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COURT OF APPEALS
DIVISION II

NO. 39415-4-II

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STATE OF WASHINGTON
BY 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PEDRO GARCIA MORALES,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding Pedro Morales's California conviction was comparable to a Washington offense.

2. The trial court deprived Mr. Morales the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section § 12 of the Washington constitution, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

3. The trial court violated Mr. Morales's Sixth and Fourteenth Amendment right to a jury trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the State alleges a foreign conviction should be included in a person's offender score, due process and the Sentencing Reform Act require the State carry the burden of proving the existence and comparability of the crime to the sentencing court. Where the foreign statute is broader or different than the pertinent Washington provision, the factual comparability analysis must be limited to facts specifically admitted or stipulated to by the person in the prior conviction. The State sought to include a California conviction of assault with a deadly weapon in Mr. Morales's offender score. As the State conceded below, the

elements of that crime are broader than any crime in Washington. In attempting to establish the factual comparability of the crime, the State offered only facts which Mr. Morales had not stipulated to as part of his California guilty plea. Did the comparability finding by the trial court violate due process, requiring reversal and remand for resentencing?

2. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and

proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

3. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Morales's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

C. STATEMENT OF THE CASE

Following a jury trial, Mr. Morales was convicted of one count of first degree assault. CP 25.

After the jury returned its verdict, the prosecutor for the first time presented evidence purporting to establish Mr. Morales had two prior convictions of most serious offense and thus was a persistent offender. CP 27-76. One of the two prior convictions was a 1997 California conviction of assault with a deadly weapon. Appendix at 1-12 (Supp. CP __, Sentencing Exhibit 12). Mr.

Morales objected to both the legal and factual comparability of the conviction. 2RP 144-45, 149, 154. The State conceded the offense was not legally comparable but contended it was factually comparable. 2RP 148.

Despite Mr. Morales's objections and the State's concession, the trial court found the offense was legally comparable to a second degree assault. CP 89. The court sentenced Mr. Morales to a sentence of life without the possibility of parole. CP 92.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN
CONCLUDING MR. MORALES'S
CALIFORNIA CONVICTION OF ASSAULT
WAS A MOST SERIOUS OFFENSE

a. Mr. Morales objected to the trial court's inclusion of his California conviction in his offender score. Mr. Morales offered several objections to the use of his California conviction of assault with a deadly weapon. Mr. Morales argued the offense was not legally comparable because the California offense does not require a specific intent to cause harm as required of an assault in Washington. 2RP 154. Mr. Morales objected because California precludes certain defenses to assault charges which would be available in Washington. 2RP 144-45. Mr. Morales also objected

to the court's consideration of a California probation report offered by the State to establish the facts of the offense. 2RP 149.

The State conceded the California offense is not legally comparable to a Washington offense, but urged the court to find it factually comparable based upon the facts contained in the offered probation report. 2RP 148.

Despite the State's concession that California has a broader definition of assault, the court concluded

That the elements of the California offense are legally comparable to Assault 2°, 9A.36.021 RCW.

CP 89 The court's conclusion is incorrect.

b. The sentencing court may use an out-of-state conviction in calculating an offender's criminal history only if it is comparable to a particular Washington felony. A persistent offender is a person who:

[h]as, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted

RCW 9.94A.030(37)(a)(ii). The State bears the burden of establishing “two applicable convictions exist.” State v. Carpenter, 117 Wn.App. 673, 678, 72 P.3d 784 (2003) (citing State v. Manussier, 129 Wn.2d 652, 681-82, 921 P.2d 473 (1996), cert. denied. 520 U.S. 1201 (1997)). To meet this burden, the State must first prove that the prior offenses would be included in the person’s offender score. See e.g. State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 284 (1999) (if an offense has “washed out” it cannot constitute a strike because it “would [not] be included in the offender score”).

RCW 9.94A.525(3) provides in relevant part:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. . . . If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

As with other issues at sentencing, due process and the Sentencing Reform Act (SRA) require that where the State alleges a defendant’s criminal history contains out-of-state felony convictions, the State must prove the existence and comparability of those convictions by a preponderance of the evidence. RCW

9.94A.525; State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452

(1999). Consistent with due process,

A criminal defendant is simply not obligated to disprove the State's position, at least insofar as the State has failed to meet its primary burden of proof. The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Ford, 137 Wn.2d at 482.

A prior out-of-state conviction may not be used to increase an offender score unless the State proves the conviction would be a felony under Washington law. State v. Cabrera, 73 Wn.App. 165, 168, 868 P.2d 179 (1994). To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479. The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” State v. Berry, 141 Wn.2d 121, 130-31, 5 P.3d 658 (2000).

If the evidence of prior out-of-state convictions is sufficient to support classification under comparable Washington law, that evidence should be presented to the court for consideration. If the evidence is insufficient or incomplete, the State should not be making assertions regarding classification which it cannot substantiate.

Ford, 137 Wn.2d at 482. The State's evidence submitted to the trial court did not substantiate its assertions.

c. Assault in California is not legally comparable to a most serious offense in Washington. Assault with a deadly weapon in California is not legally comparable to either first or second degree assault in Washington for three reasons. First, California differentiates the crime of battery: the infliction of injury, from the crime of assault: the attempt to injure. Unlike in Washington, neither the general crime of assault in California nor the specific crime of assault with a deadly weapon require a specific intent to injure. Second, assault with a deadly weapon in California has an alternative means which is not contained in either first or second degree assault in Washington. Third, California does not permit a defendant to assert either diminished capacity or intoxication as a defense to assault. Thus, Mr. Morales's California conviction is not legally comparable to a most serious offense in Washington.

i. Because an assault in California is a general intent crime, it is not legally comparable to an assault in Washington. The term “assault” is not defined by statute in Washington but instead has three common law definitions: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006). Assault by actual battery is a general intent crime. State v. Daniels, 87 Wn.App.149, 155 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1998). However, for the remaining two means a specific intent is an essential element. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). For that reason, where the State alleges a defendant committed an assault either by attempted batter or creation of fear, the jury must be instructed on specific intent. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Specific intent means “an intent to produce specific results, as opposed to intent to do the physical act that produces the result.” State v. Elmi, 166 Wash.2d 209, 215, 207 P.3d 439 (2009).

California’s Penal Code establishes separate crimes of battery and assault. Cal. Penal Code § 240, Cal. Penal Code

§242. The code then establishes specific types of assaults and batteries which carry distinct penalties. See e.g. Cal. Penal Code §245 (establishing crime of assault with a deadly wepon of which Mr. Morales was convicted). “An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240. “A battery is any willful and unlawful use of force or violence upon the person of another..” Cal. Penal Code §242. The “violent injury” required by section 240 need not result in any bodily injury at all, but could include hurt feelings. People v. Rocha, 3 Cal.3d 893, 899, n.12, 479 P.2d 372 (1971). The element is proved by “the least touching.” Id.

The crime of assault in California generally, and more specifically assault with a deadly weapon, are general intent crimes and require only that injury be a foreseeable result of a person’s willful act. The California Supreme Court has held that to convict a person of assault “the intent to cause any particular injury . . . is not necessary.” Rocha, 3 Cal.3d at 899. The California Supreme Court subsequently held that neither recklessness nor negligence were sufficient, but reaffirmed that a general intent is required: “a defendant . . . must be aware of facts that would lead a reasonable person to realize that a battery would directly, naturally,

and probably result from his conduct.” People v. Williams, 26 Cal.4th 779, 788, 29 P.3d 197 (2001). Thus the state need not prove a defendant “specifically intended to cause injury.” People v. Miller, 164 Cal.App. 4th 643, 662, 78 Cal.Rptr.3d 918 (2008). In fact, the definition provided by the California Court more closely mirror the definition of knowledge RCW 9A.08.010(1)(b)¹.

Mr. Morales was convicted of an assault, not battery. Appendix at 8. California does not require the infliction of injury to sustain an assault conviction, instead that constitutes the separate crime of battery. Compare Cal. Penal Code §240; Cal. Penal Code §242. In Washington, the only general intent version of assault is actual battery. Because Mr. Morales was convicted of assault and not battery, the relevant question is whether assault in California is comparable to assault by attempted battery or assault by creation of fear in Washington. Because it does not require a specific intent to cause injury, as does assault by attempted battery in

¹ RCW 9A.08.010(1)(b) provides:

KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

- (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Washington, the definition of “assault” in California is substantially broader than in Washington. Mr. Morales’s assault conviction is not legally comparable to a most serious offense in Washington.

ii. Because California’s assault with a deadly weapon includes an alternative means not contained in either first or second degree assault it is not legally comparable to a most serious offense. A person commits assault with a deadly weapon when he:

. . . commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.

