

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

STATE OF WASHINGTON,
Respondent,

v.

JERALD W. DAVENPORT, JR.
Appellant.

09 MAY 27 04:10:47
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
DEPUTY

PN 5/26/09

OPENING BRIEF

On appeal from Clark County Superior Court;
The Hon. Roger Bennett, Judge
Clark County No. 00-1-02097-0

Jeffrey Erwin Ellis #17139
Attorney for Mr. Davenport

Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES RELATED TO ASSIGNMENTS OF ERROR	1
C.	STATEMENT OF THE CASE	2
D.	ARGUMENT	
	1. Davenport’s Robbery Conviction from Oregon is not Comparable to a Washington “Most Serious Offense.”	3
	2. Davenport was Denied His Sixth Amendment Right to a Jury Trial When The Sentencing Court Found a Prior Conviction Raising the Maximum Sentence Authorized by the Jury Verdict.	9
E.	CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

<i>Almendarez-Torres v. United States</i> , 523 U.S. 1219 (1998)	2, 10
<i>Apprendi v. New Jersey</i> , 530 U.S. 435 (2000)	9, 10, 11
<i>Rangel-Reyes v. United States</i> , 547 U.S. 910 (2006)	11
<i>Shepard v. United States</i> , 544 U.S. 205 (2005)	11
<i>State Oil Co. v. Khan</i> , 522 U.S. 199 (1997)	11
<i>In re Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005)	5, 9
<i>State v. Bunting</i> , 115 Wn. App. 135, 613 P.3d 375 (2003)	7
<i>State v. Farnsworth</i> , 133 Wash.App. 1, 130 P.3d 389 (2006)	9
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999)	9
<i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002)	9
<i>State v. McIntyre</i> , 112 Wn. App. 478, 49 P.3d 151 (2002)	7
<i>State v. Morley</i> , 134 Wash.2d 588, 952 P.2d 167 (1998)	9
<i>State v. Thieffault</i> , 160 Wash.2d 409, 158 P.3d 580 (2007)	4

Other Authority

RCW 9.94A.525(3)	4
RCW 9A.56.190	6, 7
ORS 164.395	6, 7
ORS 164.405	6
ORS 164.015	7

A. ASSIGNMENTS OF ERROR

1. Mr. Davenport is not a persistent offender. The sentencing court incorrectly concluded that his prior Oregon robbery conviction was comparable to a Washington “most serious offense.”

2. Mr. Davenport’s Sixth Amendment right to a jury trial was violated when the sentencing court, rather than a jury, found he had been convicted of two prior most serious offenses thereby increasing the maximum sentence authorized by the jury verdict. Davenport raises this issue in order to preserve it.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1(a). Is an Oregon robbery *legally* comparable comparable to a Washington robbery where the statutory elements differ?

1(b). Is Davenport’s Oregon robbery conviction *factually* comparable to a Washington robbery where his guilty plea fails to admit to facts constituting a Washington robbery and where any attempt to now find those “unadmitted” facts would constitute improper judicial factfinding.

2. Where a judicial finding that a defendant has been previously convicted of a prior crime increases the maximum sentence authorized by a jury verdict and sets a mandatory life sentence does the Sixth Amendment right to a jury trial apply? In other words, should

Almendarez-Torres v. United States, 523 U.S. 224, 235, 118 S. Ct. 1219 (1998), be overruled?

C. STATEMENT OF THE CASE

1. Procedural History

On November 7, 2008, Jerald Davenport, Jr. was sentenced in Clark County Superior Court for the third time for his first-degree robbery conviction. Once again, Davenport was sentenced to life without parole after a judge determined that he had two prior convictions for most serious offenses. RP 38-41. More specifically for purposes of this appeal, the trial court concluded that Davenport's 1992 robbery conviction from Oregon was legally comparable to a most serious offense. *Id. See also Ruling on Comparability* attached as Appendix A.¹ Based on that finding, the trial court failed to conduct a factual comparability analysis, over the defense objection. *Id. See also* RP 32-36.

