SUPREME COURT NO. _____

NO. 84923-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRIS DRAKE, JR.,

Petitioner.

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

The Honorable Jennifer R. Langbehn, Judge

PETITION FOR REVIEW

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STATUTES, RULES, AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Darris Drake, the appellant below, seeks review of the Court of Appeals' published decision affirming the trial court's denial of his motion for resentencing (Op., attached), issued September 16, 2024.

B. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err by holding, in a published opinion, that a low-end standard range sentence predicated on an erroneously inflated offender score is not necessarily a "complete miscarriage of justice," for purposes of collateral review?

2. Did the Court of Appeals err by holding, in a published opinion, that the prejudice inquiry is forward-looking in a collateral attack asserting nonconstitutional error?

C. STATEMENT OF THE CASE

On October 18, 2010, Mr. Drake pleaded guilty to one count of first-degree assault and one count of residential burglary with a

firearm allegation. CP 53. At the time of his sentencing, ten days later, Mr. Drake's offender score on the assault was a five, and his offender score on the burglary was a four; both reflected a 2007 conviction for unlawful possession of a controlled substance (UPCS). CP 43-44.

The State recommended, and the court imposed, a low-end standard range term of 138 months for the assault and 92 months for the burglary, with a 72-month firearm enhancement running consecutive to the 138-month term, for a total confinement term of 210 months. CP 44-45, 62. The length of the firearm enhancement reflected the doubling provision in former RCW 9.94A.533(d) (2010), applicable because Mr. Drake had previously been sentenced for second-degree assault with a deadly weapon finding. CP 131.

After this Court issued its decision in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), Mr. Drake moved under CrR

7.8(b)[1] for correction of his offender score and resentencing. CP 20. The State initially agreed that Mr. Drake should be resentenced, but upon preparing the updated criminal history the prosecutor discovered a 2011 conviction for second-degree theft. CP 78-79. Realizing that Mr. Drake's offender score would remain the same after the point for the UPCS was replaced with a point for the theft, the State opposed resentencing. CP 79-84.

The State agreed that Mr. Drake was "entitled to relief" under CrR 7.8(c)(2),[2] governing transfer to the Court of Appeals,

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[1] CrR 7.8(b) provides: "On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for . . . [any of several] reasons . . . [including] (4) The judgment is void; or (5) Any other reason justifying relief from the operation of the judgment."

[2] CrR 7.8(c)(2) provides:

> The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition [PRP] unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that they are entitled to relief or (ii) resolution of the motion will require a

because his judgment and sentence was facially invalid. RP 4-5. But it argued he could not demonstrate the prejudice necessary for relief on the merits. CP 81-82; RP 4-6. This was so, the State argued, because Mr. Drake alleged non-constitutional error and was therefore entitled to relief only for a "fundamental defect resulting in a complete miscarriage of justice." CP 83; RP 6-9. It contended he could not make this showing because—once the point for the second-degree theft was added to his offender score—he would face the same standard range. RP 9.

Defense counsel reminded the court that Mr. Drake did suffer a miscarriage of justice, when he served nine months in

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> factual hearing. A defendant is entitled to relief under subsection (i) where the person (A) is serving a sentence for a conviction under a statute determined to be void, invalid, or unconstitutional by the United States Supreme Court, the Washington Supreme Court, or an appellate court where review either was not sought or was denied or (B) is serving a sentence that was calculated under RCW 9.94A.525 using a prior or current conviction based on such a statute.

confinement for the unconstitutional UPCS conviction. RP 10; CP 17. And she told the court Mr. Drake would be seeking an exceptional sentence below the standard range, on remand, based on medical issues. RP 10. Counsel elaborated: "Mr. Drake just . . . seeks the opportunity to . . . present to the Court mitigation to demonstrate to the Court that he has changed his life and he's ready to become a productive member of society." RP 10-11.

The prosecutor urged the court to ignore the sentence Mr. Drake served for the UPCS conviction because "that is not this case." RP 8.

The court denied the motion for resentencing, expressing sympathy for Mr. Drake but apparently concluding that resentencing could not possibly make any difference:

> [I]f the Court were to grant resentencing, the Court would be required under settled case law to consider the theft 2, which occurred after sentencing in the 2010 case, which means that if the Court were to resentence . . . Mr. Drake would be re-sentenced at the same offender score and same range that was used at sentencing originally in this case.

