

64004-6

64004-6

**NO. 64004-6-1**

**IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON**

Respondent,

v.

**ANTHONY MARTINEZ,**

Appellant.

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**ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY**

The Honorable David R. Needy, Judge

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**RESPONDENT'S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Anthony Martinez was convicted of committing a roof top burglary of a convenience store in Mount Vernon. Martinez claims on appeal that there was insufficient evidence presented of his prior New York burglary convictions, to allow them to be included in offender score. Because the records adequately identify Martinez, show he was convicted and are prima facia evidence of the convictions under New York statutes, they sufficiently establish under Washington law the existence of the convictions and the trial court properly included the prior convictions as criminal history.

## **II. ISSUE**

Where the out of state record of convictions are prima facia evidence of the convictions in the other state, did the trial abuse its discretion by finding the existence of out of state convictions by a preponderance of the evidence?

## **III. STATEMENT OF THE CASE**

### **1. Statement of Procedural History**

On October 8, 2008, Anthony Martinez was charged with Burglary in the Second Degree, Malicious Mischief in the Second Degree and Having Burglary Tools for an incident alleged to have occurred on October 4, 2008. CP 1-2. Martinez had been caught

climbing down from the roof of the convenience store where there was a hole through the tar, roofing paper and plywood sheathing. CP 4. A backpack containing a crowbar, pipe wrench, tin snips, screwdriver, flashlight and boarding passes in the name of Anthony Martinez were found on the roof. CP 4.

On December 15, 2008, Martinez proceeded to trial. 12/15/08 RP 2.<sup>1</sup>

On December 16, 2008, the jury found Martinez guilty of Burglary in the Second Degree, Malicious Mischief in the Second Degree and Having Burglary Tools. CP 59-61.

On February 6, 2009, the trial court began the sentencing hearing. 2/6/09 RP 2. The state admitted records pertaining to the defendant's New York criminal history. 2/6/09 RP 2, 12. The trial court determined by a preponderance of the evidence that the defendant in the courtroom was the same person convicted of three prior burglary convictions in New York. 2/6/09 RP 42. The trial court took the matter under advisement pending further briefing from the

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

12/15/08 RP	Trial Day 1 including Opening Statements and Testimony
12/16/08 RP	Trial Day 2 including Testimony and Closing Argument
2/6/09 RP	Sentencing
2/12/09 RP	Sentencing - Conclusion.

parties on the issue of whether the validity of the convictions was established by the records identifying the defendant. 2/12/09 RP 42.

On February 12, 2009, the trial court concluded the sentencing hearing. 2/12/09 RP 2. The trial court found that the defendant's prior New York convictions for burglary did exist, there was no indication the convictions were invalid and the convictions should be used for scoring criminal history. 2/12/09 RP 6-9.

On February 12, 2009, Martinez timely filed a notice of appeal. CP 82-4.

## **2. Summary of Trial Testimony**

On October 14, 2008, the Mount Vernon and Burlington police responded to an alarm at a convenience store in Mount Vernon. 12/15/08 RP 18-9. Burlington Officer Vandekamp watched the side and front of the building and saw a person start down the side of the building on a pole. 12/15/08 RP 22-3. Vandekamp used a flashlight to watch the man come down the pole. She identified the man as the defendant, Anthony Martinez. 12/15/08 RP 23.

Martinez then turned and ran into an adjoining parking lot. 1 RP 23. Officer Vandekamp and Mount Vernon Officer Walter

Martinez followed and caught him. 12/15/08 RP 25. Anthony Martinez was dressed all in dark clothing, with a black hat and brown boots. 12/15/08 RP 79. Officers went up on to the roof of the convenience store and located a backpack. 12/15/08 RP 25. The backpack contained various tools, such as a pipe wrench, a screwdriver, tin snips, a flashlight, and a crowbar. 12/15/08 RP 48. Officers also observed that the layers of the roof had been peeled open damaging the roof and resulting in water damage to the interior ceiling below and merchandise inside. 12/15/08 RP 114-115, 12/16/08 RP 9.

The total cost for repair of the exterior roof and inside ceiling and for damaged merchandise was \$4,723.33. 12/16/08 RP 9-10.

### **3. Statement of Sentencing Proceedings**

On February 6, 2009, the trial court began the sentencing proceedings. 2/6/09 RP 2. The state admitted records of the defendant's New York criminal history. 2/6/09 RP 2, 12.

