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STATE OF WASHINGTON  
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NO. 34755-5-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JERALD WAYNE DAVENPORT, JR.,**

**Appellant.**

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**BRIEF OF APPELLANT**

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pm 10/15/06

TABLE OF CONTENTS

Page

**I. ASSIGNMENTS OF ERROR ..... 1**

**1. MR. DAVENPORT IS CONSTITUTIONALLY ENTITLED TO BE PRESENT AT RESENTENCING. THE TRIAL COURT ERRED BY REFUSING TO ALLOW MR. DAVENPORT TO BE PRESENT AT HIS RESENTENCING..... 1**

**2. THE SUPERIOR COURT’S RELIANCE UPON A PRIOR OREGON CONVICTION TO ELEVATE MR. DAVENPORT’S CURRENT WASHINGTON CONVICTION TO A “THIRD STRIKE” UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT (“POAA”) WAS IMPERMISSIBLE FOR TWO REASONS: ..... 1**

**(a) The Oregon robbery statute lacks three elements of second-degree robbery in Washington – a completed crime, ownership, and a taking from the person or presence of the victim – so that prior out-of-state conviction cannot be counted as a “strike”; and ..... 1**

**(b) The prior conviction involved a “comparability” determination rather than just a decision about whether the prior conviction existed, so relegating this decision to a judge without the beyond-a-reasonable-doubt proof standard violated Apprendi..... 1**

**3. THE MANDATORY MINIMUM SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE IS DISPROPORTIONATE TO THE CRIME OF ROBBERY AND, HENCE, VIOLATES STATE CONSTITUTIONAL PROTECTIONS AGAINST CRUEL OR UNUSUAL PUNISHMENTS..... 1**

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

**1. BOTH THE FEDERAL AND STATE CONSTITUTIONS ENTITLE A DEFENDANT TO BE PRESENT AT HIS SENTENCING OR RESENTENCING. MR. DAVENPORT, WHO IS INCARCERATED WITH DOC, REQUESTED TO BE PRESENT AT HIS RESENTENCING BUT THE TRIAL COURT REFUSED. DID THE TRIAL COURT’S REFUSAL VIOLATE MR.**

<b>DAVENPORT’S CONSTITUTIONAL RIGHT TO BE PRESENT AT RESENTENCING? .....</b>	<b>2</b>
<b>2. WAS THE PRIOR OREGON ROBBERY CONVICTION “COMPARABLE” TO SECOND-DEGREE ROBBERY IN WASHINGTON, SUCH THAT IT CAN BE CLASSIFIED AS A “STRIKE” (UNDER RCW 9.94A.030(29)(O)) ELEVATING MR. DAVENPORT’S STANDARD SENTENCE RANGE TO LIFE WITHOUT PAROLE – GIVEN THAT THE OREGON STATUTE LACKS THE ELEMENTS OF A COMPLETED CRIME, OWNERSHIP, AND A TAKING FROM THE PERSON OR PRESENCE OF THE VICTIM THE CONVICTION UNDER THE WASHINGTON STATUTE REQUIRES? .....</b>	<b>2</b>
<b>3. DOES THE TRIAL COURT’S DECISION TO RAISE THE STATUTORY MAXIMUM FROM THE SRA RANGE TO LIFE WITHOUT PAROLE, BASED ON A PRIOR OREGON CONVICTION THAT COULD HAVE BEEN COMMITTED IN A VARIETY OF WAYS, SOME OF WHICH WOULD AMOUNT TO A “STRIKE” AND SOME OF WHICH WOULD NOT, WITHOUT A JURY DETERMINATION BEYOND A REASONABLE DOUBT, VIOLATE APPRENDI? .....</b>	<b>2</b>
<b>4. IS A MANDATORY MINIMUM SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE FOR SECOND-DEGREE ROBBERY UNCONSTITUTIONALLY DISPROPORTIONATE, UNDER THE STATE CONSTITUTION? .....</b>	<b>2</b>
<b>III. STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>A. Appellate History. ....</b>	<b>2</b>
<b>B. Discussion on Remand.....</b>	<b>3</b>
<b>C. Mr. Davenport’s Sentencing Brief and the Trial Court’s Response.....</b>	<b>4</b>
<b>D. Resentencing in Mr. Davenport’s Absence.....</b>	<b>4</b>
<b>Oregon Second Degree Robbery Included in Offender Score.....</b>	<b>5</b>

<b>IV. ARGUMENT.....</b>	<b>5</b>
<b>A. MR. DAVENPORT HAD A RIGHT TO BE PRESENT AT RESENTENCING; IT WAS ERROR FOR TRIAL COURT TO REFUSE HIS PRESENCE.....</b>	<b>5</b>
<b>B. MR. DAVENPORT’S PRIOR OREGON SECOND-DEGREE ROBBERY CONVICTION CANNOT COUNT AS A “STRIKE” BECAUSE ITS ELEMENTS ARE NOT “COMPARABLE” TO THE ELEMENTS OF SECOND-DEGREE ROBBERY IN WASHINGTON.....</b>	<b>6</b>
<b>1. Mr. Davenport’s Prior Oregon Conviction for Second-Degree Robbery.....</b>	<b>7</b>
<b>2. Oregon’s Second-Degree Robbery Statute Lacks The Elements of a Completed Taking, Ownership, and Taking From the Person of Another, That Are Contained in Washington’s Second-Degree Robbery Statute .....</b>	<b>8</b>
<b>3. This Comparison Of The Elements Is Outcome-Determinative; No Further Comparison Of Facts Is Permitted .....</b>	<b>15</b>
<b>4. Even A Review Of The Factual Record Of The Prior Oregon Conviction Does Not Classify It As A Strike .....</b>	<b>17</b>
<b>C. THE SENTENCE OF LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE IS GROSSLY DISPROPORTIONATE TO THE CRIME OF ROBBERY IN THE SECOND DEGREE AND, HENCE, VIOLATES THE STATE CONSTITUTION. ....</b>	<b>18</b>
<b>1. Prior Treatment of This Issue by the Washington Supreme Court in Rivers.....</b>	<b>18</b>
<b><i>a. Rivers Must Be Re-Evaluated, Because the Washington Supreme Court – in Thomas – Ruled That the Difference Between Life Without Parole and Life With Parole Was Constitutionally Significant. ....</i></b>	<b>19</b>
<b><i>b. Rivers Must Be Re-Evaluated, Because a Multi-State Comparison of Sentences for Similar Crimes Shows That the Difference is Constitutionally Significant Under Thomas.....</i></b>	<b>20</b>

<b>i. The Maximum for This Crime In Washington – Without the Three Strikes Law – Would Be 75 Months. ....</b>	<b>20</b>
<b>ii. The Average Sentence for This Crime in Washington – Without The Three Strikes Law – Would Be 75 Months.....</b>	<b>21</b>
<b>iii. The Maximum Sentence for Both First- and Second-Degree Robbery in Most Other States is Far Less Than Life Without Parole. ....</b>	<b>22</b>
<b>iv. The Maximum Sentence for Both First- and Second-Degree Robbery as Third Strikes in Other States is Still Less than Life Without Parole.....</b>	<b>46</b>
<b>v. Conclusion Regarding Rivers and Disproportionality... </b>	<b>48</b>
<b>V. CONCLUSION .....</b>	<b>49</b>

**TABLE OF AUTHORITIES**

Page

**Cases**

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....i, 1, 2, 16

In re Grisby, 121 Wn.2d 419, 853 P.2d 901 (1993).....19

In re the Personal Restraint of Laverty, 154 Wn.2d 249, 111 P.3d 837 (2005).....9, 13, 15, 16, 17

Paul v. United States, 734 F.2d 1064 (5<sup>th</sup> Cir. 1984).....5

State v. Branstetter, 85 Wn. App. 123, 935 P.2d 620, review denied, 132 Wn.2d 1011 (1997).....5

State v. Bunting, 115 Wn. App. 135, , 61 P.3d 375 (2003).....13, 15, 17

State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980) .....18

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) .....9

State v. McIntyre, 112 Wn. App. 478, 49 P.3d 151 (2002).....14, 15

State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998) .....8, 15, 17

State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996) .....18, 19, 20, 48

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).....18

State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987), cert denied, 486 U.S. 1061, 100 L.Ed 2d 934, 108 S. Ct. 2834 (1988).....5, 6

State v. Russell, 104 Wn. App. 422, 16 P.3d 664 (2001) .....8

State v. Thomas, 150 Wn.2d 821,83 P.3d 970 (2004).....19, 20, 49

State v. Thompson, 123 Wn.2d 877, 872 P.2d 1097 (1994).....5

<u>State v. Worl</u> , 91 Wn. App. 88, 955 P.2d 814 (1998).....	6
<u>United States v. Rodriguez-Gonzales</u> , 358 F.3d 1156 (9 <sup>th</sup> Cir. 2004).....	17

**Statutes**

RCW 9.94A.030(29)(O) .....	ii, 8
RCW 9.94A.525, .530.....	6
RCW 9A.20.021(1)(a) .....	20
RCW 9A.56.190.....	11
RCW 9A.56.200.....	20, 31
RCW 9A.56.210.....	11, 12, 22

**Other Authorities**

CrR 3.4 .....	5
ORS 164.015.....	10, 12
ORS 164.065.....	11
ORS 164.075.....	11, 13
ORS 164.085.....	11
ORS 164.095.....	11
<i>ORS 164.395</i> .....	9, 10, 12, 13
ORS 164.405.....	7, 9, 12, 13
Persistent Offender Accountability Act (“POAA”) .....	i, 1, 2, 3, 4, 5, 8

## I. ASSIGNMENTS OF ERROR

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4. IS A MANDATORY MINIMUM SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE FOR SECOND-DEGREE ROBBERY UNCONSTITUTIONALLY DISPROPORTIONATE, UNDER THE STATE CONSTITUTION?