> I understand that denying a resentencing on that basis may mean that Mr. Drake is not able to now request an exceptional down, or some other alternative sentence, but in considering whether or not there has been a fundamental defect in his ultimate sentence such that the Court could find that a complete miscarriage of justice has occurred, the Court cannot do so at this time. And I am sympathetic to Mr. Drake's situation, and I - - I know that there are a lot of individuals who may have ended up in different situations. A lot who may have ended up in worse situations. But when the Court is looking at whether or not under . . . [Matter of] Meippen, [193 Wn.2d 310, 440 P.3d 978 (2019)] . . . the Court would impose the lesser sentence, I do have to take note of the fact that Mr. Drake has received the low end of the sentence, and that when the Court is looking at whether there would have been a different outcome at the time, I think that there is an issue in considering what may have transpired ten years later that may now provide the basis for an exceptional sentence.

RP 23-24; see CP 6-7.

Mr. Drake appealed, arguing he suffered a miscarriage of justice in 2010, when he received a sentence predicated on an erroneously inflated offender score, and that no *additional*

showing of prejudice was required before he was entitled to resentencing. BOA at 9.

The Court of Appeals disagreed in a published opinion announcing two new prerequisites to collateral relief for non-constitutional error. Op. at 7-13. As explained below, these prerequisites conflict with this Court's precedent. This Court should therefore grant review, reverse the Court of Appeals, and remand with instructions to grant Mr. Drake's request for resentencing.

D. REASONS REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(1), this Court may review a Court of Appeals decision that is in conflict with a decision of the Supreme Court. The Court of Appeals' decision in Mr. Drake's case meets this criterion because it conflicts with this Court's decisions in In re Fletcher, 3 Wn.3d 356, 552 P.3d 302 (2024), In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), PRP of Call, 144 Wn.2d 315,

28 P.3d 709 (2001), and Matter of Johnson, 131 Wn.2d 558, 933 P.2d 1019 (1997).

1. The Court of Appeals' published opinion conflicts with longstanding precedent holding that a sentence predicated on a miscalculated offender score constitutes a fundamental defect resulting in a complete miscarriage of justice.

Because a collateral attack seeks to disturb a final judgment, the petitioner must meet a high standard to obtain relief. PRP of Finstad, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); PRP of Coats, 173 Wn.2d 123, 132-33, 267 P.3d 324 (2011). In a collateral attack raising nonconstitutional grounds for relief, the petitioner must establish a """fundamental defect which inherently results in a complete miscarriage of justice."""" Goodwin, 146 Wn.2d at 867, (quoting PRP of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) quoting PRP of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990))). He must make this showing by a preponderance of the evidence. In re Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013).

A miscarriage of justice does not result from a mere procedural error; to obtain collateral relief for any error, the petitioner must establish an error of substance. See State v. Buckman, 190 Wn.2d 51, 68, 409 P.3d 193 (2018) (applying "actual and substantial prejudice" standard for constitutional error). But longstanding precedent holds that the miscarriage of justice standard is satisfied where the petitioner shows that the sentence imposed upon him was inflated by an erroneous offender score. Goodwin, 146 Wn.2d at 868 (citing Johnson, 131 Wn.2d at 658).

The defendant in Goodwin, 146 Wn.2d at 864, pleaded guilty to two felonies, in 1998, and received a high-end standard range sentence. Over two years later, he filed an untimely PRP, challenging the inclusion in his offender score of two points for juvenile adjudications that should have washed out. Id. at 864-65.

This Court held Mr. Goodwin was entitled to resentencing, even though he had negotiated for the sentence imposed, because

"a defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence." Id. at 872, 877-78.

Mr. Goodwin received a high-end standard range term; his sentence thus exceeded the entire "statutorily permitted" standard range, "given a correct offender score." Id. at 875-76. But the rule Goodwin applied is not limited to this circumstance.

On the contrary, Goodwin unambiguously reaffirms the principle, first announced by this Court in Johnson, 131 Wn.2d at 568, that *any* sentence based upon an incorrectly inflated offender score is a "fundamental defect that inherently results in a complete miscarriage of justice." Goodwin, 146 Wn.2d at 868 (citing Johnson, 131 Wn.2d at 568). Of relevance here, this includes:

> [a] sentence [that is] . . . actually within the correct standard range, if the trial court had indicated its intent to sentence at the low end of the range, and the low end of the correct range is lower than the low end of the range determined by using the incorrect offender score.

Id.

