SUPREME COURT NO. _____

NO. 58995-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIAL WATTERS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards and David Mistachkin, Judges

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Danial Wayne Watters, appellant below, asks this Court to review the court of appeals decision referenced below.

B. COURT OF APPEALS DECISION

Watters seeks review of the court of appeals decision in State v. Watters, 2025 WL 1566385 (Slip Op filed June 3, 2025). A copy of the slip opinion is attached as an appendix.

C. REASONS WHY REVIEW IS WARRANTED

Review of the court of appeals decision in Watters is warranted under RAP 13.4(b)(1) & (2) because the decision conflicts with decisions of this Court and the court of appeals.

D. ISSUE PRESENTED FOR REVIEW

Were guilty pleas to two felony assault charges rendered invalid by the plea court affirmatively misrepresenting to Watters that the resulting sentences, whether standard range of aggravated exceptional sentences, would be served concurrently, not consecutively, and when the sentencing court imposed

consecutive statutory maximum sentences of 10-years on each count based on Watters' 9+ offender score?

E. STATEMENT OF THE CASE

By third amended information, the Grays Harbor County Prosecutor charged petitioner Danial Wayne Watters with two counts of second degree assault, both allegedly committed with a deadly weapon, and the second count includes a domestic violence allegation. CP 43-44; RCW 9A.36.021(1)(a) & (c); RCW 9.94A.533(4); RCW 10.99.020(8).[1] The prosecution alleged that on September 21, 2022, Watters assaulted his ex-girlfriend, Caitlyn Lederer, and Lederer's boyfriend, Arthur Jones, Jr., with a golf club inside Lederer's home. CP 4-7.

On September 21, 2023, Watters pleaded guilty to the charges in the third amended information before the Honorable

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[1] The prosecution's original charges included a first degree burglary charge – domestic violence. CP1-3. The first amended information added charges of attempted first degree murder and violation of a court order. CP 13-16. A second amended information added an additional count of violating a court order. CP 38-41.

Judge David Edwards. 7RP 3-22.[2] The court first granted the prosecution's motion to file the third amended information. 7RP 5. After some preliminary matters, the court began a colloquy with Watters regarding his plan to plead guilty to the amended charges. 7RP 5-7. In response to questioning by the court, Watters stated that his decision to plead guilty to the amended charges was voluntary, that he and his counsel had reviewed the plea agreement and plea statement in detail and that he understood what they stated. 7RP 7-8. Watters confirmed that he had earned a GED and could read and understand the English language well. 7RP 8. He also confirmed he understood the constitutional rights he was giving up by pleading guilty, and understood his offender score was above "9" for each offense.

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[2] There are seven volumes of verbatim report of proceedings referenced herein as follow: **1RP** – November 14 & 22, 2022, December 19 & 29, 2022, February 7, 2023, June 5, 2023, September 18, 2023 and November 3, 2023; **2RP** – December 27, 2022; **3RP** – December 29, 2022, September 8, 2023 and October 19, 2023; **4RP** - March 13, 2023; **5RP** – May 1, 2023; **6RP** – May 8, 2023; and **7RP** – September 21, 2023.

7RP 9. Regarding the potential sentencing consequences of pleading guilty, Judge Edwards engaged Watters in the following colloquy:

> THE COURT: Okay. With an offender score of nine plus, your standard range of punishment for each of these two crimes would be incarceration for not less than 63 months and not more than 84 months, plus an enhancement of 12 months. There is not an agreement regarding what the sentencing recommendation is going to be, which means that if you plead guilty to these crimes, when you are sentenced it will up to me to decide where within that range of 63 to 84 months you should be sentenced on each case. And those two sentences will be served by you at the same time, *they wouldn't be consecutive.*
>
> THE DEFENDANT: Okay.
>
> THE COURT: But the enhancement for the deadly weapon would - those will be consecutive.
>
> THE DEFENDANT: So like I did the 12 months and 12 months, is that –
>
> THE COURT: Would be –
>
> THE DEFENDANT: And then on top of –
>
> THE COURT: So your sentence would be somewhere between 63 and 84 months, plus 24 months.
>
> THE DEFENDANT: Okay.
>
> THE COURT: Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. After you serve your sentence and you are released, you would be in