Cal. Penal Code §245(a)(1). That crime is not legally comparable to either first or second Assault.

RCW 9A.36.011(1) provides:

A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm

RCW 9A.36.011(1)(a) contains the language “force or means likely to produce great bodily harm or death” which mirrors the language in the California statute. However, the statute requires that force must be used with a specific intent, the “intent to inflict great bodily harm.” RCW 9.94A.030(1). Moreover, there is the additional specific intent requirement which arises from the common-law definitions of assault for assault other than assaults by actual battery. Again California does not require either specific intents. Rocha, 3 Cal.3d at 899. Thus, the California crime of assault with a deadly weapon is broader than the first degree assault in Washington and is not legally comparable.

RCW 9.94A.021(1) provides:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
 - (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
 - (c) Assaults another with a deadly weapon; or
 - (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
 - (e) With intent to commit a felony, assaults another;
- or

- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (g) Assaults another by strangulation.

As is clear from the statutory language, second degree assault does not include an alternative similar to the “by any means of force likely to produce great bodily injury” alternative found in the California statute. Thus, the California crime of assault with a deadly weapon is broader than the second degree assault in Washington and is not legally comparable

iii. Because California precludes a defendant in an assault case from asserting defenses available in Washington, a California assault is not legally comparable to an assault in Washington. Because there is no specific intent required to prove assault or assault with a deadly weapon, California does not permit a defendant to raise voluntary intoxication or diminished capacity as a defense to an assault charge. People v. Hood, 1 Cal.3d, 444, 458-59, 462 P.2d 370 (1969) In Washington both defenses are available at a minimum to any charge where a specific intent is required. See, State v. Thomas, 123 Wn.App 771, 779-82, 98 P.3d 1258 (2004). The availability of defenses in the

foreign jurisdiction is a necessary consideration in determining the comparability of an out-of-state conviction

In In re the Personal Restraint Petition of Lavery, the defendant had been convicted of federal bank robbery, and this offense was used to impose a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA). 154 Wn.2d 249, 111 P.3d 837 (2005). Federal bank robbery is a general intent crime, but under Washington law, specific intent to steal is an essential element of the crime of second degree robbery. Id. at 255-56 (citations omitted). Thus there are several defenses available under Washington law that could not be raised in a federal bank robbery prosecution, such as intoxication, diminished capacity, duress, insanity, and claim of right. Id. at 256. It is for this reason that any effort to establish factual comparability in such a circumstance will violate due process, as the defendant may have raised a defense were he charged under Washington law that he could not have raised in the foreign jurisdiction. Id. at 258 (“ . . . Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under the robbery statute but were unavailable in the federal prosecution.”).

Similarly, because Mr. Morales was precluded from raising an intoxication or diminished capacity defense to an assault charge in California that he could have raised in Washington, the California offense cannot be legally comparable.

d. The State did not prove Mr. Morales's California assault is factually comparable to a most serious offense. If the elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the court must determine whether the underlying facts, necessarily proven beyond a reasonable doubt or expressly admitted by the defendant, make the offense comparable. Lavery, 154 Wn.2d at 258. This factual question involves an inquiry into the elements of the offenses, the proven facts underlying the prior offense, and the accused's incentive to contest issues that would have made him not guilty in Washington. Lavery, 154 Wn.2d at 258. Because of that

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 conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Id.; see also, Shepard v. United States, 544 U.S. 13, 24, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Sixth Amendment concerns require a similar limitation of federal court's ability to examine facts of prior conviction). Thus, in assessing the factual comparability of Mr. Morales's California offense, this Court is limited to consideration of the facts specifically agreed to in Mr. Morales's guilty plea. State v. Freeburg, 120 Wn.App. 192, 198-99, 84 P.2d 292 (2004); State v. Bunting, 115 Wn.App. 135, 141 61 P.3d 375 (2003).

To establish factual comparability in this case, the facts agreed to by Mr. Morales would have to establish either a specific intent to injure or the infliction of an actual injury that rises to the level of first or second degree assault, in which case specific intent is irrelevant. The facts admitted to in Mr. Morales California plea do not establish either of these.

Mr. Morales was charged by complaint with attempted murder, Count 1, and assault with a deadly weapon, Count 2. With respect the assault charge the Complaint alleged:

On or About April 13, 1997, PEDRO GARCIA did willfully and unlawfully commit an assault upon JAVIER GONZALEZ with a deadly weapon and by force or means likely to produce great bodily injury, in violation of PENAL CODE SECTION 245(a)(1).

And, it is further alleged that in the commission and attempted commission of the above offense, the defendant, PEDRO GARCIA, personally inflicted great bodily injury upon JAVIER GONZALEZ, not an accomplice to the above offense, within the meaning of Penal Code section 12022.7(a).

Appendix 3.

Mr. Morales entered a guilty plea which provided in relevant part:

I, the defendant in the above-entitled case, in support of my motion to change my plea(s) in open Court, personally and by my attorney, declare as follows:

- Of those charges now filed against me in this case, I plead GUILTY GUILTY/NO CONTEST P.6
to the following violations: (List Crimes and Code Sections)
COUNT 2, P.C. 245(A)(1), ASSAULT WITH DEADLY WEAPON
- (If Applicable) I also admit the following enhancement(s)/prior conviction(s) with which I am charged: (List Court, Docket No. and Date of any Prior Conviction)
N/A N/A
- I have not been induced to enter the above plea by any promise or representation of any kind, except: (Briefly state any agreement with the District Attorney.)
DA AGREES TO DISMISS BALANCE OF INFORMATION. COURT INDICATES PROBATION AND LOCAL CUSTODY. P.6

Appendix at 6. As is clear from the plea statement Mr. Morales pleaded guilty only to the assault allegation and not the attempted murder count or the additional allegation of having inflicted injury. Or at a minimum, because the plea is silent as to the enhancement the State did not prove Mr. Morales pleaded guilty to the enhancement. In fact the State conceded Mr. Morales did not plead guilty to the enhancement. CP 28.

The State's concession is well taken, the Judgment and order imposing probation note only a violation of PC 245(A)(1). Appendix at 8-9. The maximum punishment noted on the plea of

guilty is four years in prison, a \$10,000 fine and four years parole. Appendix at 6.. That is the maximum penalty for assault with a deadly weapon. Cal Penal Code §245(a) Had Mr. Morales pleaded guilty to the enhancement as well “an additional and consecutive term of imprisonment in the state prison for three years” would have been required. Cal. Penal Code §12022.7(a). Thus, the record establishes Mr. Morales pleaded guilty only to assault with a deadly weapon and not the additional allegation that he inflicted injury.

The court, however, concluded that Mr. Morales plea included both the base level assault offense as well as the enhancement. 2RP 150. The court chastised defense counsel “we are not here to speculate about what did or didn’t happen.” Id. Yet rather than accept the what the documents proved, the trial court asked defense counsel “where does the judgment say the enhancement was dismissed.” 2RP 152. Because Due Process requires the State prove what Mr. Morales’s plea entailed, the relevant question was “where does the judgment say the enhancement was imposed?” In fact, as the State conceded, the Judgment indicated the enhancement was dismissed. CP 28.

Thus, the State correctly agreed Mr. Morales did not plead guilty to inflicting injury on another. The State also understood that it could not establish the legal comparability of the California offense, and it was for that reason the State urged the court to look to the facts which the State asserted established Mr. Morales had in fact inflicted injury. 2RP 148. If in fact Mr. Morales did inflict injury, specific intent to harm is not required, and thus the offenses would be comparable.

In his guilty plea Mr. Morales stipulated that the “preliminary hearing transcript supports a factual basis” for the plea and described his acts. Appendix at 7. But rather than provide a copy of the transcript of the preliminary hearing to establish the facts of Mr. Morales’s crime, the State offered a probation report. CP 52-53; 2RP 148. However, Mr. Morales did not stipulate to that report or the facts contained in the probation report as a part of his plea. And, Mr. Morales objected to the trial court’s consideration of the probation report in the present case. 2RP 149. Because the State did not establish Mr. Morales stipulated to or agreed to the facts contained in the probation report, neither the trial court nor this Court may consider those facts. Lavery, 154 Wn.2d at 258.