Johnson, 131 Wn.2d at 568, illustrates this circumstance. There, the defendant was convicted of first-degree felony murder and sentenced to a low-end standard range term based on an offender score of 2. Id. at 561. It was later determined that his offender score should have been 1; the trial court had erroneously failed to treat two prior convictions as a single offense, for purposes of sentencing. Id. at 562-63.

In Johnson, correcting the offender score altered the standard range only slightly, dropping it from 261 to 347 months down to 250 to 333 months. Id. at 561, 569. The defendant's 261-month term was within both standard ranges. Id. at 569. But this Court nevertheless determined that the erroneously calculated offender score was a "fundamental defect . . . result[ing] in a miscarriage of justice." Id. at 568-69.

While Johnson did not involve a guilty plea, this Court applied the same rule in Call, 144 Wn.2d 315, which did involve a (heavily negotiated) plea.

The defendant in Call pleaded guilty to robbery and theft (three counts in all), in exchange for the State's agreement to dismiss several counts of forgery, one count of first-degree possessing stolen property, and a deadly weapon enhancement. Id. at 319. Both parties mistakenly believed the defendant's offender score was a 10; the prosecutor recommended, and the trial court imposed, a low-end standard range term consistent with that miscalculation. Id. at 319-20.

Shortly after his plea and sentencing, the defendant discovered that two of his prior convictions had washed out, and he sought resentencing on the corrected offender score of 8. Id. at 320. The State argued there had been no injustice, because the defendant's current sentence was within the standard range that would apply at the contemplated resentencing. Id. at 321.

This Court disagreed. It held the sentencing error constituted a "fundamental defect . . . resulting in a miscarriage of justice," *solely* because the sentencing court was misinformed as to the standard range:

> Unlike the sentencing judge in Johnson, the sentencing judge in this case did not specifically indicate on the record that she intended to sentence . . . [Mr.] Call at the low end of the standard range. However, the record does indicate the judge believed 129 months was the low end of the standard range based on an offender score of 10. This court has long held the existence of an erroneous sentence requires resentencing. This principle also applies to a sentence imposed under the [Sentencing Reform Act (SRA)] in which an incorrect offender score is used to calculate the standard range. The sentencing court should be afforded an opportunity to determine the appropriate sentence based upon accurate information used as a basis for calculating an offender score and in determining the correct sentence range under the SRA. We therefore . . . remand this case to the trial court for resentencing.

Id. at 333-34 (internal quotations and citations omitted).

Mr. Drake's case is like Johnson and Call: he was sentenced at the low end of the standard range, and that low end was

erroneously inflated by legal error in calculating the offender score. CP 44-45, 62. Had Mr. Drake's offender score been properly calculated in 2010, the low end would have been 201 months rather than 210. See Op. at 10.

The Court of Appeals held this was irrelevant, because even if Mr. Drake's offender score had been properly calculated, the prosecutor *could* have recommended a term of 138 months. Op. at 10. It reasoned that Mr. Drake had to present some other proof, in addition to the prosecutor's recommendation and the sentence ultimately imposed, to establish that his sentence constituted a miscarriage of justice. Op. at 10.

But this conflicts not only with Johnson and Call, which were reaffirmed in Goodwin, but also with this Court's very recent decision in Fletcher, 3 Wn.3d 356.

Like the defendant in Goodwin, the defendant in Fletcher negotiated a guilty plea predicated on a mutual mistake about his offender score: the parties believed that two juvenile adjudications

should count in the score, but in fact those adjudications had washed out. Fletcher, 3 Wn.3d at 360-61. Unlike the defendant in Goodwin, however, the defendant in Fletcher stipulated to an exceptional sentence. Fletcher, 3 Wn.3d at 360-61. Thus, his sentence did not depend on the offender score at all: the prosecutor could have sought and obtained the same exceptional term of confinement regardless of the erroneously included juvenile adjudications. Id. at 363.

This Court held that the stipulation—and the attendant statutory authority to impose the exceptional term in question—did *not* preclude collateral relief. Id. at 368-74. Relying on Goodwin, Johnson, Call, and other authority, this Court determined that "the exceptional sentence was based on improper sentencing calculations" and, given the "dramatic impact" of these errors on the defendant's standard range term, "there is a high probability that the mistake affected the original sentence." Id. at 315.

While the sentencing error in Mr. Drake's case was less "dramatic," it was no less obviously consequential. The State agreed to recommend a low-end standard range term, and the sentencing court followed the State's recommendation. Op. at 2. But both the recommendation and the correlating sentence were based on misinformation about the offender score. As in Call, 144 Wn.2d at 333-34, this was a miscarriage of justice. No additional showing of prejudice is required.