### III. STATEMENT OF THE CASE

#### A. Appellate History.

Jerald Wayne Davenport, Jr., was convicted of two counts of robbery in the first degree for a single incident on November 19, 2000, in Clark County, Washington. CP 3. He was sentenced to life without parole under the Persistent Offender Accountability Act (POAA). CP 7, 11.

Following direct appeal, one of his robbery convictions was reversed. See Mandate, CP 15-28. The Mandate ordered the trial court to resentence Mr. Davenport:

We affirm Davenport's conviction of count I. We reversed Davenport's conviction of count II and remand with instructions to dismiss with prejudice count II and for resentencing.

CP 18.

**B. Discussion on Remand.**

On March 16, 2006, the trial court discussed the status of Mr. Davenport's remand case. RP 3-10. Mr. Davenport was not present at the hearing but counsel, David Schultz, was there on Mr. Davenport's behalf. Attorney Schultz requested that Mr. Davenport be present at resentencing. RP 6. Mr. Davenport was incarcerated with DOC in Nevada. RP 6-7. The State offered to prepare a transport order. RP 7.

The court recognized Mr. Davenport's right to be present at resentencing. RP 7. However, the court felt that the Mandate only required it to vacate one of Mr. Davenport's convictions but that doing so had no effect on his sentence because he would be resented under the POAA. RP 8. Attorney Schultz disagreed arguing that Mr. Davenport was entitled to be present at a resentencing hearing regardless of the anticipated outcome. RP 5-7, 9. The court set signing of the resentencing order to April 11. RP 10.

**C. Mr. Davenport's Sentencing Brief and the Trial Court's Response.**

On March 21, Attorney Schultz filed a sentencing brief challenging Mr. Davenport's criminal history calculation and offender score. Mr. Davenport challenged his Oregon robbery conviction as strike because it is not comparable to a Washington second degree robbery. CP 30-34, 41-58. Also, Mr. Davenport challenged his life without the possibility of parole sentence as grossly disproportionate to the crime and in violation of the Washington State Constitution. CP 35-38, 68-89. Finally, Mr. Davenport challenged the trial court's decision that Mr. Davenport had no right to be present at resentencing. CP 38-40.

The sentencing brief prompted the trial court to send a letter to the parties indicating that it was not re-sentencing Davenport; rather, the court planned to vacate count II and leave the POAA sentence in effect on count I. CP 90-91.

**D. Resentencing in Mr. Davenport's Absence.**

Mr. Davenport was not present at the April 11 resentencing hearing. Attorney Schultz offered to argue the issues raised in Mr. Davenport's March 21 sentencing brief but the trial court would not take the issues into consideration. Instead, the court signed an order vacating count II, and recalculating Davenport's offender score on count I as 5 with an offender score of 57-75 months. RP 13-15; CP 92-93. Previously, at Mr.

Davenport's 2002 sentencing, the trial court had calculated Mr. Davenport's offender score as 7 with a standard range of 87-116.

**E. Oregon Second Degree Robbery Included in Offender Score.**

In determining both the 2002 and the 2006 sentences, the trial court included an Oregon Robbery in the Second Degree conviction in the offender score calculation and in determining the applicability of the POAA sentence.

**IV. ARGUMENT**

**A. MR. DAVENPORT HAD A RIGHT TO BE PRESENT AT RESENTENCING; IT WAS ERROR FOR TRIAL COURT TO REFUSE HIS PRESENCE.**

A defendant has a right, under both the Washington and United States Constitutions to be present at trial. State v. Thompson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). This right is considered fundamental. Id. By Washington court rule, the defendant's presence is necessary at arraignment, at every stage of the trial, and at the imposition of sentence. CrR 3.4; State v. Branstetter, 85 Wn. App. 123, 128, 935 P.2d 620, review denied, 132 Wn.2d 1011 (1997). Also, a defendant has a constitutional right to be present at sentencing including resentencing. State v. Rupe, 108 Wn.2d 734, 743, 743 P.2d 210 (1987), cert denied, 486 U.S. 1061, 100 L.Ed 2d 934, 108 S. Ct. 2834 (1988), (citing Paul v. United States, 734 F.2d 1064 (5<sup>th</sup> Cir. 1984)). Generally, the right exists whenever a court considers any

matter in connection with a defendant's sentence. Rupe, 108 Wn.2d at 741. The calculation of an offender score is required at sentencing. RCW 9.94A.525, .530.

In the context of determining a defendant's offender score, the operative rule is that

The offender score includes all prior convictions . . . existing at the time of that particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology.

State v. Worl, 91 Wn. App. 88, 93, 955 P.2d 814 (1998). This rule illustrates the importance and fundamental fairness behind the defendant's right to be present at resentencing or any sentencing for that matter. In resentencing Mr. Davenport, the trial court vacated count II and recalculated Mr. Davenport's standard range for count I. In making this recalculation, the trial court necessarily made factual determinations about Mr. Davenport's criminal history including the comparability of Mr. Davenport's Oregon conviction for second degree robbery. The trial court was not entitled to make this factual determination without Mr. Davenport being present.

**B. MR. DAVENPORT'S PRIOR OREGON SECOND-DEGREE ROBBERY CONVICTION CANNOT COUNT AS A "STRIKE" BECAUSE ITS ELEMENTS ARE NOT "COMPARABLE" TO THE ELEMENTS OF SECOND-DEGREE ROBBERY IN WASHINGTON.**

**1. Mr. Davenport's Prior Oregon Conviction for Second-**

### **Degree Robbery**

Mr. Davenport was convicted of second-degree robbery in Oregon in 1992. He was charged on November 19, 1992, with two counts of robbery in the second degree, in violation of ORS 164.405, for an October 17, 1992, robbery. CP 47. But he was convicted of just one count. CP 49. The Order Entering Plea of Guilty Pursuant to Petition Filed, dated April 15, 1993, shows that Mr. Davenport pled guilty to Count 1, robbery in the second degree. CP 49. As discussed in Section (2) below, that crime can be committed in a variety of ways. Some ways do not require proof of a completed crime; some ways do not require proof that the taking was from the person or presence of the victim; some ways do not require proof of the victim's ownership of the property taken. The Judgment did not specify which way Mr. Davenport's second-degree robbery was committed. CP 51. It recited only that he was convicted of second-degree robbery. CP 51.

The Petition to Plead Guilty and Waiver of Jury Trial contains Mr. Davenport's statement, and it did not fill in those blanks either; it said: "On 10/17/92, I helped another person steal money from a store clerk. The other person pretended he had a gun." CP 57-58. This statement does not contain any admission that he took anything from the person or presence of the clerk, or say anything about ownership of the money, or whether an actual robbery was completed.

**2. Oregon’s Second-Degree Robbery Statute Lacks The Elements of a Completed Taking, Ownership, and Taking From the Person of Another, That Are Contained in Washington’s Second-Degree Robbery Statute**

When dealing with out-of-state or foreign convictions in a “three strikes” or POAA case, Washington courts first ask whether the out-of-state conviction is “comparable” to one of the Washington convictions that count as a “strike,” so that it can be counted as a “strike” for “three strikes” purposes. State v. Russell, 104 Wn. App. 422, 440, 16 P.3d 664 (2001).

To determine if the foreign conviction is comparable to a “strike” – that is, comparable to a most serious offense which would count as a strike under RCW 9.94A.030(29)(o) – the court must compare the elements of the out-of-state offense with the elements of a comparable Washington offense. State v. Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). If the elements of the out-of-state offense are the same as those of the comparable Washington crime, then the foreign conviction is comparable. Morley, 134 Wn.2d at 605.

If the out-of-state offense is missing any element required to prove the Washington counterpart of the offense, then the foreign conviction is not comparable to its purported Washington counterpart. Id., 134 Wn.2d at 606; Russell, 104 Wn. App. at 441.