> what's known as community custody for a period of 18 months. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. The maximum punishment for these crimes is - is ten years in prison and/or a fine of $20,000. Mr. Jackson,[3] if the total time served by Mr. Watters is 120 months, would that eliminate community custody?
>
> MR. JACKSON: Yes.
>
> THE COURT: Okay. So the - the total of your period of incarceration and your community custody cannot exceed 120 months. Otherwise, your community custody gets cut back so that it ends at 120. Do you understand?
>
> THE DEFENDANT: Yes.

7RP 9-11 (emphasis added).

Later the Court noted that under the plea agreement, the prosecutor will be asking for 120-month sentences for each count, and that under the SRA, a sentencing court has authority to impose an exceptional sentence when an offender score is already over 9 and therefore could lead to a statutory maximum term of 120 months. 7RP 12-15. Watters then entered guilty

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[3] "Mr. Steven Jackson" was the trial deputy in this matter. 7RP 1.

pleas to both charges, which Judge Edwards accepted. 7RP 17-19.

Nowhere in the plea colloquy with Watters did Judge Edwards ever mention the possibility of consecutive sentences as a potential consequence, except as to the deadly weapon enhancements. Nor does Watters' guilty plea statement or the plea agreement mention the possibility of consecutive sentences. CP 45-63. The plea statement does note the two firearm enhancements must be served consecutively. CP 52, 55, 60 (subsections 6(b), (j) & (kk)). The plea agreement notes "The State will ask for 10 years" on each count but does not mention the possibility of consecutive sentences. CP 48 (subsection 1.4(a)).

Watters was sentenced on November 3, 2023, by the Honorable Judge David Mistachkin. 1RP 25-45. The prosecutor asked the court to impose an aggravated exceptional sentence of 120 months based on Watters' 9+ offender score on each count, noting the request would only be 12 months longer than if he

were sentenced to a high-end standard range sentence of 84 months plus a consecutive 12 months for the use of a deadly weapon. 1RP 31-33. As an alternative, the prosecutor suggested that even if the court imposed a term of confinement of less than 120 months, it should order that Watters serve a combined total of 120 months incarcerated and on Community Custody. 1RP 34.

When the court inquired if it was limited to a maximum term of 120 months, the prosecutor confirmed the court could run whatever sentences it imposed consecutive to each other as an aggravated exceptional sentence. 1RP 35-36.

Watters' counsel urged the court not to impose an aggravated exceptional sentence and instead impose a sentence that ensures Watters entered community custody for purposes of safely re-entering the community. 1RP 36-40.

Watters declined the court's invitation to provide a statement before sentence was imposed. 1RP 41.

In imposing sentence, Judge Mistachkin stated:

I see no redeeming redemption, rehabilitation for Mr. Watters. He is -- his motivation here was anger and violence and rage and vengeance. And he destroyed Mr. Jones' life: Traumatic brain injury. Can't – he is probably left significantly incapacitated to a large degree. And he had to be life-flighted to Harborview. He almost died. And he is probably lucky he didn't. And so is Mr. Watters, because then he would be looking at a murder charge; there is no doubt about it. It was attempted murder. The only reason it wasn't attempted murder is because the State was concerned with a technicality that it wasn't a burglary. Burglary in the first and assault committed therein, that's attempted murder; that's attempted murder all day long, and I wouldn't have had any problem getting there, but that's just me.

So I am going to do the right thing, and I am going to let the Court of Appeals sort it out, and that's fine. If they tell me what I am about to do is incorrect, then we can just do a re-sentencing, no harm no foul; he is going to be in for at least ten years.