Indeed, the State conceded this point at oral argument in Mr. Drake's appeal. Wash. Court of Appeals oral argument, State v. Drake, No. 84923-9-I (July 24, 2024), audiovisual recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024071139/?eventID=2024071139, at 11 min. 24 sec. It is not clear why the Court of Appeals rejected this concession, in a published decision conflicting with decades of precedent.

2. The Court of Appeals published opinion conflicts with longstanding precedent applying a backward-looking inquiry to determine whether a nonconstitutional error affected the sentencing court's decision.

The Court of Appeals also held that the trial court properly considered not only what occurred at Mr. Drake's 2010 sentencing, but also what *would* occur at his resentencing. Op. at 8-9. Specifically, the Court of Appeals held that the trial court correctly considered the fact that, at the resentencing, Mr. Drake's offender score would include a point for the 2011 theft conviction. Id.

The Court of Appeals recognized that the prejudice inquiry is "backward looking," where the sentencing error was constitutional. Id. (citing PRP of Meippen, 193 Wn.2d 310, 317, 440 P.3d 978 (2019)). The "backward looking" inquiry asks whether the *original* sentencing court would have imposed a shorter sentence, but for the error identified on collateral review. Meippen, 193 Wn.2d at 316.

But the Court of Appeals reasoned that the prejudice inquiry is more demanding in the context of non-constitutional sentencing error, and so the trial court was justified in considering a hypothetical future sentencing hearing, as well. Id.

Again, this conflicts with Johnson, 131 Wn.2d at 568-69, Call, 144 Wn.2d at 333-34, and Fletcher, 3 Wn.3d at 308, 315, as detailed. In all these cases, the court applied an entirely backward-looking inquiry to determine that the petitioner had established a "fundamental defect" resulting in "a miscarriage of justice." Id.

Mr. Drake concedes that his attorney did not dispute, at the show cause hearing underlying this appeal, that his recalculated offender score would be the same upon resentencing. See RP 10-11. But he is nevertheless entitled to that resentencing—a show cause hearing is not an adequate substitute.

This entitlement is codified in the plain language of CrR 7.8(c)(2), which provides: "A defendant is entitled to relief . . . where the person . . . is serving a sentence that was calculated under

RCW 9.94A.525 using a prior or current conviction based on . . . a [void, invalid, or unconstitutional] statute."

E. CONCLUSION

The Court of Appeals' published opinion conflicts with longstanding precedent on the "miscarriage of justice" prerequisite to relief on collateral review. This Court should grant review, reverse the Court of Appeals, and remand for resentencing.

I certify that this document was prepared using word processing software, in 14-point font, and contains 3,097 words excluding the parts exempted by RAP 18.17.

DATED this 11th day of October, 2024.

Respectfully submitted,

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FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRIS EUGENE DRAKE, JR., Appellant.	No. 84923-9-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — Darris Drake was sentenced in 2010 and now appeals from the denial of his 2022 motion for resentencing. Although Drake's offender score included a conviction later invalidated by *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), it is undisputed that his score would remain the same at resentencing due to an intervening 2011 theft conviction. Because the trial court did not abuse its discretion when it denied Drake's motion, we affirm.

FACTS

In October 2010, Drake pleaded guilty to assault in the first degree (Count I) and residential burglary while armed with a firearm (Count II). Drake's offender score for Count I was calculated as five, resulting in a standard range of 138-184 months of incarceration under the sentencing reform act of 1981[1] (SRA). His

[1] Ch. 9.94A RCW. The standard sentencing ranges for these particular crimes under these offender scores were the same pursuant to the version of the SRA in effect at the time Drake's crimes of conviction were committed as they are under the current version of the SRA. *See* former RCW 9.94A.510 (2002).

For purposes of precision and clarity, we cite to the version of the SRA applicable to the convictions at issue where appropriate.

offender score for Count II was calculated as four, resulting in a standard range of 15-20 months of incarceration under the SRA, plus an additional 72 months for the firearm enhancement to be served consecutively to the base sentences.[2] The prosecutor agreed to recommend concurrent sentences of 138 months on Count I, the low end of the range on that count, and a high-end sentence of 20 months on Count II. According to the plea agreement, Drake did not join the State's recommendation and was free to argue for the term of confinement he believed was appropriate. The record does not include a transcript of Drake's sentencing hearing but the judgment and sentence (J&S) establishes that, on October 29, 2010, the court imposed terms of incarceration consistent with the prosecutor's recommendation for a total of 210 months' confinement.