Those records included a certified copy of the criminal history record information for Anthony Martinez from the State of New York. Exhibit 1 (Supplemental Designation of Clerk's Papers Pending). Also included were certified copies of Certificate of Disposition

Indictment for three New York burglary convictions. Exhibits, 3, 4 and 5 (Supplemental Designation of Clerk's Papers Pending). The State provided certified copies of the fingerprint cards of Anthony Martinez with New York State identification number 6635297K. Exhibit 6 (Supplemental Designation of Clerk's Papers Pending). Finally, the State provided a report of a fingerprint comparison from the Washington State Patrol Identification and Criminal History section which indicated that two of the New York arrest cards were Anthony Martinez, the same individual in the Skagit County arrest card. Exhibit 7 (Supplemental Designation of Clerk's Papers Pending).

The trial court determined by a preponderance of the evidence that the defendant in the courtroom was the same person convicted of three prior burglary convictions in New York. 2/6/09 RP 42.

The burden of proof is preponderance of the evidence. So I will conclude and reiterate my decision from this morning that I do believe that the person seated before me known as Anthony Martinez is the same person from the State of New York with three prior Burglary in the 3rd Degree convictions from Queens and the Bronx. And that the certification of records from the State of New York indicating the same do meet the burden of proof for this Court to consider those convictions. I'm certainly not finding at this point in time, however, that those convictions are valid under the burdens and reasons stated earlier as to why I'm taking this matter under advisement is to try to find out if that simple certificate of indictment is enough for this Court to conclude that Mr. Martinez's rights were

adequately protected in the procedures exercised by the State of New York for both pleading guilty and sentencing; that's what is under advisement. But I will make that preliminary conclusion as to identification and the three priors.

2/6/09 RP 42.

The trial court took the matter under advisement pending further briefing from the parties on the issue of whether the validity of the convictions was established by the records identifying the defendant. 2/12/09 RP 42.

On February 12, 2009, the trial court concluded the sentencing hearing. 2/12/09 RP 2. The trial court found that the defendant's prior New York convictions for burglary did exist, there was no indication the convictions were invalid and the convictions should be used for scoring criminal history. 2/12/09 RP 6-9.

The first question to begin with is is the person seated in front of me, Anthony Martinez, in our case, the same person, who is named or who is convicted in New York of these three separate incidences of burglary in the 3<sup>rd</sup> Degree under different names? And this Court is convinced by a preponderance of the evidence, in fact, by a greater weight of the evidence than simply a preponderance, that based on the fingerprint matching the use of the state ID number and the other records maintained by the State of New York, and the fact that they have matched all three of those together to be the same individual, and also have photographic evidence of him, but the fingerprint is the far stronger evidence, that he is, in fact, the person found guilty and sentenced in three separate

timeframes going from 1993 to 2002 of three charges of Burglary 3rd Degree, which we've already established are equivalent to our Washington State Burglary 2nd Degree.

The bigger, more concerning issue, is the issue that Mr. Yanasak raises that is discussed in Booker; although, not at all a factually similar case on the constitutional validity requirements of a prior plea and sentencing as used prior history in the State of Washington.

What the Court does not have before it is an actual guilty plea from the State of New York from any of these charges.

The Court does not have actual sentencing paperwork on any of these charges. And the Defense is arguing that based on that I can't possibly find it to be constitutionally valid.

And the State's argument is that there's nothing on the face of the documents. And since I don't have them showing me that it is invalid, which would tend to be the argument that if I have a document and it's on its face invalid because of something contained in that document then I can decide whether it applies or not.

Another argument is whether or not our laws as to constitutionally invalid in Washington apply or whether another state, for example, can allow a 10 person jury, 10 out of 12 jurors to agree on something, do we second guess because that doesn't meet the Washington standard of unanimous jurors, or do we live by their laws? By making those findings, to make it clear, that this is not an absolute certainty in my mind; however, I do believe the certificates of disposition and indictment maintained by the court clerk and certified as such are valid proof of the fact that Mr. Martinez was found guilty by plea I think in every case and sentenced in the Supreme Court, which is their trial court, State of New York, on each of these occasions. And I am ruling that because I have nothing before me to base a constitutionally invalid plea or sentencing on that I will count these as criminal history. But I fully expect this is a possible area of new rulings from our higher court

should they examine this case to determine whether single page documents, certificate of dispositions, and indictments, along with indictment information themselves are going to be enough for the State of Washington to count them as criminal history.