The only competent “facts” provided to the trial court is the allegation contained in the Complaint:

On or About April 13, 1997, PEDRO GARCIA did willfully and unlawfully commit an assault upon JAVIER GONZALEZ with a deadly weapon and by force or means likely to produce great bodily injury, in violation of PENAL CODE SECTION 245(a)(1).

Appendix 3. That statement does not indicate facts which establish assault by an actual battery nor facts which establish the specific intent necessary to establish an assault by attempted battery.

In the end, the problem is precisely the same as in Lavery, Freeburg, and Bunting. Each of those cases held that where the language of a foreign statute does not establish a comparable offense, an indictment which merely parrots that statutory language is inadequate to establish factual comparability. See e.g., Bunting, 115 Wn.App. at 142-43. Because the admitted facts are merely a recitation of the statutory language, there is no indication that Mr. Morales admitted facts which establish either a specific intent to harm or an actual infliction of harm. Mr. Morales offense is not factually comparable to a Washington offense.

e. Because it is not comparable, the California offense cannot be included in Mr. Morales’s offender score and he cannot be sentenced as a persistent offender. Mr. Morales

specifically objected to the inclusion of the California assault charge in his offender score. In response, the State offered nothing to permit the trial court to conclude the offense was factually comparable. “[W]here the State fails to carry its burden of proof after a specific objection, it would not be provided a further opportunity to do so.” State v. McCorkle, 137 Wn.2d 490, 496-97, 973 P.2d 461 (1999) (citing Ford 137 Wn.2d at 485). Thus, this Court must reverse Mr. Morales’s sentence so that he may be resentenced without the inclusion of the California offense in his offender score. Because the California offense cannot be used in his offender a score, Mr. Morales is not a persistent offender. RCW 9.94A.030 (37)(a)(ii). This Court must reverse his sentence and remand for imposition of a standard range sentence calculated without the California offense.

2. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR SENTENCING FACTOR,” RATHER THAN AS AN “ELEMENT,” DEPRIVES MR. MORALES OF THE EQUAL PROTECTION OF THE LAW.

As noted, even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt,

Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has recently held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). More recently the Court noted:

Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). Beyond its failure to abide the logic of Apprendi, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell, the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,³ proof of a prior

³ Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v.

conviction functions as an “elevating element,” i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See, RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to Blakely v. Washington, the “maximum punishment” was five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment.⁴ In all other circumstance “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3⁵ would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See, Washington Sentencing

Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

⁴ Blakely v. Washington, 542 US. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004)

⁵ Because the offense is elevated to a felony based upon a conviction of prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have score lower than 3.

Guidelines Comm'n, Adult Sentencing Manual 2008, III-76. The "elevation" in punishment on which Roswell pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the penalty for the substantive crime: see RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution, persons similarly situated with respect to the

legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore where an equal protection challenge is raised, the court will apply a “rational basis” test. Id.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the POAA as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set

proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person’s only felony and thus results in a “maximum sentence” of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to

whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case was an element because it defined the very illegality reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” (Italics in original.) 165 Wn.2d at 192. But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject to. Id. So too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

The recidivist fact here operates in the precise fashion as in Roswell, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as an aggravator in another. The Court should strike Mr. Morales’s persistent offender sentence and remand for entry of a standard range sentence.

3. THE TRIAL COURT DEPRIVED MR. MORALES OF HIS RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WHEN IT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICIONS THAT WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

The trial court denied Mr. Morales the right to a jury trial when it did not charge the jury with finding beyond a reasonable doubt that Mr. Morales had two prior convictions for most serious offenses, and instead made that determination on its own and only by a preponderance of the evidence. Mr. Morales's sentence as a persistent offender therefore deprived him of his Sixth **Error!** **Bookmark not defined.** and Fourteenth Amendment rights to due process and to a jury trial and must be vacated.

- a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. It is axiomatic a criminal defendant has the right to a jury trial and may only be convicted if the

government proves every element of the crime beyond a reasonable doubt. Blakely, 542 U.S. at 300-01; Apprendi, 530 U.S. at 476-77; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77 (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

In recent cases, the Supreme Court has recognized this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant. In Blakely, the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 542 U.S. at 304-05. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death

penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S., at 476. Ring pointed out the dispositive question is one of substance, not form. "If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

b. This issues is not controlled by prior by federal decisions. Almendarez-Torres v. United States held recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Almendarez-Torres pleaded guilty and admitted his prior convictions, but argued that his prior convictions should have been included in the indictment. 523 U.S. at 227-28. The Court determined Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id. The Court concluded the prior conviction need not be included in the indictment because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges have typically exercise their discretion within a permissive range, and (4) the statue did not change a pre-existing definition of the crime; thus Congress did not try to "evade" the Constitution. Id. at 244-45.

Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

Apprendi distinguished Almendarez-Torres because that case only addressed the indictment issue. 530 U.S. at 488, 495-96.

Apprendi noted “it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id.

In Blakely, Apprendi, and Jones, the Court stated that, “Other 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.”

This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule.

Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. 530 U.S. at 499. Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. Id. at 499-519; accord, Ring v. Arizona, 536 U.S. 610 (Scalia, J. , concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute call them elements of the offense, sentencing

factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the Almendarez-Torres decision. Smith, 150 Wn.2d 135 (addressing Ring); Wheeler, 145 Wn.2d at 121-24 (addressing Apprendi). The Washington Supreme Court, however, has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds. Moreover, the Blakely decision makes clear that the Supreme Court’s protection of due process rights extends to sentencing factors that increase a sentence, not over the statutory maximum provided at RCW 9A.20.021, but over the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

Further, the reasons given by Almendarez-Torres to support its conclusion that due process does not require prior convictions used to enhance a sentence to be pled in the information do not apply to the POAA. First, Almendarez-Torres looked to the

legislative intent and found that Congress did not intend to define a separate crime. But Congressional intent does not establish the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to the prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940).

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Mr. Morales's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. This Court should revisit Washington's blind adherence to that now-disfavored decision and remand for a jury determination of the prior convictions.

c. The trial court denied Mr. Morales his right to a jury trial and proof beyond a reasonable doubt of the facts establishing

his maximum punishment. Almendarez-Torres held prior convictions need not be pled in the information for several reasons. First the court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230. Historically, however, Washington required jury determination of prior convictions prior to sentencing as a habitual offender. Manussier, 129 Wn.2d at 690-91 (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement); Furth, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

For several reasons, Almendarez-Torres does not answer the question whether Mr. Morales was entitled to have a jury decide beyond a reasonable doubt whether he had two prior convictions for most serious offenses before he could be sentenced as a persistent offender. The cases cited by Almendarez-Torres support not pleading the prior convictions until after conviction on the underlying offense; they do not address the burden of proof or jury trial right. 523 U.S. at 243-45.

Second, Almendarez-Torres noted the fact of prior convictions triggered an increase in the maximum permissive sentence. “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 118 S.Ct. at 1231-32. Here, in contrast, Mr. Morales’s prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Life without the possibility of parole in Washington is reserved for aggravated murder and persistent offenders. This fact is certainly important in the constitutional analysis.

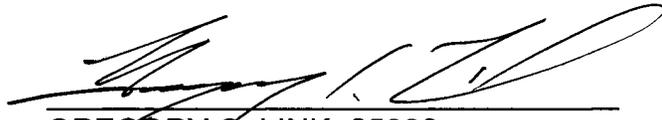
The SRA eliminated a sentencing court’s discretion in imposing the mandatory sentence under the POAA, requiring the life sentence be based on a judge’s finding regarding sentencing factors. Mr. Morales was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence.

E. CONCLUSION

For the reasons above, the Court must reverse Mr. Morales’s conviction of second degree assault. Alternatively, the

court must reverse Mr. Morales's sentence and remand for
imposition of a standard range sentence.