More than ten years later, in February 2021, *Blake* invalidated Washington's former statute that criminalized simple drug possession. 197 Wn.2d at 173. Following *Blake*, Drake filed a motion under CrR 7.8 for resentencing. He argued that relief was warranted because his offender scores on Counts I and II each included a point for a 2007 *Blake* offense and removing that point would result in a change to his standard range on each count.

The State opposed resentencing for two reasons. First, on February 11, 2011, not long after entry of the J&S at issue here, Drake was convicted of theft in the second degree in a separate proceeding. Thus, the State argued, "at the time

[2] The length of Drake's sentence for the firearm enhancement was doubled from 36 months to 72 months under RCW 9.94A.533(3)(d), which requires doubling "[i]f the offender is being sentenced for any firearm enhancements under [RCW 9.94A.533(3)](a), (b), and/or (c) . . . and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under [RCW 9.94A.533(3)](a), (b), and/or (c) . . . or [RCW 9.94A.533](4)(a), (b), and/or (c) . . . , or both."

of resentencing, [Drake] will have the same standard range and offender score which . . . will include a worse criminal history th[a]n at the original sentencing" because "[i]t is reasonable to conclude that most sentencing courts would see a conviction for theft in the second degree as being at least as significant if not more significant than a conviction for possessing a controlled substance." Second, the State argued that Drake needed—but failed—to show that the court would impose a shorter sentence if the court were to grant him a resentencing.

In reply, Drake argued that his *Blake* offense "resulted in a sentence of 12 months of incarceration and 9 to 12 months of community control" and he "lost his freedom for 9 months and he will never have those months return[ed] to him, that is a miscarriage of justice." Drake contended that "[t]his miscarriage of justice extends to [his] current sentence because that unconstitutional and voided conviction was considered by the [c]ourt when pronouncing the agreed upon disposition."

On January 11, 2023, the trial court held a show cause hearing on Drake's CrR 7.8 motion.[3] The State argued that Drake was not entitled to relief because "[they] ha[d] the correct offender score, the correct standard range," and "[a]ll that [the court] would be doing at resentencing . . . is removing the [*Blake*] conviction and replacing it with . . . a subsequent theft 2 conviction. . . . And [Drake's] sentence is not something that is going to be . . . completely out of left field or completely incorrect." Meanwhile, Drake argued that "a conviction based on an

[3] Under CrR 7.8(c)(3), "[i]f the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted."

unconstitutional statute cannot be considered in calculating an offender score, and that is exactly what has happened in [his] case." He also argued, again, that he was entitled to resentencing because he "ha[d] his freedom stolen from him for nine months from the prior [*Blake*] conviction as well." Additionally, Drake indicated that he planned to seek an exceptional sentence below the standard range at resentencing.

The trial court denied Drake's motion for resentencing, observing that Drake's offender scores and standard ranges would remain the same at resentencing and that Drake "has already received the low end of the sentence."

Drake timely appealed.

ANALYSIS

I. Standard of Review & Legal Standards

A CrR 7.8 motion for resentencing is a collateral attack. *State v. Molnar*, 198 Wn.2d 500, 509, 497 P.3d 858 (2021). "Relief by way of collateral attack is extraordinary," and the "bases . . . for collateral attack are limited because '[c]ollateral relief undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes costs society the right to punish admitted offenders.'" *State v. Basra*, 10 Wn. App. 2d 279, 287, 448 P.3d 107 (2019) (final alteration in original) (quoting *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982)).

To obtain collateral relief, "a defendant must either show that a constitutional error actually prejudiced them or that a nonconstitutional error amounted to 'a fundamental defect resulting in a complete miscarriage of justice.'"

State v. Pascuzzi, 29 Wn. App. 2d 528, 533, 541 P.3d 415 (quoting *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007)), *review denied*, 3 Wn.3d 1007 (2024). A miscalculated offender score is a nonconstitutional error. *In re Pers. Restraint of Fletcher*, ___ Wn.3d ___, 552 P.3d 302, 314 (2024). Accordingly, Drake needed to show that including the *Blake* offense in his offender score amounted to a fundamental defect resulting in a "complete miscarriage of justice." *Id.*