So here is the thing, just to make a clear record. The Free Crimes Doctrine is exactly for this situation. He is not only -- let's remember, the maximum offender score is nine, anything after that is just icing on the cake. His offender score for these two offense is 13 and 14, respectively, and he has a prior violent assault among those convictions and in those offender scores. So if I only give him the statutory max, which is what he deserves anyway for each one independently, if I run those concurrently, that's a free crime. That means one of these two very serious assaults is free. It's a freebie.

It's a free crime, as were his last several felony convictions. So no, we are not doing that. We are not doing that. Because that would be unfair. That would be a grave injustice to these victims, to one of them, at least, I mean, who is the freebie? Do you want me to make Ms. Lederer the freebie, or should I make Mr. Jones the freebie? I don't think there should be a freebie. I am not a big fan of that, not in a serious assault case, it makes no sense to me.

So the only question I have for you, to Mr. Jackson is, can I also -- is there any authority to run enhancements -- I know they run consecutive to each other, can I run those consecutive to the statutory max or does it have to include enhancements?

MR. JACKSON: My understanding, it has to include.

THE COURT: So two -- okay. All right. Then 240 it is. One-hundred-and-twenty months statutory maximum, consecutive to each other, based on the Free Crimes Doctrine. Exceptional sentence finding that I am making right now. If that turns out to be incorrect, then we will just do the sentencing again. Two-hundred-and-forty months. And Mr. Watters has earned every single day of that. And that won't help Mr. Jones or Ms. Lederer, but at least there is some justice being served, because ten years, that's a joke. That's a joke. So if that's what it ends up being, it's not going to be on me. Two-hundred-and-forty months. That's the absolute maximum I can do by law, otherwise, it would be more. If I could do more, it would be more.

So that's it. Draw it up.

1RP 42-44.

On appeal, Watters argued the plea court's affirmative misrepresentation that his sentences would be served concurrently, not consecutively, whether exceptional sentences or not, rendered his guilty pleas invalid, citing State v. Buckman, 190 Wn.2d 51, 409 P.3d 193 (2018), State v. A.N.J., 168 Wn.2d 91, 116, 225 P.3d 956 (2010), and State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). Brief of Appellant (BOA) at 1, 10-19; Reply Brief of Appellant (RBOA) at 1-6.

The court of appeals rejected Watters' claim, concluding that Judge Edwards' assertion that his sentences would be served concurrently, not consecutively, was limited to the circumstance of standard range sentences being imposed, and did not apply to the possibility of an aggravated exceptional sentence. Appendix at 6. As to Judge Edwards' reference to the prosecution's intent to request concurrent aggravated exceptional sentences of 120 months for each count and the reference to the sentencing court's discretion not to follow either parties' recommendation, the court of appeal concluded this was sufficient to inform Watters that he

could face a 20-year term of incarceration, despite no such specific warning of this potential direct consequence to Watters before he entered the pleas. Id.

F. ARGUMENT FOR REVIEW

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH PRIOR PUBLISHED DECISION OF THIS COURT AND OF THE COURT OF APPEALS.

Due process requires a guilty plea to be knowing, voluntary, and intelligent. Watters entered his guilty pleas with the erroneous understanding that the maximum total sentence he faced for the two charges was 120 months and was never informed a 240-month sentence was possible. Because Watters was affirmatively misinformed about the consequences of pleading guilty, his pleas were not knowing, voluntary and intelligent and therefore he should be allowed to withdraw them.

Due Process requires a guilty plea be knowing, voluntary, and intelligent. State v. Buckman, 190 Wn.2d 51, 409 P.3d 193, 198 (2018); State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49

(2006). It is well established that a defendant "must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea." State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). This standard is reflected in CrR 4.2(d), which provides the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea."

Consequences of pleading guilty include waiving numerous important constitutional rights intended to safeguard individuals against government overreach. These include the right to trial, the right to confront accusers and the right to present a defense. State v. MacDonald, 183 Wn2d 1, 8, 346 P.3d 748 (2015); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 21 & 22. Whether to waive these rights in favor of a government offer to compromise is a weighty decision with lasting consequences.