Prior to his current sentencing hearing, Davenport argued his Oregon conviction was not comparable to a Washington "strike." The sentencing court considered the argument on its merits, but concluded that Oregon's crime of robbery was legally comparable to a Washington

¹ In order to aid the Court and because the relevant record is so slight, Davenport has attached the relevant record—the trial court ruling (Appendix A) and the two most relevant documents from Oregon; the indictment and guilty plea (B and C, respectively).

robbery. Therefore, the trial court concluded that no factual comparability analysis was necessary. *See* Appendix A.

2. Prior Oregon Robbery Conviction

In 1992, Mr. Davenport was charged in Multnomah County Circuit Court with robbery in the second degree. *See* Appendix B. The indictment alleged that Davenport did “use or threaten the immediate use of physical force” upon another while in the “course of committing theft of property” with the “intent of overcoming resistance” to the taking of the property, and that Davenport was “aided” by “other persons actually present.” *Id.* He pled guilty on March 3, 1993 (to Count I), admitting: “On 10/17/92, I helped another person steal money from a store clerk. The other person pretended he had a gun.” *See* Appendix C.

3. Sentence and Appeal

Davenport was subsequently sentenced to life without parole.

Once again, Davenport appeals.

D. ARGUMENT

1. Davenport’s Robbery Conviction from Oregon is not Comparable to a Washington “Most Serious Offense.”

Introduction

Mr. Davenport was convicted in 1993 in Multnomah County, Oregon of “Robbery II,” as a result of “help[ing] another person steal

money from a store clerk,” and where that “other person pretended he had a gun.” Because it is legally possible to commit a robbery in Oregon without committing a robbery in Washington, the crimes are not *legally* comparable. Because Davenport did not admit to facts which necessarily would constitute a robbery in Washington, his Oregon conviction is not *factually* comparable. Because the defense objected to the factual comparability of the conviction, the State should not be given another opportunity to prove factual comparability. Instead, this Court should reverse and remand for imposition of a standard range sentence—effectively ending this case after the fourth sentencing.

Comparability Analysis

A persistent offender is one who, prior to the commission of the current offense, has been convicted of at least two most serious felony offenses. Washington law provides that “[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3).

This Court reviews a sentencing court's decision to consider a prior conviction as a strike *de novo*. *State v. Thiefault*, 160 Wash.2d 409, 414, 158 P.3d 580 (2007).

Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If a conviction is not *legally* comparable, then the court must examine whether the conviction is *factually* comparable.

To determine if a foreign crime is legally comparable to a Washington offense, the sentencing or reviewing court first looks to the elements of the crime. The comparison of elements includes a careful examination of each required mental state, including the available defenses permitted by the requisite *mens rea*. *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005) (federal bank robbery); *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (applying the legal comparability test, this Court found Montana’s attempted robbery statute broader than its Washington counterpart because Montana law permits a conviction for assault with a lesser *mens rea* than required under Washington law).

At the time of Davenport’s Oregon second degree robbery, the Washington crime of robbery required: (1) the unlawful taking (2) of personal property (3) from the person of another or in his presence (4) against his will (5) by the use or threatened use of immediate force,

violence or fear of injury to the person or his property or the person or property of anyone. RCW 9A.56.190.

The contemporaneous Oregon third degree robbery statute required that in the course of committing or attempting to commit theft, the person used or threatened the immediate use of physical force upon another 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. ORS 164.395 (1983). Third degree robbery is elevated to second degree robbery in Oregon required one of two “aggravating factors.” Thus, a perpetrator of second degree robbery must (a) represent by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon, *or* (b) be aided by another person actually present. ORS 164.405 (1983). In this case, only the second element was charged.

There are several differences in the two state’s legal definitions of robbery.

Oregon permits a conviction for robbery if the person commits or *attempts* to commit a theft. ORS 164.395. Washington requires a completed theft. In addition, unlike Washington law, ORS 164.405

incorporates all of the types of thefts listed in ORS 164.015, including theft by deception, theft of lost or mislaid property; or theft of property delivered by mistake.