There are few cases elaborating on the "complete miscarriage of justice" standard, and Division Three of this court recently observed that, "[o]utside of very general statements, [it found] no Washington authority describing standards for determining when nonconstitutional errors . . . will result in a petitioner being granted collateral relief." *In re Pers. Restraint of Quintero*, 29 Wn. App. 2d 254, 309, 541 P.3d 1007 (2024) (footnote omitted). That said, it is well established that the standard for collateral relief based on a nonconstitutional error is more demanding than the "actual and substantial prejudice" standard for constitutional error, which already presents a high barrier to relief. *See In re Pers. Restraint of Wolf*, 196 Wn. App. 496, 507, 384 P.3d 591 (2016) ("[A] collateral attack undermines the strong interest of the courts in finality, and that interest justifies the high and sometimes very difficult actual and substantial prejudice standard."); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) ("Nonconstitutional error requires *more than* a mere showing of prejudice." (emphasis added)); *In re Pers. Restraint of Call*, 144 Wn.2d 315, 329 n.57, 28 P.3d 709 (2001) (the "burden is higher" for nonconstitutional errors than those of

constitutional magnitude); *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 611, 316 P.3d 1007 (2014) (Gordon McCloud, J., concurring) ("[N]onconstitutional errors [are] subject to a far more demanding prejudice inquiry.").

It is also well established that the defendant bears the burden to prove a complete miscarriage of justice by a preponderance of the evidence. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). Furthermore, the defendant may not rely on bald assertions and conclusory allegations to meet that burden. *See State v. Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012) (explaining "bald, self-serving statement[s] without corroboration" insufficient for relief under CrR 7.8); CrR 7.8(c)(1) (motion must "stat[e] the grounds upon which relief is asked, and [be] supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based").

This court's review of a trial court's denial of a CrR 7.8 motion is "'limited to determining whether the trial court abused its discretion in denying [the] motion.'" *Pascuzzi*, 29 Wn. App. 2d at 533 (alteration in original) (quoting *State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005)). "A trial court abuses its discretion if its decision is manifestly unreasonable or is based on 'untenable grounds, or for untenable reasons.'" *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009) (internal quotation marks omitted) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

II. Denial of CrR 7.8 Motion for Resentencing

Drake argues that by denying his CrR 7.8 motion, the trial court abused its discretion for a number of reasons. We disagree.

Drake first cites *In re Personal Restraint of Goodwin*[4] for the proposition that a defendant establishes a complete miscarriage of justice by "show[ing] that the sentence imposed upon him was longer than it should have been," and he asserts that "it is undisputed that [his] sentence . . . was nine months longer than it should have been." But the record citations Drake provides do not support that this point is undisputed. One citation is to the part of the show cause hearing where the State conceded only that Drake's CrR 7.8 motion did not need to be transferred to this court.[5] Another is to Drake's own reply in the trial court in support of his motion for resentencing.

Furthermore, *Goodwin* is inapposite. There, Goodwin was sentenced to the high end of the standard range based on a miscalculated offender score. *See Goodwin*, 146 Wn.2d at 864 (noting standard range was 36-48 months on one

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[4] 146 Wn.2d 861, 868, 50 P.3d 618 (2002)

[5] *See* CrR 7.8(c)(2) (requiring the trial court, under certain circumstances, to transfer a CrR 7.8 motion to this court for consideration as a personal restraint petition). It is undisputed that the trial court properly retained Drake's CrR 7.8 motion for consideration on the merits, rather than transferring it to this court.

At oral argument before this court, Drake argued that he is entitled to resentencing under the "plain language" of CrR 7.8(c)(2) Wash. Ct. of Appeals oral argument, *State v. Drake*, No. 84923-9-I (July 24, 2024), at 0 min., 45 sec.; 6 min., 19 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024071139/?eventID=2024071139. That rule provides the following:

> A defendant is entitled to relief under [CrR 7.8(c)(2)(i)] where the person (A) is serving a sentence for a conviction under a statute determined to be void, invalid, or unconstitutional by the United States Supreme Court, the Washington Supreme Court, or an appellate court where review either was not sought or was denied or (B) is serving a sentence that was calculated under RCW 9.94A.525 [governing offender score calculations] using a prior or current conviction based on such a statute.

CrR 7.8(c)(2).