Before a decision to accept a government's offer to compromise can be made intelligently, a defendant must be aware of the potential risks of acceptance and nonacceptance. A.N.J., 168 Wn.2d at 113-14. Some aspects of the risk should be easy to quantify and compare, such as the sentencing consequences a trial might produce weighed against the sentencing consequences the government's compromise offer provides. No doubt the relative difference between the consequences is a significant and weighty factor in the decision. See Buckman, 409 P.3d at 198 (defendant pleaded guilty to avoid life sentence).

If a defendant concludes the benefits of a government plea offer do not sufficiently outweigh the risks of trial, that defendant will decide not to waive constitutional rights and instead go to trial. On the other hand, if the defendant concludes the benefits of plea offer outweigh the risks of trial, that defendant will waive their rights and accept the offer.

How each defendant weighs the risks depends on the specific circumstances of each defendant. For example, defendant "A" may determine that if the sentence contemplated by the government's compromise offer is 25% or less of the sentence that could result following conviction at trial, the government's offer should be accepted. Defendant "B," however, might require the sentence in the compromise offer be no greater than 20% of the potential sentence resulting from a trial conviction. Thus, if conviction at trial would result in a 20-year sentence, defendant "A" would accept the government's offer of five years or less in prison in exchange for waiving various constitutional rights, whereas defendant "B" would not accept anything greater that a four-year prison sentence to accept the offer.

Here, Watters was affirmatively misled by the plea court into believing he faced a total maximum sentence of 10 years in prison if he pleaded guilty to the two assault charges, when in fact the sentencing court had authority under the circumstances

to impose two consecutive 10-year terms, which it did. CP 71-80.

Affirmative misinformation about even just collateral consequences of a guilty plea can render a guilty plea unknowing and involuntary. A.N.J., 168 Wn.2d at 116; State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993). In A.N.J., a juvenile defendant pleaded guilty to a sex offense after being wrongly advised it could be purged from his record once he became an adult. 168 Wn.2d at 116. This Cort concluded such affirmative misinformation warranted allowing withdrawal of the guilty plea, even though it pertained to a collateral rather than a direct consequence. 168 Wn.2d at 117.

Similarly, in Stowe, it was reversible error not to allow withdrawal of a guilty plea when it was based on an affirmative misrepresentation by trial counsel regarding a collateral consequence, namely, whether pleading guilty would affect Stowe's military career. 71 Wn. App. at 188–89. The court stated that although "defense counsel does not have an obligation to

inform his client of all possible collateral consequences of a guilty plea," the question is "not whether counsel failed to inform defendant of collateral consequences, but rather whether counsel's performance fell below the objective standard of reasonableness when he affirmatively misinformed Stowe of the collateral consequences of a guilty plea." 71 Wn. App. at 187. "'[D]ifferent considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea.'" 71 Wn. App. at 187 (quoting In re Pers. Restraint of Peters, 50 Wn. App. 702, 707 n .3, 750 P.2d 643 (1988)).

The court found Stowe's counsel's performance deficient because counsel (1) knew Stowe wanted to continue his military career, (2) affirmatively misinformed Stowe he could maintain his military career despite the plea, and (3) failed to conduct any research before inaccurately advising Stowe. 71 Wn. App. at 188. Because Stowe had specifically asked about his ability to continue his military career and relied on his attorney's misinformation in

deciding to plead guilty, the court concluded Stowe was prejudiced by his attorney's deficient performance. 71 Wn. App. at 188–89.

The situation here is similar to that in A.N.J. and Stowe, albeit involves misinformation about a direct consequence of pleading guilty that came from the plea court instead of counsel. Judge Edwards, in discussing with Watters the consequences of pleading guilty to the two assault charges, affirmatively and unequivocally misinformed him that "those two sentences will be served by you at the same time, they wouldn't be consecutive." 7RP 10 (emphasis added). Judge Edwards noted for Watters that only the deadly weapon enhancement portion of his sentences would be served consecutively, such that his maximum sentence "would be somewhere between 63 and 84 months, plus 24."[4] Id.