Respectfully submitted this 31st day of December, 2009.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK -25228
Washington Appellate Project – 91052
Attorney for Appellant

APPENDIX

SENTENCING EXHIBIT 12
(Supplemental designation filed December 31, 2009)

REQUEST FOR CERTIFIED COPIES AND/OR PRIORS

DATE OF REQUEST 5/11/09 NEEDED BY ASAP

DEFENDANT'S NAME GARCIA, Pedro DOB 12-13-76

AKA _____ PENDING CASE # CN059533 DA # P8978701

TRIAL DATE: _____ OTHER HEARING DATE: _____

Certified copies of Prior(s) SD County Out of County

CASE NO(s). Plus good copy of fingerprint card

Penal Code §12022.1: _____ Signed O.R. _____ Bond _____

Date need to cover: _____ Case # _____

FTA Docket Case # _____ Date: _____

Search Warrant # _____ Date: _____

Address _____

Restraining Order # _____ Date: _____

Prison Package (969b) _____

DMV Printout _____

DMV Record _____

Other _____

Documents to be put in file # _____ Return to DDA: _____

Return to Investigative Specialist: _____

Comments: _____

NAME OF REQUESTER Lauren / E Miller
MUST BE FILLED IN)

GRAYS HARBOR COUNTY
CAUSE NO. 09-1-2-9
PLA/PET ID 12
DEF/RSP ID _____
EXHIBIT NO. 12
ADMITTED 6-4-09
OFFERED & REFUSED _____

RECEIVED

MAY 18 2009

Grays Harbor County
Prosecuting Attorney's Office

APPENDIX

CLERK OF COURT
NOMC

APR 16 10 21 AM '97

CUSTODY

MUNICIPAL COURT OF CALIFORNIA COUNTY OF SAN DIEGO

North County Judicial District

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	
v.	
PEDRO GARCIA,	Defendant(s)

MC No. CNF 059533
DA No. P 089787

COMPLAINT-FELONY

C O M P L A I N T
S U M M A R Y

Ct. No.	Charge	Sentence Range	Defendant	Special Allegation	Alleg. Effect
1	PC664/PC187(a)	Check	GARCIA, PEDRO	PC12022.7(PC12022(b)	+3 +1
2	PC245(a)(1) PC1054.3	2-3-4	GARCIA, PEDRO	PC12022.7(+3

INFORMAL REQUEST FOR DISCOVERY

The undersigned, certifying upon information and belief, complains that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

COUNT 1 - ATTEMPTED MURDER

On or about April 13, 1997, PEDRO GARCIA did willfully and unlawfully attempt to murder JAVIER GONZALEZ, a human being, in violation of PENAL CODE SECTION 664/187(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, PEDRO GARCIA, personally inflicted great bodily injury upon JAVIER GONZALEZ, not an accomplice to the above offense, within the meaning of Penal Code section 12022.7(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, PEDRO GARCIA, personally used a deadly and dangerous weapon, to wit, Knife, within the meaning of Penal Code section 12022(b).

COUNT 2 - ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON

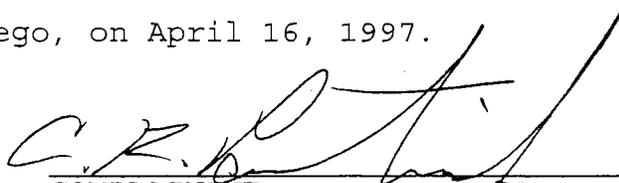
On or about April 13, 1997, PEDRO GARCIA did willfully and unlawfully commit an assault upon JAVIER GONZALEZ with a deadly weapon and by means of force likely to produce great bodily injury, in violation of PENAL CODE SECTION 245(a)(1).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, PEDRO GARCIA, personally inflicted great bodily injury upon JAVIER GONZALEZ, not an accomplice to the above offense, within the meaning of Penal Code section 12022.7(a).

Pursuant to Penal Code section 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by Penal Code section 1054.3.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER CNF 059533, CONSISTS OF 2 COUNT(S).

Executed at Vista, County of San Diego, on April 16, 1997.


COMPLAINANT

AGENCY: ESPD

AGENCY CASE: 97006422

PRELIM. TIME EST.: Hour(s)

DEFENDANT	STATUS	DOB	BOOKING NUMBER	BAIL RECOM'D	APP'NCE DATE
GARCIA, PEDRO	CUSTODY	12/13/76	97124857A		4/16/97

RECEIVED
VISTA BRANCH
APR 16 AM 10:00
TO COURT

F I L E D
KENNETH E. MARTONE
Clerk of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

MAY 29 1997

FOR THE COUNTY OF SAN DIEGO

~~By~~ M. HEREDIA, Deputy

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
v.
PEDRO GARCIA, Defendant(s)

SC No. SCN 059533
DA No. P 089787

INFORMATION

I N F O R M A T I O N
S U M M A R Y

Ct. No.	Charge	Sentence Range	Defendant	Special Allegation	Alleg. Effect
1	664/PC187(a)	Check	GARCIA, PEDRO	PC12022.7(+3 +1
2	PC245(a)(1)	2-3-4	GARCIA, PEDRO	PC12022.7(+3

The District Attorney of the County of San Diego, State of California, accuses the Defendant(s) of committing, in the County of San Diego, State of California, the following crime(s):

COUNT 1 - ATTEMPTED MURDER

On or about April 13, 1997, PEDRO GARCIA did willfully and unlawfully attempt to murder JAVIER GONZALEZ, a human being, in violation of PENAL CODE SECTION 664/187(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, PEDRO GARCIA, personally inflicted great bodily injury upon JAVIER GONZALEZ, not an accomplice to the above offense, within the meaning of Penal Code section 12022.7(a).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, PEDRO GARCIA, personally used a deadly and dangerous weapon, to wit, Knife, within the meaning of Penal Code section 12022(b).

COUNT 2 - ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON

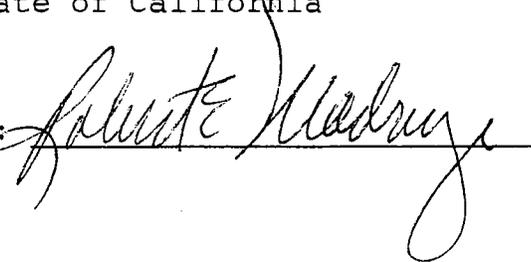
On or about April 13, 1997, PEDRO GARCIA did willfully and unlawfully commit an assault upon JAVIER GONZALEZ with a deadly weapon and by means of force likely to produce great bodily injury, in violation of PENAL CODE SECTION 245(a)(1).

And, it is further alleged that in the commission and attempted commission of the above offense, the said defendant, PEDRO GARCIA, personally inflicted great bodily injury upon JAVIER GONZALEZ, not an accomplice to the above offense, within the meaning of Penal Code section 12022.7(a).

THIS INFORMATION NUMBERED SCN 059533, CONSISTS OF 2 COUNT(S).

PAUL J. PFINGST.
DISTRICT ATTORNEY
County of San Diego,
State of California

DATED 05/29/1997

BY: 

26

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3409 <input type="checkbox"/> NORTH COUNTY BRANCH, 325 S. MELROSE, VISTA, CA 92083-6627 <input type="checkbox"/> EAST COUNTY COURT, 250 E. MAIN, EL CAJON, CA 92020-3913 <input type="checkbox"/> SOUTH BAY COURT, 500 THIRD, CHULA VISTA, CA 91910-5694		Court Use Only F I L E D KENNETH E. MARTONE Clerk of the Superior Court SEP 09 1997 By: V. BRIDGES, Deputy VISTA BRANCH
PEOPLE OF THE STATE OF CALIFORNIA VS AEDRO GARCIA	PLAINTIFF, DEFENDANT	Case Number SCN 059533 DA
PLEA OF GUILTY/NO CONTEST - FELONY (PC 1016, 1016.5, 1017)		

I, the defendant in the above-entitled case, in support of my motion to change my plea(s) in open Court, personally and by my attorney, declare as follows:

- Of those charges now filed against me in this case, I plead GUILTY to the following violations: (List Crimes and Code Sections) COUNT 2, P.C. 245(a)(1), ASSAULT WITH DEADLY WEAPON P. 6
- (If Applicable) I also admit the following enhancement(s)/prior conviction(s) with which I am charged: (List Court, Docket No. and Date of any Prior Conviction) N/A N/A
- I have not been induced to enter the above plea by any promise or representation of any kind, except: (Briefly state any agreement with the District Attorney.) DA AGREES TO DISMISS BALANCE OF INFORMATION. COURT INDICATES PROBATION AND LOCAL CUSTODY. P. 6