But Drake did not raise this argument in briefing before the trial court or on appeal. *Cf. State v. Kirwin*, 137 Wn. App. 387, 394, 153 P.3d 883 (2007) ("Absent a change in applicable law, we will not consider an issue raised for the first time during oral argument."), ***aff'd,*** 165 Wn.2d 818, 203 P.3d 1044 (2009). Regardless, we are unpersuaded that CrR 7.8(c)(2), which governs transfers to this court, relieves a defendant claiming nonconstitutional error from demonstrating a complete miscarriage of justice.

count and 0-12 months on other, and Goodwin was sentenced to 48 months and 12 months plus one day, respectively). On collateral review, our Supreme Court held that Goodwin was entitled to resentencing "using a correct offender score." *Id.* at 877-78. In doing so, it did state that "a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Id.* at 868. But, as the State points out in its briefing on appeal, *Goodwin* simply did not reach the issue that is presented here: whether a defendant can establish a complete miscarriage of justice based on an offender score that was incorrect at the time of sentencing but, due to an intervening conviction, was correct at the time the defendant sought collateral relief and would remain correct at resentencing.

Next, and to that end, Drake contends that the trial court abused its discretion by considering what would happen at resentencing, rather than asking whether Drake suffered a complete miscarriage of justice *at his original sentencing*. Drake points out that in the context of a *constitutional* sentencing error, the inquiry into whether a defendant has shown actual and substantial prejudice is backward looking. For example, in *In re Personal Restraint of Meippen*, where the petitioner argued the sentencing court committed constitutional error by failing to comply with the holding set out in *State v. Houston-Sconiers*,[6] our Supreme Court denied relief because the petitioner did not present any evidence that the *sentencing court* "would have imposed a lesser sentence"

[6] 188 Wn.2d 1, 9, 391 P.3d 409 (2017) (holding a court sentencing a juvenile must take defendant's youthfulness into account and "must have absolute discretion to depart as far as they want below otherwise applicable . . . ranges and/or sentencing enhancements").

had it complied. *Meippen*, 193 Wn.2d 310, 317, 440 P.3d 978 (2019); *cf. In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 268-69, 474 P.3d 524 (2020) (petitioner established prejudice where he showed that "[m]ore likely than not, [he] would have received a lesser sentence" had the sentencing court not committed constitutional error).

But again, the "complete miscarriage of justice" standard for nonconstitutional errors is more demanding of defendants than the "actual and substantial prejudice" standard for constitutional errors.[7] *See Davis,* 152 Wn.2d at 672. Drake cites no authority for the proposition that, in applying the more demanding standard, the trial court was precluded from considering the totality of the circumstances, including the fact that, at resentencing, it would be required to consider Drake's subsequent criminal history. Contrary to Drake's contention on this issue, RCW 9.94A.525(22) expressly states the following:

> 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 resentencing to ensure imposition of an accurate sentence.

Moreover, even if the trial court was required to focus on what the original sentencing court would have done, Drake cites no support in the record for his assertion that "the original sentencing court would most likely have imposed a shorter sentence, had it properly calculated his offender score." As noted, Drake says his sentence was "nine months longer than it should have been." But he does

[7] The State suggests in its brief that Drake must satisfy *both* standards. That is incorrect.

not articulate why this "should" have been the case, much less establish that the sentencing court more likely than not would have agreed with him on this point. He assumes that, because his base sentences were concurrent and the low end of the standard range on Count I would have been 129 months instead of 138 months had his offender score been correct, his total sentence would have been 201 months (129 months + 72 months for the firearm enhancement) instead of 210 months (138 months + 72 months for the firearm enhancement).

But this assumption glosses over the fact that the 138-month base sentence on Count I was consistent with what the prosecutor agreed to recommend under the parties' plea agreement. *See State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015) (plea agreement is a binding contract between State and defendant). Drake provided no evidence with his CrR 7.8 motion to show what if any impact his offender score had on the prosecutor's recommendation or the sentencing court's decision. He did not present any evidence about the plea negotiations or his original sentencing hearing such as, for example, evidence that the prosecutor would have recommended—and the sentencing court would have imposed—a lower sentence, or that, had the prosecutor made the same recommendation, the sentencing court would have rejected it and sentenced Drake to the low end of the correct sentencing range.