The Washington robbery statute, RCW 9A.56.190, requires property be taken “from the person of another or in his presence,” while the Oregon offense requires only that a defendant use force or the threat of force upon another “in the course of committing or attempting to commit theft or unauthorized use of a vehicle....” ORS 164.395. According to *State v. Bunting*, 115 Wn. App. 135, 143, 143 nn.17-18, 613 P.3d 375 (2003), a robbery requires proof of taking from the owner. Under Oregon law, a theft by extortion lacks this element. It appears, however, that both states have adopted the “transactional” view of robbery, *i.e.*, force used to retain property constitutes robbery, even where taking was peaceful. *See State v. McIntyre*, 112 Wn. App. 478, 49 P.3d 151 (2002).

Washington does not elevate a robbery to a higher degree based on accomplice liability. Thus, Oregon’s crime of second degree robbery is not legally comparable to Washington’s first degree robbery because being aided by another person present is not sufficient to elevate a robbery in Washington from second to first degree robbery.

The question then becomes whether Davenport's Oregon conviction is *factually* comparable to a second-degree robbery in Washington.

When Davenport pled guilty he admitted he "helped another person steal money from a store clerk." Although Davenport also states "the other person pretended he had a gun," Davenport's guilty plea statement does not establish that the other person's possession of the gun constituted a threat to overcome resistance to a theft. In other words, Davenport's admission at the time of his conviction in Oregon does not provide a nexus between the two sets of facts. Likewise, Davenport's plea also does not admit any immediacy to any threatened use of force.

Davenport's guilty plea also does not explain how he "stole" the money from the clerk. For example, he does not eliminate the possibility of "stealing" it by deception. Many retail thefts are accomplished by deceptions—true thefts, but not robberies.

Just as importantly, the guilty plea does not establish that Davenport took property from or in the presence of the property's owner.

When Davenport pled guilty, he did not authorize the Oregon court to consider any additional facts in support of his plea. Thus, in order to find the crime factually comparable to a Washington robbery, this Court would need to find facts for the first time—something that is plainly

prohibited. Going beyond the facts that were admitted in a guilty plea, implicates the right to a jury trial. *In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 111 P.3d 837 (2005); *State v. Morley*, 134 Wash.2d 588, 605-606, 952 P.2d 167 (1998); *State v. Farnsworth*, 133 Wash.App. 1, 130 P.3d 389 (2006). Indeed, where a defendant is not permitted to challenge the validity of a prior guilty plea in a persistent offender proceeding to permit the State to shore up a guilty plea by alleging facts now that were not admitted then.

Accordingly, the State did not meet its burden of proving factual comparability, and because Davenport raised this issue at sentencing, the State may not present additional facts on remand to establish comparability. *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002); *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999).

Thus, this Court should reverse and remand for a new sentencing hearing. At that hearing, Davenport should be sentenced to a “standard range” sentence. He is not a persistent offender.

2. Davenport was Denied His Sixth Amendment Right to a Jury Trial When the Sentencing Court Found a Prior Conviction Raising the Maximum Sentence Authorized by the Jury Verdict.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Justice Stevens, writing the controlling plurality

opinion joined in by Justices Ginsburg and Souter, held that “[o]ther than the fact of a prior conviction, any 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.” *Id.* at 490. In doing so, he expressly let stand the Court’s decision in *Almendarez-Torres*, “[e]ven though it is arguable that [it] was incorrectly decided,” and that it was inconsistent with the main underlying principle of its decision. *Id.* at 489.

Justice Thomas, for himself and Justice Scalia, joined the opinion of the Court but wrote separately to explain his view that “the Constitution requires a broader rule than the Court adopts.” *Id.* at 498. The broader rule espoused by Justices Thomas and Scalia is the same principle underlying Justice Stevens’s holding without the exception allowing *Almendarez-Torres* to stand. “[T]his traditional understanding—that a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment—continued well into the 20th-century, at least until the middle of the century Today’s decision, far from being a sharp break with the past, marks nothing more than a return to the status quo ante—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.” *Id.* at 517.