In the past, Washington courts had ruled that if the foreign statute lacked *some* of the elements of a purportedly comparable Washington

statute; or if the foreign statute contained alternative elements, *some* of which are missing from the supposedly comparable Washington crime; then the Washington court could review portions of the foreign conviction record to figure out which alternative and what facts actually applied to the defendant. See State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

But that has changed. In In re the Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), the Washington Supreme Court ruled that the comparability analysis is based, first and foremost, on a side-by-side comparison of the elements of the Washington and out-of-state crimes. Any comparison of the facts allegedly underlying the conviction is at best “problematic,” according to that Court, given the practical consideration that a person who pled guilty to a prior foreign offense did not necessarily have any incentive to litigate the specifics of the allegations that the State of Washington now sought to use against him. Id., 154 Wn.2d at 255.

We therefore compare the elements of second-degree robbery in Oregon with the elements of second-degree robbery in Washington, to see if the former is comparable to the latter.

Mr. Davenport was charged with second-degree robbery in Oregon in violation of ORS 164.405. That statute provides, “(1) A person commits the crime of robbery in the second degree *if the person violates ORS 164.395* and the person: (a) Represents by word or conduct that the person

is armed with what purports to be a dangerous or deadly weapon; or (b) Is aided by another person actually present.” (Emphasis added.)

The referenced ORS 164.395 provides – or rather provided, at the time of Mr. Davenport’s prior Oregon conviction:

(1) A person commits the crime of robbery in the third degree *if in the course of committing or attempting to commit theft* the person uses or threatens the immediate use of physical force *upon another* person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property *or another person* to deliver the property or to engage in other conduct which might aid in the commission of the theft.

(Emphasis added.) As the emphasized portions show, in the order in which they appear, this robbery statute does not require proof of a completed crime; does not require proof of taking from the person or presence of another (that force can be used, instead, on anyone); and does not require proof of another’s ownership.

This third-degree robbery statute, by its prohibition of theft, incorporates by reference the elements of Oregon’s theft statute, ORS 164.015. That statute sets forth a variety of ways of committing theft, including several that do not involve a taking from or in the presence of the victim, such as simply taking lost or mislaid property, withholding property,

and obtaining property by deception; it also lacks the element of taking the property from the actual owner:

A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

- (1) Takes, appropriates, obtains or withholds such property from an owner thereof; or
- (2) Commits theft of property lost, mislaid or delivered by mistake as provided in ORS 164.065; or
- (3) Commits theft by extortion as provided in ORS 164.075; or
- (4) Commits theft by deception as provided in ORS 164.085; or
- (5) Commits theft by receiving as provided in ORS 164.095.

In Washington, second-degree robbery is defined in RCW 9A.56.190 and RCW 9A.56.210. The first statute, RCW 9A.56.190, defines robbery:

A person commits robbery when he unlawfully takes personal property *from the person of another or in his presence against his will* by the use or threatened use of immediate force, violence, or fear of injury *to that person or his property or the person or property of anyone*. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

(Emphasis added.) The second statute, RCW 9A.56.210, provides that second degree robbery is robbery, as defined above.

Both the Oregon and Washington statutes require that force or threats of force be used.

But there are three other portions of the Oregon statute that are narrower than the counterpart Washington statute. First, Oregon's statutory definition of robbery requires that a person, while "in the course of committing or *attempting* to commit theft," use force or threats of force, etc. ORS 164.395 (emphasis added). Washington's robbery statute requires an actual taking, not just an attempt.

Second, Oregon's second-degree robbery statute *lacks the element of a taking from the person or the presence of another*. It criminalizes as second-degree robbery all sorts of takings, incorporating by reference all the different sorts of theft listed in ORS 164.015. That theft statute criminalizes takings of lost or mislaid property; of "property delivered by mistake"; and even of property taken "by deception." ORS 164.015(2), (4). Such takings are not necessarily from the person or presence of the victim; more likely than not, those sorts of takings occur some distance away from the victim.

Oregon's robbery statute, which incorporates the elements of this Oregon theft statute, does not provide the missing elements. Under ORS 164.405, second-degree robbery includes *either* the element that the

defendant purported to be armed, *or* the element that he was aided by another person. Aiding can certainly occur outside the presence of the victim in a theft by deception, or theft of lost or mislaid property, etc., situation; use of a weapon can, too. Under ORS 164.405's cross-referenced ORS 164.395, second-degree robbery also requires "immediate use of physical force." But such physical force can be used on any person, or in the statute's words, "another person." It does not have to be the victim. Thus, neither of these statutes supplies the missing elements that the theft statute lacks.

Related to this second problem is the third problem, that is, the ownership element. The Washington robbery statute requires proof of taking from the owner, that is, from someone with an ownership or possessor interest in the property. State v. Bunting, 115 Wn. App. 135, 143 & nn. 17-18, 61 P.3d 375 (2003) (cited with approval in In re Lavery, 154 Wn.2d 249). This element is not contained in the Oregon statute. See, e.g., ORS 164.075 (theft by extortion lacks this element; this is one of the alternative grounds of theft in the theft statute).

Hence, the elements of the prior Oregon conviction are not "comparable" to the elements of Washington's second-degree robbery statute. Since the elements of the Oregon statute are broader than the elements of the Washington statute, the two statutes are not comparable.

We acknowledge that Division II rejected an argument similar to this one in State v. McIntyre, 112 Wn. App. 478, 482, 49 P.3d 151 (2002). In that case, this court analyzed the element of a taking from the person or presence *of the victim* – and concluded that under both Washington and Oregon law, the force could be used either to obtain or retain the property, so the force *against the victim* did not have to be contemporaneous with the taking. All of the examples used in the McIntyre opinion involved taking or retaining property from the person or presence *of the victim*; all of the analysis in that opinion assumed that the element in both statutes was use of force *against the victim*. The McIntyre court therefore rejected the defendant/appellant’s argument that the Oregon statute lacked the element of taking from the person or presence that the Washington statute contained.

But we are focusing on something else. We are focusing on the fact that the Washington statute requires proof of a taking (or retaining) from the person or presence *of the victim*, or, in Washington’s statutory language, “takes personal property from the person of another or in his presence ...” The Oregon statute does not require proof of a taking from the person or presence of the victim at all – the theft can be done at a distance, by deception, by retaining lost or mislaid property, or by extortion, and in Oregon the force required can be against anyone – in Oregon’s statutory language, “upon another person,” without limitation. The McIntyre court

thus rejected an argument that attempted to distinguish the Oregon and Washington second-degree robbery statutes on the basis of *when* the force was used. It did not address the argument that we make – the argument that the Washington statute narrowly limits the recipient of the use of force to the victim of the taking while the Oregon statute does not – at all.

Further, the McIntyre court did not address the ownership issue on which the appellate court ruled in Bunting. It could not address that argument, because Bunting was decided after McIntyre.

**3. This Comparison Of The Elements Is Outcome-Determinative; No Further Comparison Of Facts Is Permitted**

It is this comparison of the elements – rather than a comparison of allegations– that must form the “cornerstone” of this Court’s inquiry.<sup>2</sup>

In fact, following Laverty, this comparison of the elements should provide the end of the inquiry. As the Supreme Court stated in In re Laverty, 111 P.3d 837, 842: “Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign

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<sup>2</sup> Morley, 134 Wn.2d at 606 (“While it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.”).

conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.” As the Laverty court acknowledged, this conclusion is bolstered by Apprendi v. New Jersey, 530 U.S. 466, 490, which held that any *fact* increasing the statutory maximum must be determined by a jury, by the beyond a reasonable doubt standard.

The Laverty Court’s ruling on this point applies here, in large part because that case arose in virtually the same procedural posture as this one, that is, in the context of a personal restraint petition challenging a “three strikes” determination based on a prior, arguably incomparable, prior conviction. Laverty, 111 P.3d 837. The Laverty Court specifically explained Apprendi’s impact on the comparability determination:

In Apprendi, the United States Supreme Court held that *except for a prior conviction*, a “fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. Life without possibility of parole is a penalty beyond the statutory maximum for the crime of second degree robbery.

In applying Apprendi, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. ... All a sentencing court needs to do is find that the prior conviction exists. ... No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence. ... *While this is also true of foreign crimes that are identical on their face, it is not true for foreign crimes that are not facially identical. In essence, such crimes are different crimes.*

whether the person he “helped” got that far. Thus, even if this Court could permissibly consider this guilty plea statement, it cannot be used to supply the missing elements that the statute lacks.