RIGHT TO A LAWYER

- I understand that I have the right to be represented by a lawyer at all stages of the proceedings. I can hire my own lawyer, or the Court will appoint a lawyer for me if I cannot afford one. P. 6

CONSTITUTIONAL RIGHTS

I understand that I also have the following constitutional rights, which I now give up to plead either Guilty or No Contest:

- | | | |
|---|-------------------------|-----------------------|
| 4. The right to be tried by a jury, in a speedy, public trial. | I understand this right | I give up this right. |
| 5. The right to confront and to cross-examine all the witnesses against me. | P. 6 | P. 6 |
| 6. The right to remain silent (unless I choose to testify on my own behalf). | P. 6 | P. 6 |
| 7. The right to present evidence and to have witnesses subpoenaed to testify in my behalf at no cost to me. | P. 6 | P. 6 |

CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST

- I understand that I may receive this maximum penalty as a result of my plea: FOUR (4) years in State Prison, \$ 10,000 fine and 4 years parole (4,7, /life), with up to one year return to prison for every parole violation. If I should receive probation, (for a period up to the maximum prison term), I understand that I may be given up to a year in local custody, plus the fine, and any other conditions deemed reasonable by the Court. I understand that if I violate any terms or conditions of probation I can be sent to State Prison for the maximum term as stated above. P. 6
- I understand that I shall be required to pay a mandatory restitution fine (\$200-\$10,000). P. 6
- My attorney has explained to me that other possible consequences of this plea may be: (Circle applicable consequences.)

(a) Consecutive sentences.	(f) Blood test and saliva sample.	<input checked="" type="checkbox"/> (k) Serious felony prior / Prison prior.
(b) Loss of driving privileges.	(g) Registration as a narcotics offender.	(l) Ineligibility for probation / presumptive prison.
(c) Commitment to the Youth Authority.	(h) AIDS education program.	(m) Vehicle interlock device (VC 23235).
(d) Registration as an arson offender.	<input checked="" type="checkbox"/> (i) Restitution.	(n) Other _____
(e) Registration as a sex offender.	(j) Priors	

P. 6
- I understand that if I am not a citizen of the United States a plea of Guilty or No Contest could result in deportation, exclusion from admission to this country, and/or denial of naturalization. P. 6
- I understand that my plea of Guilty or No Contest in this case could result in revocation of my probation or parole in other cases. P. 6
- I understand that I have the right to appeal the denial of my Penal Code Section 1538.5 motion (suppression of evidence motion) in this case. I give up that right. N/A

12. I understand that my conviction in this case will be a "strike" (Penal Code Section 667) resulting in a mandatory denial of probation and substantially increased penalties in any future felony case.

N/A

13. I now plead GUILTY to the charge(s) described in #1 above and admit that on the date charged I: (Describe facts as to each charge in #1.)

P. 6

ARTIES STIPULATE PRELIMINARY HEARING TRANSCRIPT
SUPPORTS A FACTUAL BASIS.

13a. (If Applicable) I understand that as to any and all prior convictions/enhancements alleged against me in this case, I have all the constitutional rights listed in #3-#7 above. As to any prior convictions alleged, I understand that if I request a jury trial on the current case, the jury would neither learn of nor decide, the prior conviction(s) unless and until the jury found me guilty on the current charges.

N/A

13b. (If Applicable) I hereby admit the prior conviction(s)/enhancement(s) listed in this form, and give up my constitutional rights, including the right to separate jury determination on the issue of the prior conviction(s).

N/A

14. I do understand that the matter of probation and sentence is to be determined solely by the Court.

P. 6

15. (Harvey Waiver) The sentencing judge may consider my prior criminal history and the entire factual background of the case, including any unfilled, dismissed or stricken charges or allegations or cases when granting probation, ordering restitution or imposing sentence.

P. 6

16. (Arbuckle Waiver) I understand that I have the right to be sentenced by the same judge who accepts this plea. I hereby waive that right, and agree that sentence may be imposed either by the judge who accepts this plea or by a different judge.

N/A

17. I am entering my plea freely and voluntarily, without threat or fear to me or anyone closely related to me.

P. 6

18a. I am pleading Guilty because in truth and in fact I AM GUILTY.

P. 6

18b. I understand that a plea of No Contest is the same as a plea of Guilty in this criminal case and for all purposes has the same consequences as a plea of Guilty.

N/A

19. I am now sober, I have not consumed any drug, alcohol or narcotic within the past 24 hours to the extent that my judgment is impaired.

P. 6

20. I declare under penalty of perjury, under the laws of the State of California, that I have read, understood, and initialed each item above, and everything on the form is true and correct.

P. 6

Dated: 9/9/97

Defendant's Signature Pedro Garcia

Defendant's Address _____ Street _____ City _____ State _____ Zip _____

Defendant's Telephone No. () _____

ATTORNEY'S STATEMENT

I, the undersigned, state that I am the attorney for the defendant in the above-entitled case; that I personally read and explained the contents of the above declaration to the defendant and each item thereof; that no meritorious defense exists to the charge(s) to which the defendant is pleading Guilty/No Contest; that I personally observed the defendant fill in and initial each item, or read and initial each item to acknowledge the explanation of the contents of each; that I observed the defendant date and sign the declaration; that I concur in the defendant's above plea and waiver of constitutional rights.

Dated: 9/9/97

[Signature]
Attorney for Defendant

INTERPRETER'S STATEMENT (If Applicable)

I, the interpreter in this proceeding, having been duly sworn, truly translated this form and all the questions therein to the defendant in the Spanish language. The defendant indicated understanding of the contents of the form and then initialed and signed the form.

Dated: 9/9/97

[Signature]
Court Interpreter

PROSECUTOR'S STATEMENT

The People of the State of California, plaintiff in the above-entitled criminal case, by and through its attorney, Paul Pfingst., District Attorney, concurs in the defendant's plea of Guilty/No contest as set forth above.

Dated: 9/9/97

[Signature]
Deputy District Attorney

COURT'S FINDINGS AND ORDER

The Court, having questioned the defendant concerning the defendant's constitutional rights, finds that the defendant understands these rights and has voluntarily and intelligently waived these constitutional rights. The Court finds that the defendant's pleas and admissions are freely and voluntarily made, that the defendant understands the nature of the charges and the consequences of the plea, and that there is a factual basis for the pleas. The Court accepts the defendant's plea, and the defendant is hereby convicted on the plea.

Dated: SEP 09 1997

[Signature]
Judge of the Superior Court

76 v. 5

SCN059533 DA P8978701

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

DATE 09-09-97 AT 09:00 M. 97124857 SUP READINESS CONF

PRESENT: HON J. MORGAN LESTER JUDGE PRESIDING DEPARTMENT F

CLERK DONNA COUSINS REPORTER SUZANNE LAZOVIC CSR# 2885

REPORTER'S ADDRESS: P.O. BOX 128, SAN DIEGO, CA 92112-4104

THE PEOPLE OF THE STATE OF CALIFORNIA VS.

Greg Walden DEPUTY DISTRICT ATTORNEY

GARCIA PEDRO DEFENDANT

E - J. MARTIN ATTORNEY FOR DEFENDANT (APPT'D/DETAINED)

VIOLATION OF PC654-PC187(a) *PC245(A)(1)

1st 1+2 w/ PC12022.7(a) 2nd 1 w/ PC12022(b)

INTERPRETER M. Acosta SWORN CERT LANGUAGE Spanish

READINESS

- DEFENDANT NOT PRESENT. TRIAL DATE 9-30-97 REMAINS AS SET/CONFIRMED/VACATED
DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS. DEFT. SWORN & EXAMINED. LATEST INFO./INDICT. FILED 5-29-97
DEFENDANT WITHDRAWS PLEA OF "NOT GUILTY" HERETOFORE ENTERED AND NOW PLEADS
GUILTY/NOLO CONTENDERE WITH APPROVAL OF COURT, OF THE OFFENSE:
PEOPLE V. WEST PLEA.
COUNSEL & DEFENDANT STIPULATE TO PRELIMINARY/GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA.
ON MOTION OF COURT/DDA/DEFENDANT COUNT(S) REMAINING IS/ARE DISMISSED/FOJ/VOP.
ON MOTION OF COURT/DDA/DEFENDANT ALLEGATIONS/PRIOR(S) REMAINING IS/ARE STRICKEN FOJ/VOP.

