he was assured that he could continue his career in the military. *Id.* Stowe had wanted to plead not guilty and take the matter to trial in order to clear his name and maintain his career. *Id.* Stowe's attorney, however, failed to properly investigate the consequences of an *Alford* plea on his client's status in the Army. *Id.*

After Stowe entered his guilty plea, the Army immediately discharged him. *Id.* Stowe learned that he had been discharged because the Army, at that time, did not distinguish between *Alford* pleas and any other guilty plea. *Id.* The Court in *Stowe* concluded that the defense

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counsel's erroneous advice did prejudice his client, because Stowe specifically asked about the possible consequences of his plea and relied upon that advice in making his decision. *Id* at 189. The Court continued by reasoning that but for counsel's erroneous and therefore deficient advice, Stowe would have demanded a trial. *Id.*

Applying this reasoning to Saunders' case, the record demonstrates that not only was Saunders thoroughly briefed by the trial court as to the possible consequences of his plea, but that he and his attorney made a strategic decision to see whether the State could adequately document his criminal history prior to speedy sentencing. As Saunders' attorney said immediately after his client pled, he was unwilling to "waive any speedy sentencing." RP COP 10: 9-10. Saunders' attorney had already been put on notice by the State that his client's offender score might be, "as high as 7." RP COP 3: 8-13 According to Saunders, his attorney had told him that "most likely [the State] won't get it," meaning proper documentation of that history. RP 32: 1-3. Saunders' attorney also knew prior to pleading his client that a standard range sentence on a charge of robbery first degree with a potential offender score of seven was 87 to 116 months. RP COP 3: 17-19; RP COP 3: 20-21.

Unlike Stowe's attorney who failed to properly investigate the impact that a plea might have on his client's standing in the Army, counsel

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for Saunders effectively represented his client. After pleading his client and then refusing to waive speedy sentencing, defense counsel put the burden on the State to properly document Saunders' criminal history in order to have him sentenced accurately.

Conceivably, defense counsel's strategy could have resulted in Saunders receiving sentence far beneath the standard range of 129-171 months that he ultimately faced. Defense counsel admitted as much at the May 8, 2006, change of plea hearing, when he stated, "[t]here is California history; we don't know what it is...We've explored it...[and] the ascertainable from [Washington State] is one." RP COP 3: 4-7. The trial court had informed Saunders' and his attorney just prior to this that his standard range sentence with an offender score of one would be "36 to 48 months incarceration." RP COP 2: 10-14.

As the trial court correctly reasoned, Saunders and his attorney instead chose to "roll the dice" and they lost their gamble when the State properly established Saunders' criminal history. RP 38: 15-23. Any discussion between Saunders and his attorney about potential "washing" of prior offenses was rendered irrelevant based on their decision to risk pleading guilty with the hope the State would either fail or be unable act in a timely fashion.

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Unlike the defendant in *Stowe*, there is also no indication from the record that but for defense counsel's errors, that Saunders would not have pleaded guilty and would have insisted on going to trial. Representation for Saunders was both objectively reasonable and not deficient under the two-prong *Strickland* test. Saunders was also not subject to prejudice because he received effective assistance of counsel.

3. NONE OF SAUNDERS' FELONY HISTORY FROM 1993 THROUGH 1998 AND 1998 THROUGH 2005 WASHED-OUT BECAUSE HE FAILED TO REMAIN CRIME-FREE IN THE COMMUNITY FOR FIVE CONSECUTIVE YEARS.

None of Saunders' felony history from 1993 through 1998 and/or 1998 through 2005 washed-out because he failed to remain crime-free in the community for five consecutive years.

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2).

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(a) Saunders' Felony History Does Not Wash-Out From 1993 Through 1998.

Saunders argues pro se in Additional Ground 1 that his criminal history from 1993 through 1998 should have washed-out. As was stated above, Saunders was sentenced on July 21, 1993, and had an offense date of July 20, 1998, for possession of methamphetamine; a duration of 4 years and 364 days between offenses. RP 45: 10-20. As the trial court correctly concluded:

> [T]hat's the math that breaks the defense theory...It's close, but it it's correct math...[Saunders] essentially missed [washing-out], by a day...six points. That period of time is covered by the sentence date versus the offense date on the Sacramento possession of meth. The calculation of [an offender score of] nine is correct. The standard range is 192 to 171 [months]. RP 46: 14-21.