The circumstances here are also somewhat akin to the circumstances in State v. Buckman, 190 Wn.2d 51, 409 P.3d 193

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[4] Judge Edwards also noted for Watters that the maximum penalty for each offense was "ten years in prison" such that "the total of your period of incarceration and your community custody cannot exceed 120 months." 7RP 11.

(2018). In Buckman, a juvenile defendant was misinformed he was facing potential life sentence for a child sex offense when because of his age his maximum sentence could not exceed 114 months plus three years of community custody. 190 Wn.2d at 55-56. Buckman claimed it was the possibility of a life sentence that "forced" him to plead guilty in exchange for a special sex offender sentencing alternative (SSOSA), which was ultimately imposed but later revoked for community custody violations. Id. Buckman then moved to withdraw his guilty plea on grounds he had been affirmatively misinformed about the potential sentencing consequences, which was denied by the trial court. Id. at 56.

The court of appeal rejected Buckman's appeal from the denial of his motion to withdraw his guilty plea, finding he had been properly advised of the sentencing consequences. Id. at 56-57. This Court reversed the court of appeal, agreeing instead with Buckman that the affirmative misinformation about the sentencing consequences rendered his guilty plea involuntary.

Id. at 58-60. It refused to allow him to withdraw his guilty plea, however, because he had failed to establish "actual and substantial prejudice" as a result of the misinformation. Id. at 60 (quoting In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 598-99, 316 P.3d 1007 (2014)).

When a defendant challenges the constitutionality of his guilty plea prior to sentencing, "[t]he defendant need not establish a causal link between the misinformation and his decision to plead guilty." State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). When challenged for the first time on appeal, however, the defendant must show the error in accepting the plea was "manifest." State v. Gregg, 9 Wn. App. 2d 569, 582, 444 P.3d 1219 (2019), aff'd, 196 Wn.2d 473, 474 P.3d 539 (2020). An error is manifest if the defendant shows "the asserted error had practical and identifiable consequences in the trial of the case." Id. (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotation marks omitted) (quoting State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999)). If Watters

materially relied on Judge Edwards' assurance that his sentences, whether within the standard range or not, would be served concurrently, not consecutively, then a manifest injustice has occurred, and he should be allowed to withdraw the pleas. Gregg 9 Wn. App. 2d at 583.

It is apparent from record here that no one besides Judge Mistachkin had ever contemplated the imposition of consecutive statutory maximum sentences totaling 20 years of confinement for Watters. The possibility of serving the sentences consecutively is never mentioned in the plea agreement, the guilty plea statement, or the extensive plea colloquy between Judge Edwards and Watters. The court of appeals' conclusion that Watters was adequately informed by Judge Edwards that he faced a potential 20-year sentence is not supported by the record.

Even Judge Mistachkin sensed his sentence might not be valid under the circumstances. See 7RP 43.[5] He was somewhat

[5] Judge Mistachkin states;

correct, but not because he lacked authority to enter such a sentence, but instead because Judge Edwards affirmatively misled Watters into believing he faced a maximum term of 10 years of confinement if he pleaded guilty to the charges in the third amended information. Judge Edwards failed to make Watters aware that a direct consequence of entering guilty pleas was the sentencing court's authority to impose *consecutive* 120-month terms. This lack of awareness by Watters of a direct consequence of pleading guilty to the assault charges renders his pleas unconstitutional because they were not knowing, voluntary, and intelligent. This error was manifest because the record shows Watters relied on Judge Edwards' assurance that if he pleaded guilty, he faced a maximum sentence of 10 years. Had Watters

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> "I am going to let the Court of Appeals sort it out, and that's fine. If they tell me what I am about to do is incorrect, then we can just do a re-sentencing, no harm, no foul; he is going to be in for at least ten years."

been made aware a 20-year sentence was possible; it is likely he would have taken his chances at trial instead.