Ct# 2-PC245(a)(1)

CUSTODY

- DEFENDANT REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL WITH BAIL SET AT \$
DEFENDANT ORDERED RELEASED FROM CUSTODY ON OWN/SUPERVISED RECOGNIZANCE CASE DISMISSED ACQUITTED.
DEFENDANT TO REMAIN AT LIBERTY ON BOND POSTED \$ ON OWN/SUPERVISED RECOGNIZANCE.
BAIL IS SET AT/REDUCED TO/INCREASED TO \$

FRUGS

- DEFT'S WAIVERS: STATUTORY TIME PRON. JUDGMENT/TRIAL HARVEY/ARBUCKLE PRESENCE AT POST-SENTENCE HEARING.
IN DEPARTMENT F ON MOTION OF COURT/DDA/DEFENDANT. IS SET FOR/CONT'D/TRAILED TO 10-7-97 AT 1:30 PM DAYS LEFT

WARRANTS

- BENCH WARRANT TO ISSUE, BAIL SET AT \$ SERVICE FORTHWITH. ORDERED WITHHELD TO
BENCH WARRANT ISSUED/ORDERED IS RECALLED/RESCINDED.
BOND IS EXONERATED FORFEITED. AMOUNT \$ BOND NO.
BOND COMPANY AGENT
BOND FORFEITURE OF IS SET ASIDE/REINSTATED/EXONERATED. SURETY TO PAY \$ W/IN 30 DAYS.

MH

- PROCEEDING SUSPENDED PER PC 1368. MENTAL COMPETENCY EXAMINATION ON AT
IN ROOM 1003, PSYCHIATRIC EXAMINING FACILITY.
HEARING ON AT IN DEPARTMENT
THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE.

PROBATION

- REPORT ORDERED: PRESENTENCE POST-SENTENCE PC1000 SUPPLEMENTAL. PROB. RVKD. ON
DEFENDANT FOUND GUILTY BY JURY VERDICT COURT FINDING. DEFT. WAIVES POST-SENTENCE INTERVIEW.
DEFT. ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT.
DEFENDANT REFERRED TO/ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. BELOW FOR INTERVIEW:
330 W. BROADWAY, 5TH FL, SAN DIEGO 325 S. MELROSE, VISTA 1460 E. MAIN, EL CAJON 1727 SWEETWATER, NATIONAL CITY.

OTHER:

J. Morgan Lester JUDGE OF THE SUPERIOR COURT

3

V.S

SCN059533 DA P8978701

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

DATE 10-07-97 AT 01:30M.

97124857

PROB HEAR-SENTENCING

PRESENT: HON J. MORGAN LESTER

JUDGE PRESIDING DEPARTMENT F

CLERK DONNA COUSINS

REPORTER SUZANNE LAZOVIC CSP# 2805R#

REPORTER'S ADDRESS: P.O. BOX 128 SAN DIEGO, CA 92112-4104

THE PEOPLE OF THE STATE OF CALIFORNIA VS.

Robert Healey DEPUTY DISTRICT ATTORNEY

GARCIA PEDRO DEFENDANT

P. - J. MARTIN ATTORNEY FOR DEFENDANT (APPTD/RETAINED)

VIOLATION OF 2 PC 245(A)(1)

INTERPRETER M. Acosta SWORN CERT LANGUAGE Spanish

DEFENDANT PRESENT NOT PRESENT.

DEFENDANT ADVISED OF RIGHTS AND ADMITS/DENIES A VIOLATION OF PROBATION WAIVES HEARING. PROBATION IS: FORMALLY/SUMMARILY REVOKED REINSTATED MODIFIED CONTINUED ST&C EXTENDED TO:

WAIVES ARRAIGNMENT. APPRAIGNED FOR JUDGMENT. IMPOSITION/EXECUTION OF SENTENCE IS SUSPENDED. PROBATION IS: DENIED GRANTED 3 YEARS (FORMAL/SUMMARY) TO EXPIRE 10-6-2000.

COMMITMENT TO SHERIFF FOR 365 DAYS. STAYED TO: ADULT INST. RECOMMENDED. PAROLE NOT TO BE GRANTED. PERFORM HRS/DAYS PSP/VOL. WORK AT NONPROFIT ORG. SUBMIT PROOF TO PROBATION/COURT BY

FOURTH AMENDMENT WAIVER OF PERSON/AUTO/RESIDENCE/PERSONAL EFFECTS. SHORT TERM WORK FURLOUGH, REPORT: UPON COMPLETION OF CUSTODY/DEFENDANT RELEASED TO U.S.I.N.S./UPON DEPORTATION, FORMAL PROBATION REVERTS TO SUMMARY.

FURTHER CONDITIONS ARE SET FORTH IN PROBATION ORDER. VEHICLE INTERLOCK DEVICE (VC 23235/23246). DEFENDANT IS COMMITTED TO THE DEPARTMENT OF CORRECTIONS PER PC 1170(d). DEFENDANT IS COMMITTED TO THE CALIFORNIA YOUTH AUTHORITY PER WI 1737

FOR LOWER/MIDDLE/UPPER TERM OF YEARS/MONTHS/TO LIFE ON COUNT CODE & NO. PRINCIPAL COUNT. NO VISITATION, PER PC 1202.05. VICTIM IS UNDER 18 YRS. OF AGE. DA TO COMPLY WITH NOTICES.

DEFENDANT IS ADVISED REGARDING PAROLE/APPEAL RIGHTS. REGISTRATION PER PC 290/HS 11590/PC 457.1. TESTING PER PC 1202.1. CIRCUMSTANCES IN MITIGATION/AGGRAVATION OUTWEIGH THOSE IN MITIGATION/AGGRAVATION.

RESTITUTION FINE OF \$ 200.00 PER PC 1202.4(b). FORTHWITH PER PC 2085.5. RESTITUTION FINE OF \$ PER PC 1202.45 SUSPENDED UNLESS PAROLE IS REVOKED.

FINE OF \$ 200.00 INCLUDING PENALTY ASSESSMENT. RESTITUTION OF \$ TO VICTIM/REST. FUND PER PC 1202.4(f). AT \$ 75.00 PER MONTH. COMBINED RATE. TO START 90 DAYS AFTER RELEASE/ON THROUGH REVENUE AND RECOVERY.

DEFENDANT TO PAY PRE-PLEA INVESTIGATION AND REPORT PREPARATION COSTS. DEFENDANT TO PAY BOOKING FEES. REFERRED TO REVENUE AND RECOVERY. COURT APPOINTED ATTORNEY FEES ORDERED IN THE AMOUNT OF \$

DEFENDANT REMANDED TO CUSTODY OF SHERIFF. WITHOUT BAIL. WITH BAIL SET AT \$

DEFENDANT ORDERED RELEASED FROM CUSTODY. ON PROBATION. ON OWN/SUPERVISED RECOGNIZANCE. THIS CASE ONLY. DEFENDANT TO REMAIN AT LIBERTY. ON BOND POSTED \$ ON PROBATION. ON OWN/SUPERVISED RECOGNIZANCE.

DEFENDANT WAIVES STATUTORY TIME FOR PRONOUNCEMENT OF JUDGMENT. DEFENDANT REFERRED FOR DIAGNOSTIC EVALUATION. PER PC 1203.03. PER WI 707.2.

CONTINUED TO/SET FOR AT M. IN DEPT. ON MOTION OF COURT/DDA/DEFENDANT/PROBATION OFFICER. REASON:

BENCH WARRANT TO ISSUE, BAIL SET AT \$ SERVICE FORTHWITH. ORDERED WITHHELD TO BENCH WARRANT ISSUED/ORDERED IS RECALLED/RESCINDED.

BOND IS EXONERATED. FORFEITED. AMOUNT \$ BOND NO. BOND COMPANY AGENT

PROCEEDINGS SUSPENDED PER PC 1368, MENTAL COMPETENCY. (SEE BELOW FOR DATES OF EXAMINATION AND HEARING.) PER WI 3051, ADDICTION OR DANGER OF ADDICTION. (SEE BELOW FOR SERVICE DATE OF PETITION AND ORDER.)

SUPPLEMENTAL REPORT ORDERED. REPORT TO REGISTRAR OF VOTERS. DMV ABSTRACT. B.A.C.