**C. THE SENTENCE OF LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE IS GROSSLY DISPROPORTIONATE TO THE CRIME OF ROBBERY IN THE SECOND DEGREE AND, HENCE, VIOLATES THE STATE CONSTITUTION.**

**1. Prior Treatment of This Issue by the Washington Supreme Court in Rivers<sup>5</sup>.**

The Washington State Constitution bars cruel or unusual punishments, and that portion of our Constitution is more protective of individual rights than is the Federal Constitution.<sup>6</sup> In fact, the Washington Supreme Court has explicitly ruled that Washington’s constitutional requirement of *proportionality* in sentencing – the protection at issue here – is more protective of individual rights than is the U.S. Constitution. State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

In State v. Rivers, 129 Wn.2d 697, 712-15, however, the Court ruled that application of the “three strikes” law to a defendant convicted of second-degree robbery did *not* constitute cruel punishment. It examined

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<sup>5</sup> State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996).

<sup>6</sup> State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000), amended by Order Changing Opinion (February 2, 2001) (citing “our repeated recognition that the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment”) (numerous citations omitted).

several factors, including a comparison of the punishment imposed for this crime in the other states, and concluded:

It is likely Defendant Rivers would have received a similar, harsh sentence for his third serious offense under the majority of jurisdictions in this country. The penalties vary, but many include life sentences for three-time offenders. This court has held that the distinction between life sentences with and without parole is not significant. *In re Grisby*, 121 Wn.2d 419, 427, 853 P.2d 901 (1993).

Thus, without conducting a state by state comparison of the actual penalties imposed in other states, the *Rivers* court summarily stated that all such sentences would be harsh. It then concluded that the difference between a harsh life sentence that involves parole, and a harsh life sentence that denies parole, was not “significant.”

Both conclusions must be re-evaluated. It is not true that most other jurisdictions would impose an equally harsh sentence; and it is no longer legally correct to say that the difference between even a life with parole sentence and a life without parole sentence is not “significant.”

***a. Rivers Must Be Re-Evaluated, Because the Washington Supreme Court – in Thomas<sup>7</sup> – Ruled That the Difference Between Life Without Parole and Life With Parole Was Constitutionally Significant.***

With respect to the latter point, the Washington Supreme Court has now ruled that the difference between even a life with parole sentence and a

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<sup>7</sup> *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004).

life without parole sentence is constitutionally significant. State v. Thomas, 150 Wn.2d 821, 847 (explicitly acknowledging that despite the contrary statement in Rivers, quoted above, the Court was now holding: “For several reasons, we hold that there *is* a significant difference between a life sentence with parole and a sentence of life without parole in the context of capital sentencing.”). This alone compels re-evaluation of Rivers’ conclusion.

***b. Rivers Must Be Re-Evaluated, Because a Multi-State Comparison of Sentences for Similar Crimes Shows That the Difference is Constitutionally Significant Under Thomas.***

Now that we know that the difference between a sentence for a term of years and a sentence of life without parole matters, there is no way to do the comparability analysis other than by actually comparing the sentence imposed for Mr. Davenport’s crime of conviction, with the sentence he would have received in other states. The Rivers Court did not do that; we present that comparison here.

***i. The Maximum for This Crime In Washington – Without the Three Strikes Law – Would Be 75 Months.***

First-degree robbery, Mr. Davenport’s crime of conviction, is a Class A felony. Without the three strikes law, the statutory maximum for such a class A felony would be life in prison (though not life without possibility of parole). RCW 9A.56.200; RCW 9A.20.021(1)(a).

The standard sentence range, however, with a criminal history score of 5, was 57 to 75 months, as the Judgment itself states. Further, second-degree robbery – the basis for Mr. Davenport’s two prior “strikes” – constitute Class B felonies, with a statutory maximum of ten years.

Thus, Mr. Davenport’s life without parole sentence is very much more serious than the sentence he would have received without these prior convictions in Washington.

**ii. The Average Sentence for This Crime in Washington – Without The Three Strikes Law – Would Be 75 Months.**

The Sentencing Guidelines Commission keeps statistics on sentences for all crimes in Washington, and we have learned from them that the average prison sentence for the offense of *second-degree robbery* in Washington, under the SRA, from 1999 to 2004, has been approximately 19.6 months.<sup>8</sup>

The average prison sentence for the offense of *first-degree robbery* in Washington, under the SRA, for the period July 1, 1999 to June 30, 2004, has been 75.6 months.

Mr. Davenport’s sentence of life imprisonment is disproportionate to both of those average sentences.

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<sup>8</sup> Sentencing Guidelines Commission, Statistical Summaries, 1997-2001.

**iii. The Maximum Sentence for Both First- and Second-Degree Robbery in Most Other States is Far Less Than Life Without Parole.**

The next question is whether Mr. Davenport's punishment is disproportionate to sentences imposed in *other* jurisdictions for the same crime.

For that reason, we did a multi-state analysis of the sentences imposed in other states for the comparable crime. In some cases that comparable crime may be characterized as second-degree robbery; in some cases it may be characterized as first-degree robbery. We include the results of that survey for both crimes, here.

**ROBBERY STATUTES AND PENALTIES BY STATE**

RCW 9A.56.210 (2002), Robbery in the second degree:

- (1) A person is guilty of robbery in the second degree if he commits robbery.
- (2) Robbery in the second degree is a class B felony.

<b>State</b>	<b>Robbery Statute</b>	<b>Sentence</b>	<b>Fine</b>
Alabama	Code of Ala. § 13A-8-43(2)(b) (2005)  Robbery 3rd degree Class C felony	Code of Ala. § 13A-5-6 (3) (2005) not less than 1 yr 1 day, not more than 10 years	Code of Ala. § 13A-5-11 (a)(3) (2005)  not more than \$5,000
Alaska	Alaska Stat. § 11.41.510 (a)(2)(b) (2006)	Alaska Stat. § 12.55.125 (d) (2006)	Alaska Stat. § 12.55.035 (3) (2006)

	Robbery 2nd degree Class B Felony	not more than 10 yrs	not more than \$100,000
Arizona	A.R.S. § 13-1902A.B. (2006) Robbery Class 4 felony	A.R.S. § 13-702A.3 (2006) Min. 1.5 yrs. Max. 3 yrs.	A.R.S. § 13-801A (2006)  Not more than \$150,000
Arkansas	A.C.A. § 5-12-102 (a)(b) (2006)  Class B Felony	A.C.A. § 5-4-401 (a)(3) (2006)  Not less than 5 yrs, not more than 20 yrs	A.C.A. § 5-4-201 (a)(1) (2006)  Not to exceed \$15,000
California	Cal Pen Code § 212.5 (c) (2006)  Robbery 2nd degree	Cal Pen Code § 213 (B)(2) (2006)  2,3 or 5 yrs.	Not applicable
Colorado	C.R.S. § 18-4-301 (2005)  Robbery Class 4 Felony	C.R.S. § 18-1.3-401 (V) (A) (2005)  Min. 2 yrs. Max. 6 yrs.  Mandatory Period of Parole - 3 years	C.R.S. § 18-1.3-701 (2005)  No fine shall be imposed for conviction of a felony except as provided by §18-1.3-401
Connecticut	Conn. Gen. Stat. § 53a-136 (2004) Robbery 3rd degree Class D Felony	Conn. Gen. Stat. § 53a-35a (7) (2004) not less than 1 year; not more than 5 yrs	Conn. Gen. Stat. § 53a-41 (4) (2004) not to exceed \$5,000
Delaware	11 Del. C § 831(a) (2) (2005) Robbery 2nd degree	11 Del. C. § 4205(5) (2005) up to 5 yrs	11 Del. C. § 4205 (k) (2005)

	Class E Felony	served at level V facility	as court deems appropriate
District of Columbia	D.C. Code § 22-2801 (2006)  Robbery	D.C. Code § 22-2801 (2006)  min. 2 yrs.- max. 15 yrs.	Not applicable
Florida	Fla. Stat. § 812.13 (c) (2005) Robbery 2nd degree Felony – 1st degree	Fla. Stat. § 775.082 3(c) (2005)  not exceeding 15 yrs	Fla. Stat. § 775.083 (b) (2005)  \$10,000
Georgia	O.C.G.A. § 16-8-40 (a)(2) (2005)  Robbery	O.C.G.A. § 16-8-40 (b) (2005) Min. 1 yr – max. 20 yrs	Not applicable
Hawaii	HRS § 708-841(1)(b) (2005) Robbery 2nd degree Class B Felony	HRS § 706-660(1) (2005) 10 yrs	HRS § 706-640(1)(b) (2005) \$25,000
Idaho	Idaho Code § 18-6501 (2005)  Robbery	Idaho Code § 18-6503 (2005) Not less than 5 yrs and may be extended to life	Not applicable
Illinois	720 ILCS 5/18-1(a) and (b) (2005) Robbery Class 2 Felony	730 ILCS 5/5-8-1(5) (2005) not less than 3 yrs, not more than 7 yrs	730 ILCS 5/5-9-1(a) (1) (2005)  \$25,000
Indiana	Burns Ind. Code Ann. § 35-42-5-1 (2) (2005)  Robbery Class C Felony	Burns Ind. Code Ann. § 35-50-2-6 (a) (2005) Fixed 4 yrs. (aggravating	Burns Ind. Code Ann. § 35-50-2-6 (2005)  Not more than