F. CONCLUSION

The court of appeals decision conflicts with this Court's decision in Buckman and A.N.J., which unequivocally hold that affirmative misinformation about the direct or indirect consequences of a guilty plea render a guilty plea invalid. Buckman, 190 Wn.2d at 58-60; A.N.J., 168 Wn.2d at 116. Similarly, the court of appeals decision in Watters also conflicts with its own decision in Stowe, which similarly holds that misinformation about the direct or collateral consequences of a guilty plea render it invalid. Therefore, review is warranted under RAP 13.4(b)(1) & (2). This Court should grant review, and reverse and remand for a new trial.

I certify that this document was prepared using word processing software and contains 3,936 words in 14 point font excluding those portions exempt under RAP 18.17.

DATED this 1st day of July, 2025.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 3, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIAL WAYNE WATTERS, Appellant.	No. 58995-8-II UNPUBLISHED OPINION

CHE, J. — Danial Wayne Watters appeals his judgment and sentence for two counts of second degree assault with a deadly weapon, one count as a crime of domestic violence. He argues that his guilty plea was not knowing, voluntary, or intelligent because, at his plea hearing, the trial court misinformed him that his sentences on the two convictions, but not his enhancements, would run concurrently without acknowledging that the sentences could run consecutively if an exceptional sentence was imposed. In a statement of additional grounds, Watters also argues that the trial court erred by not entering written findings and conclusions to support an exceptional sentence, RCW 9.94A.535(2)(c) is unconstitutional as applied to him, the exceptional sentence violated his Sixth Amendment rights, and the trial court miscalculated his offender score. We disagree with all of Watters' arguments. Accordingly, we affirm.

FACTS

One evening, Watters broke into his ex-girlfriend, CL's, home where she was sleeping with her new boyfriend, AJ. Watters grabbed a golf club, hit CL in the head with it, and then proceeded to hit AJ repeatedly. AJ was flown to Harborview Medical Center for critical brain injuries as a result of the attack.

The State charged Watters with attempted first degree murder, first degree assault, first degree burglary (domestic violence), second degree assault (domestic violence), and two counts of felony violation of a domestic violence protection order (domestic violence).

In exchange for Watters' guilty plea, the State filed a third amended information charging him with second degree assault and second degree assault (domestic violence). As part of the plea agreement, Watters agreed that there should be a special finding that he was armed with a deadly weapon in both counts. Watters agreed that his criminal history was correct and complete and that his offender score was 13. In his statement of defendant on plea of guilty, Watters acknowledged that the trial court would not be bound by either party's recommended sentence and that the trial court could impose an exceptional sentence above the standard range if he was being sentenced for more than one crime and had an offender score of more than 9.

At the plea hearing, the trial court confirmed that Watters chose to plead guilty voluntarily, understood the plea form, and had adequate time to discuss the decision with his attorneys. The trial court reviewed the standard ranges, enhancements, community custody, and the maximum term of punishment for each charge. Watters agreed that his criminal history was

set forth accurately and completely and that his offender score was greater than 9. The trial court reviewed the standard sentence range with Watters given his offender score of 9 plus.

> With an offender score of nine plus, your standard range of punishment for each of these two crimes would be incarceration for not less than 63 months and not more than 84 months, plus an enhancement of 12 months. There is not an agreement regarding what the sentencing recommendation is going to be, which means that if you plead guilty to these crimes, when you are sentenced it will be up to me to decide where within that range of 63 to 84 months you should be sentenced on each case. And those two sentences will be served by you at the same time, they wouldn't be consecutive. . . . But the enhancement for the deadly weapon would—those will be consecutive.

Rep. of Proc. (RP) (Sept. 21, 2023) at 9-10. The trial court also reviewed the maximum term on each charge, confirming that Watters understood that the maximum punishment for each was 10 years in prison. The court asked Watters if he had any questions about anything in the statement on plea of guilty, to which Watters responded, "No, Your Honor. My attorney has been over it very well with me." RP (Sept. 21, 2023) at 12.