Drake also did not address whether and to what extent the terms of his plea factor into the "complete miscarriage of justice" inquiry. In that regard, Drake's plea agreement was quite favorable. According to a probable cause affidavit, Drake broke into the home of Erik Burnett on November 24, 2009 and shot Burnett

three times while he was asleep in his bed with his girlfriend and their infant child. The State initially charged Drake with assault in the first degree and burglary in the first degree—both of which are deemed most serious, or "strike" offenses under the SRA. *See* former RCW 9.94A.030(30)(a) (2009) (providing that class A felonies are most serious offenses); former RCW 9A.36.011(2) (1997) ("Assault in the first degree is a class A felony."); RCW 9A.52.020(2) ("Burglary in the first degree is a class A felony."). Drake's criminal history included a prior strike offense, a 2004 conviction for assault in the second degree, putting him at greater risk under the persistent offender accountability act. *See* former RCW 9.94A.030(35)(a)(ii) (2009) (persistent offender is one who has, before the commission of a current most serious offense, "been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score"); former RCW 9.94A.030(30)(b) (2009) (assault in the second degree is a most serious offense). Additionally, the State included firearm enhancement allegations on *both* the assault charge and burglary charge, each of which would run consecutively to the base sentences and each other. *See* RCW 9.94A.533(3)(e) ("Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under [the SRA].").

In exchange for Drake's guilty plea, the State not only reduced the charge

on Count II from burglary in the first degree to residential burglary, a non-strike class B felony,[8] but also removed the firearm allegation from Count I entirely. The State also agreed to dismiss or not file a separate charge for unlawful possession of a firearm in the first degree arising from the same incident with Burnett. And, it agreed to dismiss or not file additional burglary and residential burglary charges that would have double scored against one another and against Drake's conviction on Count II. *See* former RCW 9.94A.525(16) (2008) ("If the present conviction is for Burglary 2 or residential burglary, count priors as in [RCW 9.94A.525(7)]; however, count two points for each . . . prior Burglary 1 conviction, and two points for each . . . prior Burglary 2 or residential burglary conviction."); *see also* former RCW 9.94A.589(1)(a) (2002) (offender scores generally calculated by treating "all other current and prior convictions as if they were prior convictions").

In short, even if Drake were correct about the relevant point in time for the trial court's analysis, he fails to show that it was manifestly unreasonable for the trial court to conclude that Drake's original sentence did not constitute a complete miscarriage of justice. *Cf. Quintero*, 29 Wn. App. 2d at 309-10 (observing that, under federal habeas corpus standards, a petitioner alleging nonconstitutional error must show that the error "amount[s] to something akin to a denial of due process"); *Fletcher*, 552 P.3d at 315 (offender score error resulted in complete miscarriage of justice where sentencing calculations were "dramatically incorrect" and there was "high probability that the mistake affected the original sentence").

Drake next points out that, in denying his CrR 7.8 motion, the trial court

[8] RCW 9A.52.025(2); *see also* former RCW 9.94A.030(30) (2009) (listing strike offenses at time of offense at issue here).

stated that "there is an issue in considering what may have transpired ten years later that may now provide the basis for an exceptional sentence." According to Drake, the trial court "appears to have concluded that Mr. Drake would have been precluded, in a resentencing hearing, from citing any post-conviction developments in a bid for an exceptional sentence below the standard range," and he asserts that "[t]his was error." But Drake takes the trial court's statement out of context. The trial court stated that "*when the* [*c*]*ourt is looking at whether there would have been a different outcome at the time*, I think that there is an issue in considering what may have transpired ten years later that may now provide the basis for an exceptional sentence." (Emphasis added.) That is, it made the unremarkable observation that, to the extent it was asking what the *original* sentencing court would have done, it would be incongruous to consider events that transpired some ten years later. The trial court's comment is not a basis for reversal.

Finally, Drake points out that resentencing would give him the opportunity to request an exceptional sentence below the standard range on the grounds that he served a "lengthy term of confinement" on the *Blake* offense and his base sentence was "clearly excessive" due to the mandatory doubling of his firearm enhancement.[9] As a preliminary matter, this first contention is effectively a request to credit time served as a result of the 2007 conviction that was later invalidated by *Blake* against crimes committed years later. But a collateral attack on the judgment and sentence herein is not a proper vehicle for challenging the sentence

[9] The State correctly points out that Drake cited only medical issues in the trial court as a basis for his anticipated request for an exceptional sentence below his standard range.

imposed on Drake's earlier *Blake* offense. Nor has he offered any authority that would support a trial court's deviation from the standard ranges of the SRA in order to "correct" a conviction and sentence under a statute that was later invalidated. And, as the trial court observed, Drake's current term of confinement is already at the low end of what would remain the standard range at resentencing due to Drake's his 2011 theft conviction. The trial court did not abuse its discretion when it concluded that not giving Drake an opportunity to request an even shorter exceptional sentence would be a complete miscarriage of justice that warrants disturbing a long final judgment.

Affirmed.

Hazelrigg, ACJ

WE CONCUR:

Díaz, J.

Birk, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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