		add <u>not more than</u> 4 yrs; mitigating subtract <u>not more than</u> 2 yrs)	\$10,000
Iowa	Iowa Code § 711.3(2005)  Robbery 2nd degree Class C Felony	Iowa Code § 902.9 4 (2005)  not more than 10 years	Iowa Code § 902.9 4 (2005)  At least \$1,000 but not more than \$10,000
Kansas	K.S.A. § 21-3426 (2005) Robbery Level 5/Person Felony	K.S.A. § 21-4704 (2005) Per grid on Kansas website 50-60 months	Not applicable
Kentucky	KRS § 515.030 (1)(2) (2005)  Robbery 2nd degree Class C Felony	KRS § 532.060 (2)(c) (2005)  Not less than 5 yrs, not more than 10 yrs	KRS § 534.030 (1) (2005) Not less than \$1,000, not greater than \$10,000 or double the commission of the offense, whichever is greater
Louisiana	La. R.S. § 14:65 A (2005)  Simple Robbery	La. R.S. § 14:65 B (2005)  Not more than 7 yrs, and/or fine	La. R.S. § 14:65 B (2005)  Not more than \$3,000 and/or imprisonment
Maine	17 A M.R.S. § 651 1B(2), 2 (2005) Robbery Class B Crime	17-A M.R.S. § 1252 2B.(2005) not to exceed 10 yrs.	17-A M.R.S. § 1301 1-A.B(2005) not to exceed \$20,000

		(looks at criminal history)	
Maryland	Md. Criminal Law Code Ann. §3-402(a)(b) (2006)  Robbery Felony	Md. Criminal Law Code Ann. §3-402(a)(b) (2006)  Not to exceed 15 yrs.	Not applicable
Massachusetts	Mass. Ann. Laws ch. 265 § 21 (2005)  Confining or Putting in Fear a Person for the Purpose of Stealing	Mass. Ann. Laws ch. 265 § 21 (2005)  For life or for any term of years	Not Applicable
Michigan	MCL § 750.531 (2005) Robbery; bank, safe or vault; compelling opening; destruction; attempts Felony	MCL § 750.531 (2005)  For life or any term of years	Not Applicable
Minnesota	Minn. Stat. § 609.24 (2005)  Simple Robbery	Minn. Stat. § 609.24 (2005)  Not more than 10 yrs and/or fine	Minn. Stat. § 609.24 (2005)  not more than \$20,000 and/or imprisonment
Mississippi	Miss. Code Ann. § 97-3-73 (2005)  Robbery	Miss. Code Ann. § 97-3-75 (2005)  Not more than 15 yrs.	Not Applicable
Missouri	§ 569.030 R.S.Mo. 1,2 (2006) Robbery 2nd Degree	§ 558.011 R.S.Mo. 1(2) (2006)	Not Applicable

	Class B Felony	not less than 5 yrs and not to exceed 15 yrs	
Montana	Mont. Code Anno. § 45-5-401 (1)(b) (2005)  Robbery	Mont. Code Anno. § 45-5-401(2) (2005)  not less than 2 yrs or more than 40 yrs and may be fined	Mont. Code Anno. § 45-6-103(2) (2005)  not to exceed \$50,000
Nebraska	R.R.S. Neb. § 28-324 (1)(2) (2005)  Robbery Class II felony	R.R.S. Neb. § 28-105 (1) (2005)  Min. 1 yr. Maximum 50 yrs	Not Applicable
Nevada	NRS § 200.380(1)(a)(b), 2 (2005)  Robbery Category B Felony	NRS § 200.380 (2) (2005)  Not less than 2 yrs, not more than 15 yrs	Not Applicable
New Hampshire	RSA 636:1.I (b), III (2005)  Robbery – Class B Felony	RSA 625:9 (a)(2)(2005)  More than 1 yr, not in excess of 7 yrs.	RSA 618:1 (2005)  Imposed by the sentence of the court
New Jersey	N.J. Stat. §2C:15-1 a(2) (2005)  Robbery 2nd degree crime	N.J. Stat. § 2C:43-6 a(2) (2005)  Between 5 and 10 yrs	N.J. Stat. § 2C:43-3 a(2) (2005)  \$150,000
New Mexico	N.M. Stat. Ann. § 30-16-2 (2006)	N.M. Stat. Ann. § 31-18-15A(5)(2006)	N.M. Stat. Ann. § 31-18-15E(5)(2006)

	Robbery 3rd Degree Felony	3 years imprisonment	Court may impose fine not to exceed \$5,000
New York Note: no clear match - Definition of using "forcibly"	NY CLS Penal § 160.05 (2005)  Robbery 3rd degree Class D Felony	NY CLS Penal § 70.00 2(d) (2005)  Term fixed by court not to exceed 7 yrs	NY CLS Penal § 80.00 2(a)(b) (2005)  Fixed by court not to exceed \$5,000 or double the amount of defendant's gain
North Carolina	N.C. Gen. Stat. § 14- 87.1 (2005)  Common-law Robbery Class G Felony	N.C. Gen. Stat § 15A- 1340.17(c) (2005)  Max. 13-16 months	N.C. Gen. Stat § 15A- 1340.17(b) (2005)  Fines <u>may be</u> <u>included</u>
North Dakota	N.D. Cent. Code, § 12.1-22-01 (2005)  Robbery Class C felony	N.D. Cent. Code, § 12.1- 32-01 (4) (2005) Max. 5 yrs and/or fine	N.D. Cent. Code, § 12.1- 32-01 (4) (2005) \$5,000 and/or imprisonment
Ohio	ORC Ann. 2911.02 (A)(3) (2006)  Robbery Felony 3rd degree	ORC Ann. 2929.14 (A)(3) (2006)  1,2,3,4 or 5 years	ORC Ann. 2929.18 (3)(c) (2006)  Not more than \$10,000
Oklahoma	21 Okl. St. § 791, § 794, § 797 (2005) Robbery 2nd degree Felony	21 Okl. St § 799 (2005) Not exceeding 10 yrs	Not applicable
Oregon	ORS § 164.395	ORS §	ORS §

	(1)(b) (2003) Robbery 2nd degree Class C Felony	161.605 (3) (2003)  5 yrs	161.625 (1) (c) (2003)  Not to exceed \$100,000
Pennsylvania	18 Pa.C.S. § 3701(a)(1)(V)(2)(b) (2005) Robbery Felony – 3rd degree	18 Pa.C.S. § 106 (b)(4) (2005) not more than 7 yrs	Not applicable
Rhode Island	R.I. Gen. Laws § 11- 39-1(a)(b) (2006)  Robbery 2nd degree	R.I. Gen. Laws § 11-39- 1(a)(b) (2006) Not less than 5 years and not more than 30 yrs And/or fine	R.I. Gen. Laws § 11-39- 1(a)(b) (2006) Not more than \$10,000 and/or imprisonment
South Carolina	S.C. Code Ann. § 16-11-325 (2005) Robbery Felony	S.C. Code Ann. § 16-11- 325 (2005)  Not more than 15 yrs	Not applicable
South Dakota	S.D. Codified Laws § 22-30-1, § 22-30- 6, § 22-30-7 (2006)  Robbery 2nd degree Class 4 felony	S.D. Codified Laws § 22-6-1 (6)(2006)  10 yrs. and fine may be imposed	S.D. Codified Laws § 22-6-1 (6)(2006)  May add on \$15,000
Tennessee	Tenn. Code Ann. § 39-13-401 (2005)  Robbery Class C felony	Tenn. Code Ann. § 40-35- 111(b)(4) (2005) Not less than 3 yrs, not more than 15 yrs.	Tenn. Code Ann. § 40-35- 111(b)(4) (2005) Jury may assess fine not to exceed \$5,000

Texas	Tex. Penal Code § 29.02(2)(b) (2005)  Robbery Felony 2nd degree	Tex. Penal Code § 12.33 (a) (2005)  not less than 2 yrs, not more than 20	Tex. Penal Code § 12.33 (b) (2005) May include fine not to exceed \$10,000
Utah	Utah Code Ann. § 76-6-301 (1)(b)(3) (2005) Robbery Felony 2nd degree	Utah Code Ann. § 76-3-203 (2)(b) (2005) not less than 1 yr., not more than 15 yrs	Utah Code Ann. § 76-3-301 (1)(a) (2005) may be sentenced to pay fine not to exceed \$10,000
Vermont	13 V.S.A. § 2503 (2006)  Larceny from the person	13 V.S.A. § 2503 (2006)  not more than 10 yrs and/or fine	13 V.S.A. § 2503 (2006) not fined more than \$500 and/or imprisonment
Virginia	Va Code Ann. §18.2-95 (ii) (2005)  Grand Larceny	Va Code Ann. §18.2-95 (2005)  Not less than 1 yr, not more than 20 yrs	Va Code Ann. §18.2-95 (2005)  Not applicable unless sent to jail in a non-jury trial, than \$2,500 may be fined
Washington	RCW § 9A.56.190, RCW § 9A.56.210 (2005) Robbery 2nd degree Class B felony	RCW § 9A.20.021 (1)(b)(2005) 10 years and may include fine	RCW § 9.94A.550 (2005) 0-\$20,000 in addition to imprisonment