2/12/08 RP 6-9.

Martinez's offender score was determined to seven as to Burglary in the Second Degree and four as to Malicious Mischief in the First Degree using the three New York burglary convictions.

2/21/09 RP 9. Martinez was sentenced to 38 months for Burglary in the Second Degree, 14 months for Malicious Mischief in the First Degree, and 365 days for Making or Having Burglary Tools.

2/12/09 RP 11; CP 71-80.

#### **IV. ARGUMENT**

**Where the New York State records are admissible under New York law and adequately identify the defendant and his prior convictions, the trial court did not abuse its discretion in finding the prior burglary convictions existed.**

Martinez's sole contention on appeal is that the New York state records do not adequately establish that he had been convicted of the offenses listed.<sup>2</sup>

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<sup>2</sup> It is important to note what Martinez is not claiming on appeal. Martinez is not appealing from the trial court's decision to admit the records. Martinez is not contending on appeal that he is not the person named in the records. Martinez is not contending that the New York burglary convictions are not comparable to the

The State contends that given the process for plea and sentences and the statutes pertaining to certified records in the State of New York, that the records adequately establish the existence of Anthony Martinez's three convictions for Burglary in the Third Degree which are equivalent to Burglary in the Second Degree in Washington State.

To establish a defendant's criminal history for sentencing purposes, the State must prove the existence of prior convictions by a preponderance of the evidence. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986).

State v. McCorkle, 88 Wn. App. 485, 492, 945 P.2d 736 (1997).

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. **Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.** On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

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Washington burglary statute. Finally, Martinez is not contesting the constitutional validity of the New York convictions. State v. Booker, 143 Wn. App. 138, 143-144, 176 P.3d 620 (2008) (state does not have the affirmative burden of proving the constitutional validity of a prior conviction used for sentencing).

RCW 9.94A.530(2) Emphasis added.

Washington courts have indicated that certified copies of judgment and sentences are the best method for proof of prior convictions.

The best evidence of a prior conviction is a certified copy of the judgment. Cabrera, 73 Wn. App. at 168, 868 P.2d 179. **However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history.** Cabrera, 73 Wn. App. at 168, 868 P.2d 179; *see also* Morley, 134 Wn.2d at 606, 952 P.2d 167 (court may look at foreign indictment and information to determine whether underlying conduct satisfies elements of Washington offense).

State v. Ford, 137 Wn. 2d 472, 480, 973 P.2d 452 (1999).

Washington courts have recognized that the process by which convictions occur in other states and the records showing that vary from those in Washington and allows other records to establish the existence of the convictions. State v. Vickers, 148 Wn.2d 91, 120, 59 P 3d 58 (2002) (signed docket sheet of Massachusetts court indicating guilty plea); State v. Morley. 134 Wn.2d 588, 611, 952 P.2d 167 (1998) (court martial record); State v. Winings, 126 Wn. App. 75, 91-93, 107 P3d 141 (2005) (criminal complaint, statement on plea of guilty, minute order, and abstract of judgment); State v. Reinhart, 77 Wn. App. 454, 456-57, 891 P.2d

735, rev. denied, 127 Wn.2d 1014 (1995) (FBI RAP sheet, certified copies of unsigned judgments and sentences, presentence records).

Sufficiency of proof of the existence of out-of-state convictions was discussed in some detail in the recent case of State v. Harris, 148 Wn. App. 22, 197 P.3d 1206 (2008). In Harris, the defendant contended on appeal that the records regarding his Louisiana convictions was insufficient because the State had failed to provide certified copies of judgment and sentences and did not demonstrate that those documents were unavailable. State v. Harris, 148 Wn. App. at 25, 197 P.3d 1206 (2008). The Harris court recognized that different states have different procedures to accomplish pleas and sentences as well as recording those events.

The State may introduce other comparable evidence only if it shows that a certified copy of the judgment is unavailable for some reason other than the serious fault of the proponent. Lopez, 147 Wn.2d at 519, 55 P.3d 609 (citing State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979)).