CREDIT FOR TIME SERVED	
178	DAYS LOCAL
	DAYS STATE INST.
88	DAYS PC 4019/2933.1
266	TOTAL DAYS CREDIT

Judge of the Superior Court signature

Duen

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL COURT, 220 W. BROADWAY, SAN DIEGO, CA 92101-3409 <input checked="" type="checkbox"/> NORTH COUNTY BRANCH, 325 S. MELROSE, VISTA, CA 92083-6627 <input type="checkbox"/> EAST COUNTY COURT, 250 E. MAIN, EL CAJON, CA 92020-3913 <input type="checkbox"/> SOUTH BAY COURT, 500 THIRD, CHULA VISTA, CA 91910-5694		COURT USE ONLY FILED KENNETH E. MARTONE Clerk of the Superior Court OCT 07 1997 By: V. BRIDGES, Deputy VISTA BRANCH
PEOPLE OF THE STATE OF CALIFORNIA VS <i>Pedro Garcia</i>		PLAINTIFF DEFENDANT
PROB A # <u>789681</u> CII # <u>11741669</u> BK # <u>97124857A</u>	ORDER GRANTING PROBATION (PC 1203)	Case # <u>SCN 59533</u> DA # <u>P8978701</u> DEPT # <u>F</u>

Having been convicted of violating section(s) PC 245(A)(1), IT IS ORDERED that the imposition of sentence be suspended/ sentence of _____ years/months in state prison be imposed and execution be suspended, for a period of 3 years, and the defendant be granted probation to the court, under the supervision of the probation officer, to convert to probation to the court _____ on the following terms and conditions:

- 1. COMMITMENT:** a. To the custody of the Sheriff for 365 day(s), with credit for 178 actual day(s) and 88 PC 4019 credits, for a total of 266 day(s) credit. Custody is stayed until _____
 b. **COMMIT RECOMMENDATIONS:** 1. Adult Institutions 2. The Electronic Surveillance Program
 3. Probation Work Furlough. Defendant to report on _____ at _____ am/pm to 551 S. 35th St., San Diego 92113.
 4. Women's Work Furlough. Defendant must report to Las Colinas on date set by SDSO & call Jail Counselor at 258-3253 within 72 hours.
 c. Custody is to be served consecutive to/concurrent with _____

- 2. PROBATION DEPARTMENT PUBLIC SERVICE PROGRAM (PSP)/VOLUNTEER WORK:**
 a. Work _____ day(s) in Public Service Program. Defendant is to report forthwith to enroll at Vista Probation
 b. Complete _____ hours of volunteer work at a nonprofit organization. Work is to be completed by _____ with proof of completion to the probation officer on or before _____

- 3. THE DEFENDANT SHALL PAY:**
 a. A fine of \$ 200.00 including penalty assessment. b. Restitution fine of \$ 200.00, per PC 1202.4(b).
 c. Restitution of \$ _____ to: 1. Victim(s) per P.O.'s report plus interest of 10% annually on unsatisfied amount.
 2. Restitution fund if victim received assistance from state's Victims of Crime Program.
 d. Additional fine of \$10.00 per PC 1202.5 for payment to _____ law enforcement agency.
 e. All fines and/or restitution are to be paid to Probation through Revenue & Recovery at combined rate of \$ 25.00 per month. Payments are to start 60 days after release from custody/ on _____
 f. Restitution is to be determined/modified by further court order if the victim reports a loss/further loss.
 g. Any restitution order shall become a judgment under PC 1203(j) if it is unpaid at the end of probation.

- 4. UNDOCUMENTED DEFENDANT CONDITIONS:**
 a. An undocumented defendant shall not enter or be in the United States without proper documentation evidencing lawful presence.
 b. Formal probation to become probation to the court on verification that the undocumented defendant has been released to USINS for processing.

- 5. WAIVER OF EXTRADITION:**
 Defendant waives extradition and agrees NOT to contest any such extradition to the State of California from any other state, government, country or jurisdiction. The waiver is in effect from today through the duration of probation, including periods of revocation.

- 6. THE DEFENDANT SHALL:**
 a. Obey all laws. Minor traffic infractions will not affect probation status.
 b. Submit person, property, place of residence, vehicle, personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by probation officer or other law enforcement officer.
 c. Report to P.O. in a manner and at times as may be directed by that officer. Within 72 hours of release from custody.
 d. Report any change of address or employment to the probation officer and Revenue & Recovery within 72 hours.
 e. Seek and maintain full-time employment, schooling, or a full-time combination of the two.
 f. Follow such course of conduct as the probation officer may prescribe.
 g. Register per HS 11590 PC 290 PC 457.1
 h. Obtain the consent of the P.O. before leaving San Diego county OR written consent of the San Diego Superior Court before moving to another state. The defendant may travel to or reside in _____ pursuant to interstate compact.
 i. Maintain a checking/charge account or be in possession of checks/credit cards ONLY if issued pursuant to employment.
 j. Not possess a firearm.

Garcia, Pedro

CASE NUMBER: SCN 59533
PROBATION A# 789681

CONDITIONS LISTED IN SUBSECTIONS 7, 8, 9, 10 AND 11 ARE NORMALLY IMPOSED IN CASES INVOLVING SPECIFIED OFFENSES, E.G., DRUGS, SEX, ETC., BUT MAY BE IMPOSED FOR OTHER OFFENSES IF REASONABLE AND LAWFUL.

7. DRUG AND ALCOHOL CONDITIONS:

- a. Attend and successfully complete a _____ counseling program, as/ if directed by the P.O. Authorize the counselor to provide progress reports to the probation officer when requested; all costs to be borne by defendant.
- b. If a fine is imposed, it shall be increased per HS 11372.5 and 11372.7 to include a criminal lab analysis fee of \$ _____ and a drug program fee of \$ _____.
- c. Complete a program of residential treatment as/ if directed by probation officer.
- d. Submit to testing for the use of controlled substances/alcohol when required by the probation or law enforcement officer.
- e. Attend meetings of Alcoholics/Narcotics Anonymous or similar organization as directed by the probation officer.
- f. Complete the county AIDS Education Course per PC 1001.10; Call Provider at _____ within 30 days of release from custody or issuance of order to enroll unless course is completed while defendant is in custody.
- g. Pay a fee not exceeding \$50 to AIDS Education provider in lieu of fine, for crimes described in PC 1463.23.
- h. Not use or possess any controlled substance without a valid prescription.
- i. Totally abstain from the use of alcohol.
- j. Register/enroll in the SB38 Program within 30 days, and satisfactorily complete that program as directed by the probation officer. All costs are to be borne by the defendant.
- k. Take antabuse (if physically able, as determined by a licensed physician) if directed by the P.O. and continue in the program until excused. If not physically able to take antabuse, submit a written statement from physician verifying inability to do so.
- l. If arrested for drunk driving, submit to any chemical test of blood, breath, or urine to determine the blood alcohol content.
- m. Surrender your driver's license forthwith to the court for forwarding to DMV per VC 13350-13351.
- n. Not frequent places, except in the course of employment, where alcohol is the main item for sale.
- o. Not drive unless licensed and insured as required by the State of California.

8. ~~GANG~~ CONDITIONS:

- a. Have a photo ID card on your person at all times.
- b. If contacted by law enforcement, provide true name, address, and date of birth. Report contact or arrest in writing to the probation officer within 7 days. Include the date of contact/arrest, charges, if any, and the name of the law enforcement agency.
- c. Not appear in court or at the courthouse unless you are a party or witness in the proceedings.
- d. Not associate with any known gang member or persons who are associated with the _____ gang.
- e. Not visit or frequent any school grounds unless you are a student registered at the school.
- f. Not knowingly be an occupant in a stolen vehicle.
- g. Not own, transport, sell, possess any weapon, firearm, replica, ammunition, or any instrument used as a weapon.
- h. Not associate with any persons who have firearms or weapons in their possession.
- i. Not participate in activities/frequent places where firearms or weapons are used illegally or legally (hunting/target shooting).
- j. Not be in possession of any beeper or paging device except in course of lawful employment.
- k. Not be within two blocks of _____ (an area of gang or criminal activity).
- l. Not wear, display, use, or possess any insignias, emblems, badges, buttons, caps, hats, jackets, shoes, flags, scarves, bandanas, shirts, or other articles of clothing which are evidence of affiliation with or membership in the _____ gang.
- m. Not display any gang signs or gestures.
- n. Comply with a curfew if so directed by the probation officer.