West Virginia	W. Va. Code § 61-2-12 (b)(2005) Robbery, second degree Felony	W. Va. Code § 61-2-12 (b) (2005) Not less than 8 years	Not applicable
Wisconsin	Wis. Stat. § 943.32 (1)(b) (2005) Robbery Class E Felony	Wis. Stat. § 939.50(3)(e) (2005) Not to exceed 15 yrs. And/or fine	Wis. Stat. § 939.50(3)(e) (2005) Not to exceed \$50,00 and/or imprisonment
Wyoming	Wyo. Stat. § 6-2-401(a)(ii)(b) (2005)  Robbery Felony	Wyo. Stat. § 6-2-401(a)(ii)(b) (2005)  Not more than 10 yrs	Not applicable

#### ROBBERY STATUTES AND PENALTIES BY STATE

RCW 9A.56.200 (2002), Robbery in the first degree:

- (1) A person is guilty of robbery in the first degree if:
  - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
    - (i) Is armed with a deadly weapon; or
    - (ii) Displays what appears to be a firearm or other deadly weapon; or
    - (iii) Inflicts bodily injury; or
  - (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.
- (3) Robbery in the first degree is a class A felony.

<b>State</b>	<b>Robbery Statute</b>	<b>Sentence</b>	<b>Fine</b>
Alabama	Code of Ala. § 13A-8-41 (2005)  Robbery 1 <sup>st</sup> degree Class A felony	Code of Ala. § 13A-5-6 (a)(1) (2005)  not less than 10 years, not more than 99 years or for life	Code of Ala. § 13A-5-11 (a)(1) (2005)  not more than \$20,000
Alaska	Alaska Stat. § 11.41.500 (2006)  Robbery 1 <sup>st</sup> degree Class A Felony	Alaska Stat. § 12.55.125 (c) (2006)  not more than 20 yrs 1 <sup>st</sup> offense 5-8 yrs 1 <sup>st</sup> and armed 7- 11 yrs; 2 <sup>nd</sup> offense 10-14 yrs; 3 <sup>rd</sup> offense 15-20 yrs	Alaska Stat. § 12.55.035 (2) (2006)  not more than \$250,000
Arizona	A.R.S. § 13- 1904A.B. (2006) Armed Robbery Class 2 felony	A.R.S. § 13- 702A.1 (2006) Min. 4 yrs. Max. 10 yrs.	A.R.S. § 13- 801A (2006)  Not more than \$150,000
Arkansas	A.C.A. § 5-12- 103 (a)(b) (2006)  Aggravated Robbery Class Y Felony	A.C.A. § 5-4- 401 (a)(1) (2006)  Not less than 10 yrs, not more than 40 yrs, or life	A.C.A. § 5-4- 201 (d)(1) (2006)  Not to exceed 2x amount of pecuniary gain
California	Cal Pen Code § 212.5 (a)(b) (2006)  Robbery 1 <sup>st</sup> degree	Cal Pen Code § 213 (B) (2006)  3,4 or 6 yrs.  Dwelling (3,6	Not applicable

		or 9 yrs - § 213 (A))	
Colorado	C.R.S. § 18-4-302 (2005)  Aggravated Robbery Class 3 Felony	C.R.S. § 18-1.3-401 (1)(A)(II) (2005)  Min. 8 yrs. Max. 12 yrs. Increase of 4 yrs to presumptive range per (10)(b) (IX)	C.R.S. § 18-1.3-401 (III)(A) (2005)  \$3,000-\$750,000
Connecticut	Conn. Gen. Stat. § 53a-134 (2004)  Robbery 1st degree OR Robbery 2 <sup>nd</sup> degree (53a-135)  Class B Felony OR Class C Felony	Conn. Gen. Stat. § 53a-35a (5) or (6) (2004)  not less than 1 year; not more than 20 yrs OR not less than 1 yr; not more than 10 yrs	Conn. Gen. Stat. § 53a-41 (2) or (3) (2004)  not to exceed \$15,000 OR Not to exceed \$10,000
Delaware	11 Del. C § 832(a) (2005)  Robbery 1 <sup>st</sup> degree Class B Felony	11 Del. C. § 4205(2) (2005) Not less than 2 yrs, up to 25 years served at level V facility	11 Del. C. § 4205 (k) (2005) as court deems appropriate
District of Columbia	D.C. Code § 22-2801 (2006)  Robbery	D.C. Code § 22-2801 (2006)  min. 2 yrs.-max. 15 yrs.	Not applicable
Florida	Fla. Stat. § 812.13 (2) (a) (b) (2005) Robbery 1st degree Felony - 1st	Fla. Stat. § 775.082 3(a) (2)(2005)  Life or not exceeding 40	Fla. Stat. § 775.083 (b) (2002)  \$10,000

	degree	yrs	
Georgia	O.C.G.A. § 16-8-41 (2005)  Armed Robbery	O.C.G.A. § 17-10-6.1 (2) (b) (2005)  Mandatory Min. of 10 years	Not applicable
Hawaii	HRS § 708-840 (2005) Robbery 1st degree Class A Felony	HRS § 706-659 (2005) Indeterminate term of 20 years, min. determined by parole authority	HRS § 706-640(1)(a) (2005)  Not exceeding \$50,000
Idaho	Idaho Code § 18-6501 (2005)  Robbery	Idaho Code § 18-6503 (2005) Not less than 5 yrs and may be extended to life	Not applicable
Illinois	§ 720 ILCS 5/18-5 (2005) or 5/18-2  Aggravated Robbery OR Armed Robbery Both - Class 1 Felony	§ 730 ILCS 5/5-8-1(4) (2005)  not less than 3 yrs, not more than 15 yrs	§ 730 ILCS 5/5-9-1(a)(1) (2005)  \$25,000
Indiana	Burns Ind. Code Ann. § 35-42-5-1 (2) (2005)  Robbery Class B Felony	Burns Ind. Code Ann. § 35-50-2-5 (2005)  Fixed term between 6 and 20 yrs, advisory is 10 yrs	Burns Ind. Code Ann. § 35-50-2-5 (2005)  Not more than \$10,000
Iowa	Iowa Code § 711.2 (2005)  Robbery 1 <sup>st</sup> degree	Iowa Code § 902.9 2 (2005)  not more than 25 years	Not applicable

	Class B Felony		
Kansas	K.S.A. § 21-3427 (2005) Aggravated Robbery Level 3/Person Felony	K.S.A. § 21-4704 (2005) Per grid on Kansas website 89-100 months	Not applicable
Kentucky	KRS § 515.020 (2005)  Robbery 1 <sup>st</sup> degree Class B Felony	KRS § 532.060 (2)(b) (2005)  Not less than 10 yrs, not more than 20 yrs	KRS § 534.030 (1) (2005) Not less than \$1,000, not greater than \$10,000 or double the commission of the offense, whichever is greater
Louisiana	La. R.S. § 14:64.1 A (2005)  First Degree Robbery	La. R.S. §14:64.1 B (2002)  Not less than 3 yrs, and not more than 40 yrs	Not applicable
Maine	17 A M.R.S. § 651 C, D, E (2005) Robbery Class A Crime	17-A M.R.S. § 1252 2A.(2005) not to exceed 30 yrs.	17-A M.R.S. § 1301 1-A.(A) (2005) not to exceed \$50,000
Maryland	Md. Criminal Law Code Ann. §3-403 (2006)  Robbery with a Dangerous Weapon Felony	Md. Criminal Law Code Ann. §3-403(b) (2006)  Not to exceed 20 yrs.	Not applicable
Massachusetts	Mass. Ann. Laws ch. 265 § 21	Mass. Ann. Laws ch. 265 §	Not Applicable