Here, the State presented packets of documents for each of the five alleged Louisiana convictions, each containing (1) a felony bill of information, (2) a page containing a stamp with specific language, the defendant's fingerprints, and a signature, and (3) an extract of court minutes for the trial court judge's oral sentencing ruling. These documents are not obviously judgment and sentences of the sort Washington courts issue and the State

failed to argue to the trial court that they were judgment and sentences.

...

For the first time on appeal, the State cites a Louisiana statute defining that state's documentary proof of judgment and sentence, Louisiana Code of Criminal Procedure article 871. The State also relies on State v. Donald, 1999-3612 (La.12/8/00); 775 So.2d 1054, 1057, in which the Louisiana Supreme Court defined how its state "seals" public documents. Based on this Louisiana law, we hold that the trial court did not err in admitting the State's documentary evidence as sufficient proof of Harris's criminal history.

In Louisiana, a judgment is documented as a felony bill of information attached to a copy of the defendant's fingerprints, a certificate regarding the fingerprints, and the signature of the law enforcement officer who has custody of the defendant. La.Code Crim. Proc. Ann. art. 871(B)(1). Having scrutinized the State's evidence, we hold that the State presented judgments conforming to the Louisiana statute.

Further, under the same Louisiana statute, a sentence is pronounced orally and is documented only in the court minutes. La.Code Crim. Proc. Ann. art. 871(A). Here, the State submitted the relevant court minutes and, therefore, submitted the documents necessary to prove Louisiana sentences. Accordingly, we hold that the State presented judgments and sentences for each of the five prior Louisiana convictions.

State v. Harris, 148 Wn. App. 22, 30-31, 197 P.3d 1206 (2008).

Similar to the situation in Harris, the courts of New York State follow a different procedure from Washington for acceptance of guilty pleas and sentences and New York statutes specifically

provide that the certified copies of disposition indictment are proof of the existence of the prior convictions.

New York has a statute applicable to guilty pleas indicating that they are entered orally on the record.

#### **220.50 Plea; entry of plea**

- 1. A plea to an indictment, other than one against a corporation, must be entered orally by the defendant in person; except that a plea to an indictment which does not charge a felony may, with the permission of the court, be entered by counsel upon submission by him of written authorization of the defendant.**
- 2. A plea to an indictment against a corporation must be entered by counsel.**
- 3. If a defendant who is required to enter a plea to an indictment refuses to do so or remains mute, the court must enter a plea of not guilty to the indictment in his behalf.**
- 4. Where the permission of the court and the consent of the people are a prerequisite to the entry of a plea of guilty, the court and the prosecutor must either orally on the record or in a writing filed with the indictment state their reason for granting permission or consenting, as the case may be, to entry of the plea of guilty.**
- 5. When a sentence is agreed upon by the prosecutor and a defendant as a predicate to entry of a plea of guilty, the court or the prosecutor must orally on the record, or in writing filed with the court, state the sentence agreed upon as a condition of such plea.**
- 6. Where the defendant consents to a plea of guilty to the indictment, or part of the indictment, or consents to be prosecuted by superior court information as set forth in section 195.20 of this chapter, and if the defendant and prosecutor agree that as a condition of**

the plea or the superior court information certain property shall be forfeited by the defendant, the description and present estimated monetary value of the property shall be stated in court by the prosecutor at the time of plea. Within thirty days of the acceptance of the plea or superior court information by the court, the prosecutor shall send to the commissioner of the division of criminal justice services a document containing the name of the defendant, the description and present estimated monetary value of the property, and the date the plea or superior court information was accepted. Any property forfeited by the defendant as a condition to a plea of guilty to an indictment, or a part thereof, or to a superior court information, shall be disposed of in accordance with the provisions of section thirteen hundred forty-nine of the civil practice law and rules.

7. [Deemed repealed Sept. 1, 2009, pursuant to L.1995, c. 3, § 74, subd. d.] **Prior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.** Where the plea of guilty is to a count or counts of an indictment charging a felony offense other than a violent felony offense as defined in section 70.02 of the penal law or an A-I felony offense other than an A-I felony as defined in article two hundred twenty of the penal law, the court must also, prior to accepting such plea, advise the defendant that, if the defendant is not a citizen of the United States and is or becomes the subject of a final order of deportation issued by the United States Immigration and Naturalization Service, the defendant may be paroled to the custody of the Immigration and Naturalization Service for deportation purposes at any

time subsequent to the commencement of any indeterminate or determinate prison sentence imposed as a result of the defendant's plea. The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization.