The logical or rational disconnect between the holding in *Almendarez-Torres* and the basic underlying principles of *Apprendi* and

subsequent cases were clear in the Justices' opinions and cannot be denied. As late as 2005, Justice Thomas repeated his view that *Almendarez-Torres* “has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.” *Shepard v. United States*, 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

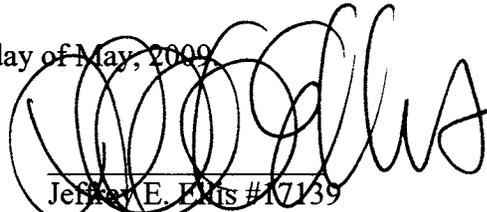
Indeed, no justice has ever argued that the two decisions are based on intrinsically compatible rationales or that they can be reconciled logically in any principled way. Justice Stevens recently indicated, in the context of denying certiorari, that he continued to see the two decisions as being in conflict but that he might vote to uphold *Almendarez-Torres* based on the doctrine of *stare decisis*. *Rangel-Reyes v. United States*, --- U.S. ---, 126 S.Ct. 2873, 2874, 165 L.Ed.2d 910 (2006). Justice Thomas, on the same subject, argued forcefully that *Almendarez-Torres* should be overruled: “The Court's duty to resolve this matter is particularly compelling, because we are the only court authorized to do so. *See State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (“[I]t is this Court's prerogative alone to overrule one of its precedents.”).

In the meantime, Davenport raises the issue in order to preserve it.

E. CONCLUSION

Based on the above, this Court should vacate the judgment and remand this case to Clark County Superior Court for a new sentencing hearing with instructions to sentence Mr. Davenport to a standard range sentence.

DATED this 26th day of May, 2009



Jeffrey E. Ellis #17139

Attorney for Mr. Davenport

Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Ave., Ste 401
Seattle, WA 98104
(206) 262-0300 (o)
(206) 262-0335 (f)

Appendix A

SCANNED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

FILED
NOV 05 2008

STATE OF WASHINGTON
Plaintiff,

vs.

JERALD WAYNE DAVENPORT, JR.
Defendant.

Sherry W. Parker, Clerk, Clark Co.

Case No. 00-1-02097-0

RULING ON COMPARABILITY
OF PRIOR CONVICTION

In this sentencing proceeding, the court has permitted the defendant to raise the issue of comparability of his prior Oregon conviction for Robbery in the 2nd Degree, O.R.S.164.405, to the Washington crime of Robbery in the 2nd Degree, RCW 9A.56.190, 210. The defendant also has a prior Washington Robbery conviction, which is not at issue here.

Defendant argues that the Washington and Oregon statutes are not comparable, and therefore the Oregon conviction should not be counted as a "strike" under the Washington Persistent Offender Accountability Act, RCW 9.94A.505. Defendant invites the court to compare the elements of the two statutes to determine comparability. Division II of the Court of Appeals, however, has already done this. In State vs. McIntyre, 112 Wn. App. 478, 49 P.3d. 51 (2002), the court determined that the Robbery III statute in Oregon is comparable to the Robbery II statute in Washington. Since the Oregon Robbery II statute incorporates the elements of Oregon's Robbery III, and then adds elements to elevate the crime, it follows that Oregon's

215

Appendix B

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

NOV 19 PM 2:11
FILED

THE STATE OF OREGON,)	
)	C 92-11-36764
Plaintiff,)	DA 479344
)	PPB 92-93691
v.)	
)	INDICTMENT FOR VIOLATION OF
JERALD WAYNE DAVENPORT,)	
DOB: 3/20/72)	ORS 164.405 (1,2)
Defendant.)	