The State indicated it would be making an argument at sentencing regarding Watters' offender score and sentencing. When the trial court asked if that was covered in the statement on plea of guilty, the State explained that it was set out in the plea agreement that the State would be arguing for an exceptional sentence of 120 months as to each count, to run concurrently. The agreement also stated that Watters would ask for a sentence at the low end of the standard range. The trial court then explained the possibility of an exceptional sentence to Watters.

> There is a statute in the State of Washington, Mr. Watters, that provides when—when an offender has a score of greater than nine that the prosecution may seek a [] special sentence—an enhanced sentence based upon the fact that the offender score exceeds nine because the legislature provided for increased punishment as [] an offender score goes up what it tops out at nine. And so there's no greater punishment for someone with an offender score of ten than there is 9 or

> 15 than there is 9. But there is a statute that [] grants some discretion to the Court where an offender score is substantially greater than 9 of imposing a greater sentence. And the prosecutor in this case is going to be asking that your sentence be enhanced because of your offender score to the maximum of 120 months.

RP (Sept. 21, 2023) at 14.

The trial court found that Watters voluntarily made a knowing and intelligent waiver of his constitutional rights, that he understood the terms and conditions of the plea agreement. The trial court accepted Watters' guilty pleas.

At sentencing, the State argued for an exceptional sentence of 120 months as to each count, to run concurrently. Watters argued for a standard sentence at the low end of the standard range for a total of 87 months in custody and community custody to follow. The trial court explained its view of the case:

> I see no redeeming redemption, rehabilitation for Mr. Watters. He is—his motivation here was anger and violence and rage and vengeance. And he destroyed [AJ's] life: Traumatic brain injury. Can't—he is probably left significantly incapacitated to a large degree. And he had to be life-flighted to Harborview. He almost died. And he is probably lucky he didn't. And so is Mr. Watters, because then he would be looking at a murder charge; there is no doubt about it. It was attempted murder. The only reason it wasn't attempted murder is because the State was concerned with a technicality that it wasn't a burglary. Burglary in the first and assault committed therein, that's attempted murder; that's attempted murder all day long, and I wouldn't have had any problem getting there, but that's just me.

RP (Nov. 3, 2023) at 42.

The trial court emphasized Watters' extensive criminal history, noting that his offender scores were 13 and 14, respectively. The court explained, "The Free Crimes Doctrine[1] is exactly for this situation." RP (Nov. 3, 2023) at 42. On that basis, the trial court imposed an exceptional

[1] RCW 9.94A.535(2)(c)

upward sentence of the maximum term of 10 years on each count, ran consecutively for a total confinement period of 20 years. The trial court explained "[T]hat's the absolute maximum I can do by law, otherwise, it would be more. If I could do more, it would be more." RP (Nov. 3, 2023) at 44.

Watters appeals his exceptional sentence.

ANALYSIS

I. DIRECT APPEAL

Watters argues that his guilty plea is invalid because the trial court affirmatively misinformed him that his sentences would be served concurrently and failed to inform him that the terms could be imposed consecutively under an exceptional sentence.

A plea must be knowing, voluntary and intelligent to be valid. *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). "Before a guilty plea is accepted, the defendant must be informed of all direct consequences of the plea." *State v. Gregg*, 196 Wn.2d 473, 483, 474 P.3d 539 (2020). A direct consequence is one that "'represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). "Affirmative misinformation as to a direct consequence renders a plea constitutionally invalid." *Gregg*, 196 Wn.2d at 484.

Watters focuses on the trial court's comments during the plea hearing. There, the trial court explained to Watters that "those two sentences will be served by you at the same time, they wouldn't be consecutive." RP (Sept. 21, 2023) at 10. Watters contends that this amounted to

affirmative misinformation. But the context of the trial court's statements reveals that the trial court was specifically discussing standard range sentences when it said the sentences would be concurrent. RP (Sept. 21, 2023) at 10.