N.Y. Crim. Proc. Law § 220.50 (McKinney's).

New York case law describes that courts engage in plea colloquies with defendants on the record in which defendants waive their rights.

**There is no requirement for a “uniform mandatory catechism of pleading defendants.”** (People v. Nixon, 21 N.Y.2d 338, 353, 287 N.Y.S.2d 659, 234 N.E.2d 687.) Though a rigorous and detailed colloquy may be appropriate in certain instances, under most ordinary circumstances such questioning by the Trial Judge would be an unnecessary formalism. The seriousness of the crime, the competency, experience and actual participation by counsel, the rationality of the “plea bargain”, and the pace of the proceedings in the particular criminal court are among the many factors which the Trial Judge must consider in exercising discretion. (People v. Nixon, *supra*, at p. 353, 287 N.Y.S.2d 659, 234 N.E.2d 687.) **But as we have emphasized on a previous occasion, “there is no requirement that the Judge conduct a *pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel \* \* \* may nevertheless not know what he is doing.”** (People v. Francis, 38 N.Y.2d 150, 154, 379 N.Y.S.2d 21, 341 N.E.2d 540.) Overall, a sound discretion, exercised in cases on an individual basis is preferable to a ritualistic uniform procedure. ( People

v. Nixon, *supra*, 21 N.Y.2d at p. 355, 287 N.Y.S.2d 659, 234 N.E.2d 687.)

People v. Harris, 61 N.Y.2d 9, 16-17, 459 N.E.2d 170, 17, 471 N.Y.S.2d 61, 64 (N.Y.,1983) (emphasis added).

Defendant's sole argument is that the loss of the untranscribed stenographic notes of the proceeding in which he pleaded guilty mandates reversal of the judgment and dismissal of the indictment. Defendant fails to raise a single substantive issue other than to suggest that there might be a question as to the adequacy of trial counsel if his guilty plea had been interposed before a disposition of his motion for inspection of the grand jury minutes and dismissal of the indictment. There is nothing in the record to indicate a disposition of this motion. As to the unresolved motion, defendant's remedy lies not in an appeal from his conviction, but, rather, in a post-conviction proceeding pursuant to CPL 440.10 in which, if warranted, the question of counsel's ineffectiveness may be explored at an evidentiary hearing. (See People v. Brown, 45 N.Y.2d 852, 854, 410 N.Y.S.2d 287, 382 N.E.2d 1149.)

While the result may be different where a defendant has been convicted after trial (see People v. Rivera, 39 N.Y.2d 519, 384 N.Y.S.2d 726, 349 N.E.2d 825), **"the loss of plea \* \* \* minutes does not, by itself, automatically entitle a defendant to summary reversal of his judgment of conviction."** (People v. Bell, 36 A.D.2d 406, 408, 321 N.Y.S.2d 212.) **A presumption of regularity attaches to all judicial proceedings and judgments of conviction.** Since defendant, who pleaded guilty, has failed to articulate any appealable issue, that presumption stands un rebutted, and is entitled to full effect. The judgment of conviction is affirmed.

People v. Gonzalez, 488 N.Y.S.2d 382, 382-383(N.Y.A.D. 1 Dept.,1985) (emphasis added).

This Court has consistently rejected a formalistic approach to guilty pleas, preferring instead to leave the ascertainment of whether the defendant has entered the plea voluntarily, knowingly and intelligently to the trial court's "sound discretion exercised in cases on an individual basis" ( People v. Nixon, 21 N.Y.2d 338, 355, 287 N.Y.S.2d 659, 234 N.E.2d 687). Thus, we have said repeatedly that there "is no requirement for a 'uniform mandatory catechism of pleading defendants' " (People v. Harris, 61 N.Y.2d 9, 16, 471 N.Y.S.2d 61, 459 N.E.2d 170 [quoting People v. Nixon, *supra*, 21 N.Y.2d at 353, 287 N.Y.S.2d 659, 234 N.E.2d 687]).