The above defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crimes of COUNTS 1 and 2 - ROBBERY IN THE SECOND DEGREE, committed as follows:

COUNT 1

ROBBERY IN THE SECOND DEGREE

The said defendant, on or about October 17, 1992, in the County of Multnomah, State of Oregon, did unlawfully and knowingly use and threaten the immediate use of physical force upon Laura Rusk, being aided by other persons actually present, while in the course of committing theft of property, to-wit: lawful currency of the United States of America, with the intent of preventing and overcoming resistance to the said defendants' taking of the said property, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 2

ROBBERY IN THE SECOND DEGREE

The said defendant, on or about October 17, 1992, in the County of Multnomah, State of Oregon, did unlawfully and knowingly aid and abet another who used and threatened the immediate use of physical force upon Laura Rusk, and did represent by word and conduct that he, the said defendant was armed with a deadly weapon, to-wit: a firearm, while in the course of committing theft of property, to-wit: a cash drawer and its contents to include lawful currency of the United States of America and food stamps, with the intent of preventing and overcoming resistance to the said defendant's taking of the said property, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Dated at Portland, Oregon, in the county aforesaid on November 19, 1992.

Witnesses

Examined Before the Grand Jury:

A TRUE BILL

Laura Rusk
Donald Lind

ENTERED

NOV 19 1992

IN REGISTER BY SB

[Signature]

/s/ JAMES A. ELOWSON
Foreman of the Grand Jury

MICHAEL D. SCHRUNK (67111)
District Attorney
Multnomah County, Oregon

By *[Signature]* Deputy

Security Amount: \$ 20,000 + 20,000

The District Attorney hereby affirmatively declares for the record, as required by ORS 161.565, upon appearance of the defendant for arraignment, and before the court asks under ORS 135.020 how the defendant pleads to the charge, the State's intention that any misdemeanor charged herein proceed as a misdemeanor. BALL/78015/dlb

Appendix C



In the Circuit District Court of the State of Oregon
for Multnomah County

93 APR 14 AM 11:34

STATE OF OREGON,

Plaintiff,

C 92-11-36764
DA No. 479344
Citation No. _____

v.
Jerald Wayne Davenport, Jr.

Defendant.

PETITION TO PLEAD GUILTY/
~~NO CONTEST~~ AND WAIVER OF
JURY TRIAL

ENTERED

APR 15 1993

The defendant represents to the Court:

1. My full true name is above
but I also am known as _____
2. I am 21 years of age. I have gone to school through Grade 7 GED
My physical and mental health are satisfactory. I am not under the influence of any drugs or intoxicants, except _____

IN REGISTERED BY GED

3. I understand my right to hire or have the Court appoint a lawyer to help me.
(a) I am represented by: Scott RAIVIO
(b) I choose to give up my right to a lawyer; I will represent myself: _____ (defendant's initials).

4. I have told my lawyer all the facts I know about the charge(s) against me. My lawyer has advised me of the nature of the charge(s) and the defenses, if any, that I have in this case. I am satisfied with the advice and help I have received from my lawyer.

5. I understand that I have the following rights: (A) the right to a jury trial; (B) the right to see, hear and cross-examine or question all witnesses who testify against me at trial; (C) the right to remain silent about all facts of the case; (D) the right to subpoena witnesses and evidence in my favor; (E) the right to have my lawyer assist me at trial; (F) the right to testify at trial; (G) the right to have the jury told, if I decide not to testify at trial, that they cannot hold that decision against me; and (H) the right to require the prosecutor to prove my guilt beyond a reasonable doubt.

6. I understand that I give up all of the rights listed in paragraph 5 when I plead guilty/no contest. I also understand that I give up: (A) any defenses I may have to the charge(s); (B) objections to evidence; and (C) challenges to the accusatory instrument.