Saunders bases his argument on an earlier version of the wash-out rules. Because Saunders offenses had not washed-out by 1995, however, the current statute cited is controlling. The trial court did not err by finding that Saunders' felony history did not wash-out from 1993 through 1998 under RCW 9.94A.525(1)(2) and/or (3) as he asserts.

(b) Saunders' Felony History Does Not Wash-Out From 1998 Through 2005.

Saunders' felony history does not wash-out from 1998 through 2005 as he argues pro se in Additional Ground 2, because he was extradited back

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to California while under supervision during this time. The trial court informed Saunders at sentencing that:

> [T]he calculation of your personal offender score looks right to this court; it looks like that you sit at ten. I understand you're saying, hey, it isn't fair, I abscond from California, that's why I get hauled-back on these probation violations; but essentially, it's this [c]ourt's read that that does keep you alive on the [offender score] calculation. RP 48: 19-25.

The key wash-out language in RCW 9.94A.525 is, "since [the defendant's] the last date of release from confinement." RCW 9.94A.525(2). Saunders' extradition back to California indeed qualifies as "confinement," regardless of significance (or lack thereof) he may place on it. The trial court did not err by finding that Saunders' felony history did not wash-out from 1998 through 2005 under RCW 9.94A.525(1)(2) and/or (3) as he argues.

(c) Saunders' Argument That His Offender Score Should Be 9 Instead of 10 Is Irrelevant Because It Does Not Change His Standard Range Sentence.

Saunders' pro se argument in Additional Ground 3 is irrelevant, as an offender score of 9 or higher placed him in a standard range sentence of 129-171 months in the Department of Corrections on a conviction for robbery in the first degree.

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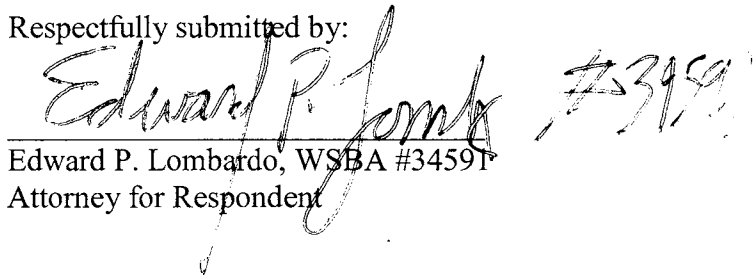
F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 14TH day of February, 2007

Respectfully submitted by:



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Attorney for Respondent

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	
	)	No. 35258-3-II
Respondent,	)	
	)	DECLARATION OF
vs.	)	FILING/MAILING
	)	PROOF OF SERVICE
RICHARD W. SAUNDERS	)	
	)	
Appellant,	)	
	)	

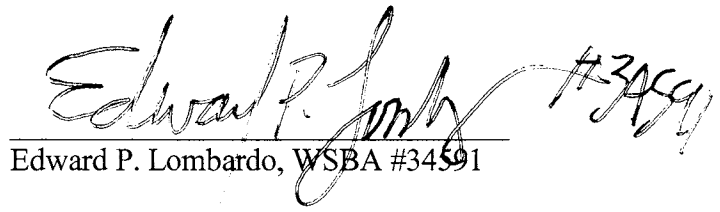
I, Edward P. Lombardo, declare and state as follows:

On Wednesday, February 14, 2007 , I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, Edward P. Lombardo , declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 14th day of February, 2007, at Shelton, Washington.



Edward P. Lombardo, WSBA #34591

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RICHARD W. SAUNDERS Appellant,	))))))))))	No. 35258-3-II DECLARATION OF FILING/MAILING PROOF OF SERVICE

COURT OF APPEALS
DIVISION II
07 FEB 15 PM 1:07
STATE OF WASHINGTON
BY
DEPUTY

I, Edward P. Lombardo, declare and state as follows:

On Wednesday, February 14, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Richard Saunders
DOC#886372
Washington Correctional Center
Shelton, WA 98584

I, Edward P. Lombardo, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 14th day of February, 2007, at Shelton, Washington.

Edward P. Lombardo, WSBA #34591