	(2005) Confining or Putting in Fear a Person for the Purpose of Stealing	21 (2005) For life or for any term of years	
Michigan	MCL § 750.531 (2005) Robbery; bank, safe or vault; compelling opening; destruction; attempts Felony	MCL § 750.531 (2005) For life or any term of years	Not Applicable
Minnesota	Minn. Stat. § 609.245 (2005)  Aggravated Robbery	Minn. Stat. § 609.245 (2005)  Not more than 20 yrs and/or fine	Minn. Stat. § 609.245 (2005)  not more than \$35,000 and/or imprisonment
Mississippi	Miss. Code Ann. § 93-3-79 (2005)  Robbery; use of deadly weapon	Miss. Code Ann. § 97-3-79 (2005)  Not less than three yrs., max. life (jury determined)	Not Applicable
Missouri	§ 569.020 R.S.Mo. 1,2 (2006) Robbery 1st Degree Class A Felony	§ 558.011 R.S.Mo. 1(1) (2006) not less than 10 yrs and not to exceed 30 yrs	Not applicable
Montana	Mont. Code Anno. § 45-5-401 (2005)  Robbery	Mont. Code Anno. § 45-5-401 (2005)  not less than 2	Mont. Code Anno. § 45-4-401(2) (2005)  not to exceed

		yrs or more than 40 yrs and may be fined	\$50,000
Nebraska	R.R.S. Neb. § 28-324 (1)(2) (2005)  Robbery Class II felony	R.R.S. Neb. § 28-105 (1) (2005)  Mand. Min. 3 yrs Maximum 50 yrs	Not Applicable
Nevada	NRS § 200.380(1)(a)(b), 2 (2005)  Robbery Category B Felony	NRS § 200.380 (2) (2005)  Not less than 2 yrs, not more than 15 yrs	Not Applicable
New Hampshire	RSA 636:1.I III (2005)  Robbery – Class A Felony	RSA 625:9, III (a)(1)(2005)  in excess of 7 yrs.	RSA 625:9 III(a)(1) (2005)  Imposed by the sentence of the court
New Jersey	N.J. Stat. § 2C:15-1 a, b (2005)  Robbery 1st degree crime	N.J. Stat. § 2C:43-6 a(1) (2005)  Between 10 and 20 yrs	N.J. Stat. § 2C:43-3 a(1) (2005)  Not to exceed \$200,000
New Mexico	N.M. Stat. Ann. § 30-16-2 (2006)  Robbery 1 <sup>st</sup> Degree (second or more offense) or 2 <sup>nd</sup> Degree (first offense) Felony	N.M. Stat. Ann. § 31-18-15A(2) (5)(2006)  1 <sup>st</sup> degree – 18 yrs 2 <sup>nd</sup> degree – 9 yrs	N.M. Stat. Ann. § 31-18-15E (2)(5)(2006)  Court may impose fine not to exceed \$15,000 OR not to exceed \$10,000
New York	NY CLS Penal § 160.15 (2005)  Robbery 1 <sup>st</sup>	NY CLS Penal § 70.00 2(b), 3(a)(i) (2005)	NY CLS Penal § 80.00 2(a)(b) (2005)

	degree Class B Felony	Term fixed by court not less than 15 years, not to exceed 25 yrs	Fixed by court not to exceed \$5,000 or double the amount of defendant's gain
North Carolina	N.C. Gen. Stat. § 14-87 (2005)  Robbery with firearms or other dangerous weapons Class D Felony	N.C. Gen. Stat § 15A-1340.17(c) (2005)  Max. 103-129 months	N.C. Gen. Stat § 15A-1340.17(b) (2005)  Fines <u>may be</u> <u>included</u>
North Dakota	N.D. Cent. Code, § 12.1-22-01 (2005)  Robbery Class B felony	N.D. Cent. Code, § 12.1- 32-01 (3) (2005)  Max. 10 yrs and/or fine	N.D. Cent. Code, § 12.1- 32-01 (4) (2005)  \$10,000 and/or imprisonment
Ohio	ORC Ann. 2911.02 (B) (2006)  Robbery Felony 2nd degree	ORC Ann. 2929.14 (A)(2) (2006)  2-8 years	ORC Ann. 2929.18 (3)(a) (2006)  Not more than \$20,000
Oklahoma	21 Okl. St. § 791, § 794, § 801 (2005) Robbery or attempted robbery with dangerous weapon or imitation firearm Felony	21 Okl. St § 801(2005) Not less than 5yrs, up to life imprisonment	Not applicable
Oregon	ORS § 164.415 (2003)  Robbery 1st degree	ORS § 161.605 (1) (2003)  Max. of 20 yrs	ORS § 161.625 (1) (b) (2001)  Not to exceed \$375,000

	Class A Felony		
Pennsylvania	18 Pa.C.S. § 3701 (2005)  Robbery Felony – 1 <sup>st</sup> degree	18 Pa.C.S. § 106 (2) (b)(2) (2005)  Max. more than 10 years	Not applicable
Rhode Island	R.I. Gen. Laws § 11-39-1(a)(b) (2006)  Robbery 1 <sup>st</sup> degree	R.I. Gen. Laws § 11-39-1(a)(3) (2) (2006) Not less than 10 years and not more than life And/or fine	R.I. Gen. Laws § 11-39-1(a)(b) (2006) Not more than \$15,000 and/or imprisonment
South Carolina	S.C. Code Ann. § 16-11-330(A) (2005)  Robbery and attempted robbery while armed with a deadly weapon Felony	S.C. Code Ann. § 16-11-330(A) (2005)  Not more than 30 yrs	Not applicable
South Dakota	S.D. Codified Laws § 22-30-1, § 22-30-2, § 22-30- 3, § 22-30-7 (2006)  Robbery 1st Class 2 felony	S.D. Codified Laws § 22-6-1 (4) (2006)  25 yrs. and fine may be imposed	S.D. Codified Laws § 22-6-1 (4) (2006)  May add on \$50,000
Tennessee	Tenn. Code Ann. § 39-13-402 (2005)  Aggravated Robbery Class B felony	Tenn. Code Ann. § 40-35- 111(b)(2) (2005) Not less than 8 yrs, not more than 30 yrs.	Tenn. Code Ann. § 40-35- 111(b)(2) (2005) Jury may assess fine not to exceed \$25,000
Texas	Tex. Penal Code § 29.03 (2005)	Tex. Penal Code § 12.32 (a) (2005)	Tex. Penal Code § 12.32 (b) (2005)

	Aggravated Robbery Felony 1st degree	Life, or any term not more than 99 yrs, less than 5 years	May include fine not to exceed \$10,000
Utah	Utah Code Ann. § 76-6-302 (2005)  Aggravated Robbery Felony 1st degree	Utah Code Ann. § 76-3-203 (1) (2005)  not less than 5 years, which may be life	Utah Code Ann. § 76-3-301 (1)(a) (2005)  may be sentenced to pay fine not to exceed \$10,000
Vermont	13 V.S.A. § 2503, § 2507 (2006) Larceny from the person, Larceny conviction in burglary or robbery prosecution	13 V.S.A. § 2503 (2006)  not more than 10 yrs and/or fine	13 V.S.A. § 2503 (2006)  not fined more than \$500 and/or imprisonment
Virginia	Va Code Ann. §18.2-58 (2006)  Robbery	Va Code Ann. §18.2-58 (2006)  Not less than 5 yrs, not more than life	Not applicable
Washington	RCW § 9A.56.190, RCW § 9A.56.200 (2005) Robbery 1st degree Class A felony	RCW § 9A.20.021 (1)(a)(2005) Term of life or fine fixed by court, or both	RCW § 9.94A.550 (2005) 0-\$50,000 in addition to imprisonment
West Virginia	W. Va. Code § 61-2-12 (a) (2) (2005) Robbery 1 <sup>st</sup> degree Felony	W. Va. Code § 61-2-12 (a) (2) (2005) Not less than 10 years	Not applicable
Wisconsin	Wis. Stat. §	Wis. Stat. §	Wis. Stat. §

	943.32 (2) (2005) Robbery Class C Felony	939.50(3)(c) (2005) Not to exceed 40 yrs. And/or fine	939.50(3)(c) (2005) Not to exceed \$1000,00 and/or imprisonment
Wyoming	Wyo. Stat. § 6-2- 401(c) (2005)  Aggravated Robbery Felony	Wyo. Stat. § 6- 2-401(c) (2005)  Not less than 5 yrs, nor more than 25 yrs	Not applicable

This shows that with respect to second-degree robbery, the majority of the states (31) have established a maximum penalty of ten years or less for this crime – and of those 31 states with a ten-year-or-less maximum penalty, thirteen establish a maximum penalty of ten years; seven establish a maximum penalty of six to nine years; seven establish a maximum penalty of only five years; and four establish a maximum penalty of even less than five years. The remainder of the states has statutory maximum penalties that are higher. Ten states establish a statutory maximum penalty of 15 years; four states establish a statutory maximum penalty of 20 years; one state has a maximum of 30 years; and one state each has a maximum of 40 years, 50 years, term that might be extended to life. Two states then have the highest punishment, which appears to be a term of life or any term of years.

With respect to first-degree robbery, the majority of the states (29) have established a maximum penalty of twenty-five years or less for this

crime – and of those eleven states have a ten-year-or-less maximum penalty, seven establish a maximum penalty of ten years, and four establish a maximum penalty of six to nine years. The remainder of the states has statutory maximum penalties that are higher. Four states establish a statutory maximum penalty between 12 and 15 years; nine states establish a statutory maximum penalty of 20 years; five states have a maximum of 25 years; four states have a maximum of 30 years; five states have a maximum of 40 years; one state has a maximum of 50 years; and five states have a term that might be extended to life. Six states then have the highest punishment, which appears to be a term of life or any term of years.