The trial court then went on to explain that an exceptional sentence was possible based on his offender score of 9 plus. And while the trial court noted that the State intended to ask the sentencing court to impose a total sentence amounting to the statutory maximum of one crime, it also clearly explained that the sentencing court would have discretion to depart from the standard range if it imposed an exceptional sentence. Watters was also informed that the sentencing court would not be bound by the State's recommendation in the plea agreement and in his statement on plea of guilty.

Considering the trial court's statements in their entirety, and given that Watters was repeatedly informed that the sentencing court would have discretion if it imposed an exceptional sentence based on Watters' high offender score, Watters was not misinformed of the direct consequences of his plea. Accordingly, we hold that Watters fails to show that his plea was not knowing, voluntary, and intelligent.

II. STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Watters argues that the trial court erred by not entering written findings of fact and conclusions of law supporting the exceptional sentence. When a trial court imposes a sentence outside the standard sentencing range, the court shall set forth the reasons for its decision in written findings and conclusions. RCW 9.94A.535. Here, the trial court made written findings and conclusions in the judgment and sentence explaining its

decision to impose an exceptional sentence. The judgment and sentence shows that the trial court imposed an exceptional sentence above the standard range on both counts by running the term of confinement on each count consecutive and included the written explanation of "Court ordered an exceptional sentence based on RCW 9.94.535. 120 months consecutive to 120 months." Clerk's Papers at 79. This is sufficient to comply with RCW 9.94A.535's written findings requirement. *See State v. Friedlund*, 182 Wn.2d 388, 341 P.3d 280 (2015).

Watters also argues that the trial court violated his Sixth Amendment right to a jury trial and that RCW 9.94A.535(2)(c) is unconstitutional as applied to him.[2] A trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when it determines that the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. *State v. Alvarado*, 164 Wn.2d 556, 568-69, 192 P.3d 345 (2008); RCW 9.94A.535(2)(c). Watters contends that RCW 9.94A.535(2)(c) is unconstitutional as applied to him because he did not stipulate to his criminal history or waive his jury trial right during sentencing. But the record reflects that Watters did agree that his criminal history was correct. And a trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when it determines that the defendant has committed multiple current offenses and the defendant's high offender score results in some of

[2] Watters also mentions that his sentence violated his Fourteenth Amendment rights. But Watters does not further develop this contention, and therefore we do not address it further. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Hoffman*, 116 Wn.2d 51, 71, 804 P.2d 577 (1991).

the current offenses going unpunished. *Alvarado*, 164 Wn.2d at 568-69; RCW 9.94A.535(2)(c). Watters' arguments fail.

Watters also argues that the trial court erred by running his sentences consecutive under RCW 9.94A.589(1)(b) because his second degree assault conviction was not a "serious violent" offense. But the trial court imposed consecutive sentences as part of an exceptional sentence based on RCW 9.94A.535(2)(c), expressly departing from the standards in RCW 9.94A.589(1) and (2). *See* RCW 9.94A.535 ("A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section.").

Finally, Watters argues that the trial court erred by not counting four of his prior offenses as one point under the same criminal conduct analysis. Whether his prior offenses constituted the same criminal conduct calls for information outside of the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Moreover, it was Watters' obligation to raise this issue at sentencing, and he bore the burden of demonstrating, to the trial court, that these offenses should be counted as one offense for scoring purposes. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). But even if four of his prior offenses should have counted as 2 points,[3] Watters' offender scores on his current offenses would still

[3] One of the four prior adult convictions sharing the same offense date in 2005 was a second degree assault. Second degree assault is a violent offense and because he is being sentenced for second degree assault convictions, a prior second degree assault conviction is scored as 2 points. Former RCW 9.94A.525(8) (2022).

have been over 9, and his standard sentence range would be the same. Moreover, Watters stipulated that his offender score was over 9. Accordingly, Watters' claim fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Cruser, C.J.

Price, J.

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

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