People v. Fiumefreddo, 82 N.Y.2d 536, 543, 626 N.E.2d 646, 649, 605 N.Y.S.2d 671, 674 (N.Y.,1993). In Fiumefreddo, the defendant entered a plea based upon a colloquy done on the record with the trial judge. People v. Fiumefreddo, 82 N.Y.2d at 541-2, 626 N.Ed.2d at 648-9, 605 N.Y.S.2d at 674-3.

Likewise, sentencing in New York State is on the record.

### **380.40 Defendant's presence at sentencing**

**1. In general.** The defendant must be personally present at the time sentence is pronounced.

N.Y. Crim. Proc. Law § 380.40 (McKinney's).

Sentences are then recorded by clerk's minutes.

### **380.70 Minutes of sentence**

In any case where a person receives an indeterminate or determinate sentence of imprisonment, a certified copy of the stenographic minutes of the sentencing proceeding, a certificate of conviction specifying the section and, to the extent applicable, the subdivision, paragraph and subparagraph of the penal law or other statute under which the defendant was convicted and a copy of any order of protection or temporary order of protection issued against the defendant at the time of sentencing must be delivered by the court to the person in charge of the institution to which the defendant has been delivered within thirty days from the date such sentence was imposed; provided, however, that a sentence or commitment is not defective by reason of a failure to comply with the provisions of this section.

N.Y. Crim. Proc. Law § 380.70 (McKinney's).

However, it is the certificate of conviction which operates as the judgment and sentence under New York law.

### **380.60 Authority for the execution of sentence**

Except where a sentence of death is pronounced, a certificate of conviction showing the sentence pronounced by the court, or a certified copy thereof, constitutes the authority for execution of the sentence and serves as the order of commitment, and no other warrant, order of commitment or authority is necessary to justify or to require execution of the sentence.

N.Y. Crim. Proc. Law § 380.60 (McKinney's).

The certified judgments of conviction from New York are prima facie evidence of existence of the valid convictions in New York.

**60.60 Rules of evidence; certificates concerning judgments of conviction and fingerprints**

1. A certificate issued by a criminal court, or the clerk thereof, certifying that a judgment of conviction against a designated defendant has been entered in such court, constitutes presumptive evidence of the facts stated in such certificate.

2. A report of a public servant charged with the custody of official fingerprint records which contains a certification that the fingerprints of a designated person who has previously been convicted of an offense are identical with those of a defendant in a criminal action, constitutes presumptive evidence of the fact that such defendant has previously been convicted of such offense.

N.Y. Crim. Proc. Law § 60.60 (McKinney's) (underlined emphasis added). New York case law supports that the certificate of disposition is presumptive evidence of a conviction.

The certificates of disposition attested to by the Clerk of Bronx County stating that defendant previously was convicted of criminal sale of a controlled substance in the third degree (Penal Law § 220.39) and manslaughter in the first degree (Penal Law § 125.20) constitute presumptive evidence of those convictions (see, CPL 60.60 [1]).

People v. Compton, 277 A.D.2d 913, 914, 716 N.Y.S.2d 263 (2000).

The defendant was properly sentenced as a persistent violent felony offender, since the certified copies of the judgments of conviction from the clerks of both New York and Westchester Counties constituted presumptive evidence of the defendant's two prior violent felony convictions (see, CPL 60.60[1]).

People v. Mezon, 644 N.Y.S.2d 763, 763 -764 (N.Y.A.D. 2 Dept.,1996).

Under New York law, “a certificate of conviction shows the sentence pronounced by the court, [ ] constitutes the authority for execution of the sentence and serves as the order of commitment, and no other warrant, order of commitment or authority is necessary to justify or to require execution of the sentence.” N.Y. C.P.L § 380.60 (McKinney 2005).

Walker v. Perlman, 556 F.Supp.2d 259, 268 (S.D.N.Y., 2008).

In the present case, the State provided the Certificate of Disposition Indictment for each of the three prior New York burglary conviction of Martinez. Exhibits 3, 4 and 5 at sentencing 2/6/09 (Supplemental Designation of Clerk’s Papers Pending). Those records sufficiently establish the prior New York convictions exist.

Other records established the fact that the same person with those three prior New York convictions is Martinez.<sup>3</sup>

New York statues pertaining to fingerprinting establish the record of conviction is appropriately connected to a particular defendant.