9. FURTHER CONDITIONS:

- a. _____
- b. _____
- c. _____
- d. _____
- e. _____
- f. _____
- g. _____

Garcia, Pedro

CASE NUMBER: SCN 59533

PROBATION A# 789681

10. VIOLENCE AND SEX CONDITIONS:

- a. Submit to DNA Testing:
 - 1. By SDSO/Adult Institutions, prior to release, per PC 290.2;
 - 2. By San Diego County Health at 1700 Pacific Highway within 14 days of release.
 - 3. Provide proof of testing to probation officer.
- b. Submit to service and comply with any order of the family court, including restraining orders.
- c. Comply with a curfew if so directed by the probation officer.
- d. Do not use force, threats, or violence on another person.
- e. Do not contact _____ except per family court orders regarding visitation and/or custody of children.
- f. Make \$ _____ payment to the domestic violence special fund per PC 1203.097(e).
- g. Successfully complete a probation officer approved batterer's program at least one year in duration, involving weekly two-hour sessions. Show proof of enrollment to probation officer by _____.
- h. Perform _____ hours of community service as directed by the probation officer.
- i. Submit to AIDS Testing per PC 1202.1:
 - 1. By SDSO/Adult Institutions, prior to release;
 - 2. By San Diego County Health at _____.
- j. Pay an additional fine of \$ _____ per PC 290.3 to Probation through Revenue & Recovery at \$ _____ per month beginning today/ 30 days after release from custody.
- k. Obey all orders of Juvenile and Family courts.
- l. Be responsible for all therapy expenses incurred by the victim.
- m. Defendant's residence and employment are subject to approval by the probation officer.
- n. Undergo periodic polygraph examinations at defendant's expense, at the direction of the probation officer.
- o. Not contact, annoy, or molest Javier Gonzalez
- p. Not associate with minors, nor frequent places where minors congregate, unless with an adult approved by the probation officer.
- q. Not reside with the victim unless approved by therapist, victim's therapist, victim's non-offending parent or guardian, and P.O.
- r. Not contact the victim unless approved by therapist, victim's therapist, victim's non-offending parent or guardian, and P.O.
- s. Not purchase or possess a camera or related photographic equipment, nor possess or have in residence any toys, video games, or similar items.
- t. Not possess any pornographic material, nor frequent areas of pornographic activity (e.g., X-rated bookstores, etc.).

11. FURTHER CONDITIONS:

- a. _____
- b. _____
- c. _____
- d. _____
- e. _____
- f. _____
- g. _____

<i>Garcia, Pedro</i>	CASE NUMBER: <u>5CN 59533</u> PROBATION A# <u>789681</u>
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12. ORDERED TO PAY:

- a. Probation costs: \$ 400 ~~827.00~~ for presentence investigation and \$ 66.00 per month for supervision to the Probation Office through Revenue & Recovery at a combined rate of \$ 75.00 per month beginning 90 days after release.
- b. Appointed attorney fees in the amount of \$ _____ Name of attorney: _____
- c. Costs of transcripts on any subsequent appeals.

13. REFERRAL TO DEPARTMENT OF REVENUE AND RECOVERY:

Defendant's Address: 1925 E. Grand Ave., Escondido CA 92027

Phone Number: 760/738-6853 DOB: 12-13-76

You are ordered to report to the Department of Revenue and Recovery at:

Downtown Courthouse
 Room M-060 (Mezzanine)
 220 W. Broadway
 San Diego, CA

Central Office
 Second Floor
 625 Broadway
 San Diego, CA

North County
 Room C-65
 325 S. Melrose
 Vista, CA

Further Payment Conditions: _____

If it is determined by the Department of Revenue and Recovery that you have the present ability to repay the county for court appointed attorney fees, or the costs of transcripts on appeal, and you do not agree with such determination, you have the right to a hearing before the court to determine your present ability. Failure to report to the Department of Revenue and Recovery will be deemed a waiver of your right to a hearing on your present ability to repay the county, and a civil judgment will be entered against you for the amount of funds expended for the above services. Failure to pay a fine or restitution may result in a warrant being issued for your arrest. Execution may be issued on the order for costs of probation investigation/report, the costs of probation supervision, and the costs of transcripts on appeals, in the same manner as a judgment in a civil action (PC 1203.1b). Each of the above ordered amounts are to be paid to the Department of Revenue and Recovery.

In open court: 10-7-97

J. Morgan Lester

J. MORGAN LESTER Judge of the Superior Court

CLERK'S CERTIFICATE

The foregoing is a full, true and correct copy of the original on file in this office.

KENNETH E. MARTONE
 CLERK OF THE SUPERIOR COURT



Date: _____

By _____, Deputy

<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</p> <p><input type="checkbox"/> CENTRAL COURT, 220 W. BROADWAY, SAN DIEGO, CA 92101-3409</p> <p><input checked="" type="checkbox"/> NORTH COUNTY BRANCH, 325 S. MELROSE, VISTA, CA 92083-6627</p> <p><input type="checkbox"/> EAST COUNTY COURT, 250 E. MAIN, EL CAJON, CA 92020-3913</p> <p><input type="checkbox"/> SOUTH BAY COURT, 500 THIRD, CHULA VISTA, CA 91910-5694</p>	<p style="text-align: right;"><i>FOR COURT USE ONLY</i></p> <p style="text-align: center;">F I L E D</p> <p style="text-align: center;">KENNETH E. MARTONE CLERK OF THE SUPERIOR COURT</p> <p style="text-align: center;">May 30, 1997</p> <p style="text-align: center;">By V. BRIDGES, Deputy</p>
<p style="text-align: center;">PEOPLE OF THE STATE OF CALIFORNIA</p> <p style="text-align: center;">vs.</p> <p>DEFENDANT: PEDRO GARCIA</p>	
<p style="text-align: center;">FINGERPRINT FORM</p>	<p>CASE NUMBER</p> <p style="text-align: right;">SCN059533 01</p>

INSTRUCTIONS

Immediately following arraignment in superior court of a defendant charged with a felony or arraignment of a defendant by a municipal court judge sitting as a superior court judge, the court shall require the defendant to provide a right thumbprint on this form. In the event the defendant is convicted, this form shall be attached to the minute order reflecting the defendant's sentence and shall be permanently maintained in the court file. Please see Penal Code section 992 for further information, including when the defendant is physically unable to give a right thumbprint.

For a proper imprint and durable record, this form should be printed on paper that meets California Department of Justice specifications: a 99 pound white tab card or 100 pound white tab stock 0.0070 inch thick (0.0066 through 0.0074 inch is acceptable). Paper smoothness should be 100-140 sheffield units. The form should be printed with the grain left to right.

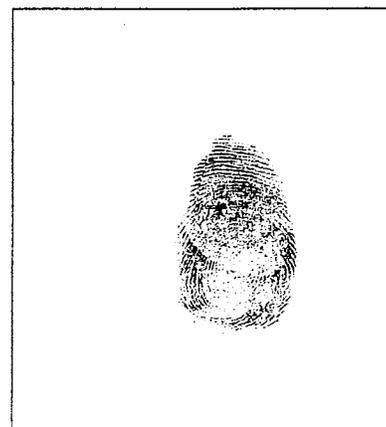
1. The box to the right contains the defendant's

- right thumbprint
- other print (*specify*):

2. The print was taken on (*date*): 5.30.97

3. The print was taken by

- a. Name: GARY VANHOUSEN / SCOTT KING
- a. Position: BALIFF
- a. Badge or serial No.: 48 89



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 39415-4-II
)	
PEDRO MORALES,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|----------------------------|--|
| <p>[X] GERALD FULLER, DPA
GRAYS HARBOR CO. PROSECUTOR'S OFFICE
102 W. BROADWAY AVENUE, ROOM 102
MONTESANO, WA 98563-3621</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |
| <p>[X] PEDRO MORALES
835192
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326</p> | <p>(X)
()
()</p> | <p>U.S. MAIL
HAND DELIVERY
_____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2009.

X _____ *Jan*

STATE OF WASHINGTON
BY _____ DEPUTY
10 JAN -4 AM 10:00
COURT OF APPEALS
DIVISION II

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710