7. I want to plead Guilty/~~No Contest~~ to the charge(s) of Robbery - Second Degree (Count 1)

8. I know that a No Contest Plea will result in a Guilty finding regarding the charge(s) listed in Paragraph 7.

9. I know that when I plead Guilty/No Contest to the charge(s) in paragraph 7, the maximum possible sentence is 10 years in (prison) ~~and~~, and a fine with assessments totaling \$ 100,000, including a mandatory fine of \$ _____. I also know that the Court can impose a minimum sentence of _____. Further I know that these maximum and minimum sentences can be added to sentences in these other cases: _____

Finally, I know that my driver's license ~~can~~ (will) (cannot) be suspended for _____

10. I understand that I might () will not () be sentenced as a dangerous offender, which could increase each maximum sentence to 30 years, with a 15-year minimum.

11. I have been told that if my crime involved my use or threatened use of a firearm I can receive a mandatory minimum sentence without parole or work release for a period of N/A

12. I know that if I am not a United States citizen, my plea may result in my deportation from the USA, or denial of naturalization, or exclusion from future admission to the United States.

13. I know that this plea can affect probation or parole and any hearing I may have regarding probation or parole. If probation or parole is revoked, I know that the rest of the sentence in each of those cases could be imposed and executed, and could be added to any sentence in this case.

14. I know that the sentence is up to the Court to decide. The District Attorney may provide reports or other information if requested by the Court. I understand that the District Attorney will make the following recommendation to the Court about my sentence or about other pending charges. This recommendation is () is not () made pursuant to ORS 135.432(2): Gridlock 6 I, 3 years probation, 10 units work release or 150 hours community service, CNA fees, curfew assessment, District Court 2

15-A. I plead Guilty because, in Multnomah County, Oregon, I did the following: on 10/17/92, I helped another person steal money from a store clerk. The other person pretended he had a gun.

15-B. I plead No Contest because (A) I understand that a jury or judge could find me guilty of the charge(s), so I prefer to accept the plea offer (defendant's initials: _____). of (B): _____

16. I declare that no government agents have made any threats or promises to me to make me enter this plea other than the District Attorney's recommendation set forth in Paragraph 14, except: _____

17. I am signing this plea petition and entering this plea voluntarily, intelligently, and knowingly.

3/30/93
(Date)

Jenald W. Dawnsford Jr.
(Defendant's Signature)

CERTIFICATE OF COUNSEL

I am the lawyer for the defendant and I certify:

- 1. I have read and explained fully to the defendant the allegations contained in the accusatory instrument(s). I believe defendant understands the charges and all possible defenses to them. I have explained alternatives and trial strategies to defendant.
- 2 I have explained to the defendant the maximum and minimum penalties that could be imposed for each charge and for all charges together.
- 3. The plea(s) offered by defendant is (are) justified by my understanding of the facts related to me.
- 4. To the best of my knowledge and belief, the declarations made by defendant in the foregoing petition are true and accurate.
- 5. Defendant's decision to enter the plea is made voluntarily, intelligently, and knowingly. I recommend that the Court accept the plea.

I have signed this certificate in the presence of the defendant and after full discussion of its contents with the defendant.

3/30/93
(Date)

Scott Naim
(Lawyer's Signature)

86093
(Bar No.)

CERTIFICATE OF SERVICE

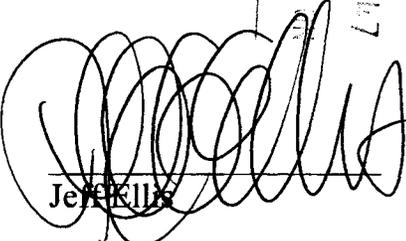
I, Jeff Ellis, certify that on May 27, 2009, I served the parties listed below and Mr. Davenport with a copy of the *Opening Brief* by mailing it, postage pre-paid to:

Michael C. Kinnie
Clark County Prosecuting Attorney's Office
1200 Franklin St.
P.O. Box 5000
Vancouver, WA 98666-5000

Jerald Davenport
DOC # 708898
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

5/27/09 Seattle, WA
Date and Place

COURT OF APPEALS
DIVISION II
MAY 27 AM 10:47
STATE OF WASHINGTON
BY _____
DEPUTY



Jeff Ellis