**160.10 Fingerprinting; duties of police with respect thereto**

1. Following an arrest, or following the arraignment upon a local criminal court accusatory instrument of a

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<sup>3</sup> Martinez does not contest on appeal that he is the person with those convictions.

defendant whose court attendance has been secured by a summons or an appearance ticket under circumstances described in sections 130.60 and 150.70, the arresting or other appropriate police officer or agency must take or cause to be taken fingerprints of the arrested person or defendant if an offense which is the subject of the arrest or which is charged in the accusatory instrument filed is:

- (a) A felony; or
- (b) A misdemeanor defined in the penal law; or
- (c) A misdemeanor defined outside the penal law which would constitute a felony if such person had a previous judgment of conviction for a crime; or
- (d) Loitering, as defined in subdivision three of section 240.35 of the penal law; or
- (e) Loitering for the purpose of engaging in a prostitution offense as defined in subdivision two of section 240.37 of the penal law.

2. In addition, a police officer who makes an arrest for any offense, either with or without a warrant, may take or cause to be taken the fingerprints of the arrested person if such police officer:

- (a) Is unable to ascertain such person's identity; or
- (b) Reasonably suspects that the identification given by such person is not accurate; or
- (c) Reasonably suspects that such person is being sought by law enforcement officials for the commission of some other offense.

3. Whenever fingerprints are required to be taken pursuant to subdivision one or permitted to be taken pursuant to subdivision two, the photograph and palmprints of the arrested person or the defendant, as the case may be, may also be taken.

4. The taking of fingerprints as prescribed in this section and the submission of available information concerning the arrested person or the defendant and the facts and circumstances of the crime charged must be in accordance with the standards established by the commissioner of the division of criminal justice services.

N.Y. Crim. Proc. Law § 160.10 (McKinney's)

**160.20 Fingerprinting; forwarding of fingerprints**

Upon the taking of fingerprints of an arrested person or defendant as prescribed in section 160.10, the appropriate police officer or agency must without unnecessary delay forward two copies of such fingerprints to the division of criminal justice services.

N.Y. Crim. Proc. Law § 160.20 (McKinney's)

**160.30 Fingerprinting; duties of division of criminal justice services**

1. Upon receiving fingerprints from a police officer or agency pursuant to section 160.20 of this chapter, the division of criminal justice services must, except as provided in subdivision two of this section, classify them and search its records for information concerning a previous record of the defendant, including any adjudication as a juvenile delinquent pursuant to article three of the family court act, or as a youthful offender pursuant to article seven hundred twenty of this chapter, and promptly transmit to such forwarding police officer or agency a report containing all information on file with respect to such defendant's previous record, if any, or stating that the defendant has no previous record according to its files. Such a report, if certified, constitutes presumptive evidence of the facts so certified.

2. If the fingerprints so received are not sufficiently legible to permit accurate and complete classification, they must be returned to the forwarding police officer or agency with an explanation of the defects and a request that the defendant's fingerprints be retaken if possible.

N.Y. Crim. Proc. Law § 160.30 (McKinney's).

The State provided the trial court the certified copy of the criminal history record information for Anthony Martinez from the State of New York. Exhibit 1 (Supplemental Designation of Clerk's Papers Pending). That criminal history record specifically states that it is the official criminal history "pursuant to C.P.L. §60.60 and C.P.L.R. §4518(c)."

Other records. All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician.

N.Y. C.P.L.R. § 4518 (McKinney's 2007).

In addition a fingerprint comparison was performed establishing that the person convicted in New York was the same person as Anthony Martinez convicted in Washington. Exhibits 6 and 7 (Supplemental Designation of Clerk's Papers Pending).

The records from the court clerk as well as the division of criminal justice services are both proper certificates of public officers under New York law.

#### **4520. Certificate or affidavit of public officer**

Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.

N.Y. C.P.L.R. § 4520 (McKinney's 2007).

Thus, the trial court properly found the existence of Martinez's New York convictions by a preponderance of the evidence.

#### V. CONCLUSION

For the foregoing reason, this Court must find that the trial court did not abuse its discretion in finding the existence of the criminal convictions from New York for Anthony Martinez and affirm the judgment and sentence.

DATED this 16th day of October, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ] United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: ERIC J. NIELSEN, addressed as Nielsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16<sup>th</sup> day of October, 2009.

  
KAREN R. WALLACE, DECLARANT