Thus, there is no state in the union that imposes life without parole as a punishment for second-degree robbery (which it is not a third strike); the table below shows the maximum statutory punishments for this crime in all 50 states and not one of them is life without parole:

**SUMMARY OF MAXIMUM SENTENCING BY LENGTH OF TIME BY STATE for Robbery in the Second Degree**

<b>Length of Maximum Sentence</b>	<b>State</b>
For a term of life or any term of years	Massachusetts Michigan
May be extended to life	Idaho
50 years	Nebraska
40 years	Montana

30 years	Rhode Island
20 years	Arkansas Georgia Texas Virginia
15 years	Dist. of Columbia Florida Maryland Mississippi Missouri Nevada South Carolina Tennessee Utah Wisconsin
10 years	Alabama Alaska Hawaii Iowa Kentucky Maine Minnesota New Jersey Oklahoma South Dakota Vermont <b>Washington</b> Wyoming
6 – 9 years	Colorado (6) Illinois (7) Louisiana (7) New Hampshire (7) New York (7) Pennsylvania (7) West Virginia (8)

5 years	California Connecticut Delaware Kansas North Dakota Ohio Oregon
Less than 5 years	Arizona (3) Indiana (4) New Mexico (3) North Carolina (1.5)

The same is true of first-degree robbery; there is not one state that imposes a punishment of life without parole (when it is not a third strike), as the following table summarizes:

**SUMMARY OF MAXIMUM SENTENCING BY LENGTH OF TIME BY STATE for Robbery in the First Degree**

<b>Length of Maximum Sentence</b>	<b>State</b>
For a term of life or any term of years	Alabama Massachusetts Michigan Mississippi Texas <b>Washington</b>
May be extended to life	Idaho Oklahoma Rhode Island Utah Virginia
50 years	Nebraska
40 years	Arkansas

	Florida Louisiana Montana Wisconsin
30 years	Maine Missouri Tennessee South Carolina
25 years	Delaware Iowa New York South Dakota Wyoming
20 years	Alaska Connecticut Hawaii Indiana Kentucky Minnesota New Jersey New Mexico (18) Oregon
15 years	Colorado (12) District of Columbia Illinois Nevada
10 years	Arizona Georgia (Mandatory Minimum) North Carolina North Dakota Pennsylvania Vermont West Virginia
6 – 9 years	California (9) Kansas (8.5) New Hampshire (7) Ohio (8)

**iv. The Maximum Sentence for Both First- and Second-Degree Robbery as Third Strikes in Other States is Still Less than Life Without Parole.**

The next question is, what sentence would be imposed for this crime in states with “Three Strike” laws similar to Washington’s? The answer is that very few would impose the mandatory minimum term of imprisonment of life without parole.<sup>9</sup> A summary of third strike penalties and maximum “third strike” sentencing by state is attached as Appendix F.

There are *fifteen states* that do not have “three strikes,” or equivalent “persistent offender,” or “habitual criminal,” laws applicable to a third felony conviction at all for second-degree robbery. They are: Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia. See Appendix F. Then there are *nine states* that do not have “three strikes,” or equivalent “persistent offender,” or “habitual criminal,” laws applicable to a third felony conviction at all for first-degree robbery. They are: Arkansas, Idaho, Illinois, Iowa, Maine, Oregon, South Dakota,

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<sup>9</sup> For second-degree robbery: Louisiana, Mississippi, Montana and Washington; for first-degree robbery: Alabama (Code of Ala § 13A-5-9(b)(3) (2006)), Georgia (O.C.G.A. § 17.10.6.1 (a)(2) and §17-10-7(2) (2005)), Louisiana (La. R.S. § 15.529.1A.(1)(b)(ii) and La. R.S. § 14.2(13) (2005)), Mississippi (Miss. Code Ann. § 99-19-81, § 99-19-83 (2005)), Montana (Mont. Code Anno., § 46-18-219(1)(b)(iv) (2005)), South Carolina (S.C. Code Ann. § 17-25-45 (A)(1), (C)(1) (2005)), Virginia (Va Code Ann. § 18.2-58, §19.2-297.1(e) (2006)) and Washington (RCW § 9.94A.570 (2005)).

Tennessee and Vermont. Id. These states do not provide the harsh automatic penalty of life without possibility of parole for robbery even where it is a third serious felony.

There are then several states that have “three strikes” or equivalent laws applicable to a third felony conviction, but their third strike type of laws are *discretionary* in application – they do not automatically “click in” upon proof of prior convictions but are activated only if the priors are proved *and* the sentencing judge believes that the extended sentence is appropriate given the nature of the offense and the character of the defendant. For second-degree robbery, those states are Hawaii, Indiana, Kentucky, Michigan, North Dakota, Rhode Island, Wisconsin. Appendix F. For first-degree robbery, those states are Hawaii, Maine, Michigan, Minnesota, North Dakota and Wisconsin. Id. Thus, these states do not provide the harsh automatic penalty of life without possibility of parole for first or second-degree robbery even where it is a third serious felony – they leave sentencing discretion where it has traditionally been, with the trial court judge.

Then there are a few states and the District of Columbia that do mandate some sort of increase in the statutory *maximum* sentence for first or second-degree robbery where it is a third serious felony. Those states are Connecticut (first-degree robbery), District of Columbia (first and second-

degree robbery), Michigan (first and second-degree robbery), and Missouri (first-degree robbery). Appendix F. But these listed states only mandate an increase in the statutory maximum for robbery as a third “strike” – they do not provide an increase in the statutory mandatory minimum. Hence, they do not provide the harsh automatic penalty of life without possibility of parole for robbery even where it is a third serious felony. They do not provide any automatic sentence at all, but simply increase the discretion of the sentencing judge.

There are other states – like Washington – that have provided a mandatory increase in the statutory minimum sentence for robbery where as here it is a third “strike.” But most of the states that have done so have not extended that mandatory increase in the statutory minimum sentence for robbery as a third “strike” to life *without possibility of parole*. Instead, they increase the mandatory minimum sentence by a matter of years – sometimes a few years, and sometimes a great many years, but just by a set number of years. See Summaries of Maximum “Third Strike” Sentencing for Robbery in the Second Degree, Robbery in the First Degree, Appendix F.

**v. Conclusion Regarding Rivers and Disproportionality.**

Thus, the punishment of life in prison without possibility of parole for robbery as a third strike is impermissible under the Washington Constitution, despite the holding of Rivers to the contrary. Rivers'

conclusion that the sentence of life without parole was not significantly different from sentences imposed in the other jurisdictions for this crime is simply incorrect under new, controlling, authority. First, it is now clear, following Thomas that a sentence of life without parole is significantly different from a sentence of life with parole and, hence, these differences must factor into the multi-state comparison of proportionality. Given that recognition, it is now also clear that Rivers' factual conclusion was incorrect. The sentences that robbers receive in other jurisdictions are significantly different, and significantly shorter, than the sentence that Mr. Davenport received under Washington's three strikes law.

#### V. CONCLUSION

Mr. Davenport's case should be remanded for a resentencing. Mr. Davenport should be present at the resentencing hearing. The resentencing court should allow a challenge to Davenport's calculation of his criminal history and offender score.

Respectfully submitted this 15<sup>th</sup> day of October, 2006



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LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	Clark County No. 00-1-02097-0
	)	Court of Appeals No. 34755-5-II
Respondent,	)	
	)	AFFIDAVIT OF MAILING
v.	)	
	)	
JERALD WAYNE DAVENPORT, JR,	)	
	)	
Appellant.	)	

LISA E. TABBUT, being sworn on oath, states that on the 15th day of October 2006, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Michael C. Kinnie  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666

And

Mr. Jerald Davenport/DOC# 708898  
Florence Correctional Center  
1100 Bowling Road  
Florence, AZ 85232-2667

AFFIDAVIT OF MAILING - 1 -

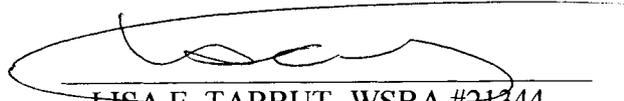
LISA E. TABBUT  
ATTORNEY AT LAW  
1402 Broadway • Longview, WA 98632  
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And that said envelope contained the following:

- (1) APPELLANT'S BREIF
- (2) AFFIDAVIT OF MAILING

Dated this 15th day of October 2006



LISA E. TABBUT, WSBA #21344  
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 15th day of October 2006.



Stanley W. Munger  
Notary Public in and for the  
State of Washington  
Residing at: Longview, WA 98632  
My commission expires:

*May 24, 2008*



AFFIDAVIT OF MAILING - 2 -

LISA E. TABBUT

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