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

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE LABARBERA,

Appellant.

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

*Appellant's Brief*

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A. ASSIGNMENTS OF ERROR

1. The prosecution failed to present sufficient evidence to prove that appellant's prior California conviction was comparable to a Washington felony, as required under RCW 9.94A.525(3). Appellant assigns error to the sentencing court's order finding such comparability. CP 129.

2. Appellant's due process rights were violated by imposition of a sentence based upon wholly insufficient evidence.

3. The sentencing court applied the wrong standard for determining "comparability."

4. The sentencing court erred in refusing to strike and apparently relying on evidence the prosecution presented for the first time on remand in violation of this Court's ruling that remand was limited to a determination based solely on the evidence presented at the original sentencing.

5. Appellant's state and federal constitutional rights to trial by jury and due process were violated when his sentencing range was increased based upon the sentencing court's evaluation of the factual comparability of the foreign conviction by a preponderance of the evidence, and RCW 9.94A.525(3) is unconstitutional to the extent it permits such a procedure.

6. Under the binding precedent of State v. Hughes, 154 Wn.2d 249, 111 P.3d 837 (2005), the "harmless error" standard does not apply.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To determine "comparability" of a foreign crime prior to

that crime being counted in an offender score under RCW 9.94A.525(3), the sentencing court must compare the statutory schemes creating both the foreign crime and an allegedly comparable Washington crime. In this case, the prosecution presented only evidence that the defendant had been convicted of a crime in California, and that he was accused of committing it a particular way, without providing the relevant statutory scheme for either California or Washington.

Was this evidence sufficient to support a finding that all of the elements of the California crime as it was defined in 1991 were the same as the elements of a crime in Washington at the same time?

Further, were appellant's due process rights violated by imposition of a sentence unsupported by sufficient evidence?

2. A sentencing court only considers the facts of a prior foreign conviction if it first finds there is not legal comparability, i.e., that the elements of the foreign crime were not identical to and were more broad than an allegedly comparable Washington crime. State v. Mutch,<sup>1</sup> which suggests to the contrary, was overturned by In re Personal Restraint of Lavery,<sup>2</sup> prior to the resentencing in this case.

Did the sentencing court err in determining "comparability" based on the facts of the prior conviction even though there was insufficient evidence to support the prerequisite legal comparability analysis?

3. Mr. Labarbera objected to the insufficiency of the evidence

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<sup>1</sup>87 Wn. App. 433, 942 P.2d 1018 (1997) review denied, 134 Wn.2d 1016 (1998), overturned by In re Personal Restraint of Lavery, 154 Wn. 2d 249, 111 P.3d 837 (2005).

<sup>2</sup>154 Wn.2d 249, 111 P.3d 837 (2005).

the prosecution presented to prove “comparability” at the original sentencing. In its decision ordering remand, this Court made it clear that the prosecution was not permitted to present any additional evidence to support a comparability analysis but was limited to the record as it was before the sentencing court at the original hearing. CP 86-95; State v. Labarbera, 128 Wn. App. 343, 115 P.3d 1038 (2005).

Prior to the resentencing, the prosecution filed a “Memorandum” presenting, for the first time on remand, several California statutes it said defined the 1991 crime for which Mr. Labarbera was convicted, as well as the 1991 Washington statutory scheme it argued, for the first time on remand, was comparable. The prosecutor also presented oral “evidence” that she had determined that the statutes in both states had not changed from 1966 to 1991.

Did the resentencing court err in refusing to strike this new evidence even though the prosecution’s presentation of it was in violation of this Court’s clear order and settled law? Further, did the court err in apparently relying on this evidence?

4. The state and federal constitutional rights to trial by jury and due process require that any fact which increases a defendant’s sentence must be proven to a jury beyond a reasonable doubt, under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Supreme Court has noted that a limited “prior conviction” exception to this rule does not apply where a foreign conviction is for a crime the elements of which are not identical to a comparable Washington crime. Lavery, supra.

Were appellant's rights violated where appellant's range of punishment was increased based upon the sentencing court's finding of facts from a California charging document, where there was no evidence to prove that the elements of the foreign crime were identical to a comparable Washington crime and no evidence the defendant had agreed or stipulated to those facts or that they had been found by a jury beyond a reasonable doubt?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Lawrence Labarbera was charged by second amended information with first-degree kidnaping with a deadly weapon enhancement, two counts of first-degree rape, one with a deadly weapon enhancement, and first degree burglary. CP 9-11; RCW 9.41.010, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 9A.44.040(1), RCW 9A.52.030(1)(a). The kidnaping and burglary charges were dismissed pretrial, and, on May 21, 2004, Mr. Labarbera was found guilty of the rape charges after a bench trial on stipulated facts. CP 16-18.

On June 18, 2004, Mr. Labarbera was sentenced by the Honorable Ronald Culpepper to 370 months in custody, based upon an offender score of 7, calculated by including an alleged California conviction as prior conviction. CP 19-31.

Mr. Labarbera appealed and, on July 7, 2005, this Court reversed and remanded for resentencing. CP 69-95.

Resentencing was held before Judge Culpepper on December 19, 2005. CP 129. Mr. Labarbera appealed, and this pleading follows. See

CP 130-31.

2. Overview of facts relating to offense

In its findings and conclusions on the stipulated facts trial, the trial court found that Mr. Labarbera had, on October 4, 1999, grabbed A.S. around the neck from behind, put what appeared to be a gun to her head, taken her into his van, raped her there and, at some point, went into her house and again raped her. CP 15-18.

3. Facts relevant to issues on appeal

At the original sentencing hearing on June 18, 2004, counsel for Mr. Labarbera informed the court that the prosecutor had only just shown him, moments before sentencing, two documents regarding the prior convictions, one of which was “purporting to be the California” offense. 1RP 19. Counsel objected that the prosecution had failed to provide sufficient proof of Mr. Labarbera’s criminal history, as required before that history could be used to increase his offender score. 1RP 19.

In response, the prosecutor then produced and filed documents it said supported the criminal history, including a judgment and sentence she said was “certified from California which shows that he has a robbery in the second degree conviction.” 1RP 26.<sup>3</sup> Without conducting a comparability analysis, the sentencing court relied upon the offender score calculated by the prosecution, including two points for the California offense. See CP 92-94.

The only briefing filed by the prosecution for the sentencing

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<sup>3</sup>Copies of those documents were attached as an Exhibit to the defense brief below and are attached hereto for the Court’s convenience as Appendix A.

hearing presented argument about whether the two current crimes were the “same criminal conduct.” CP 12-14.

On appeal, this Court held that it was error for the sentencing court to have imposed a sentence calculated based on including the California conviction in the offender score without having conducted the required comparability analysis. State v. Labarbera, 128 Wn. App. 343, 115 P.3d 1038 (2005); CP 86-95. Because Mr. Labarbera had specifically objected that the evidence was insufficient below, the Court granted only a limited remand for the sentencing court to decide whether the prosecution had proven comparability based only upon the evidence the prosecution had submitted at the original sentencing. CP 94.

Prior to the resentencing on remand, the prosecution filed a five-page “Memorandum Regarding Comparability of Defendant’s California Robbery in the Second Degree Conviction.” CP 96-100. In that document, the prosecution admitted that the only evidence it had presented at the previous hearing was “a certified copy of the judgment and sentence, a declaration of guilty plea, a warrant of commitment, and an information.” CP 96. The prosecution then presented the additional information, not presented at the original hearing, of the specific language of sections of the California Penal Code which defined robbery and its different degrees and elements, the specific language of statutes it said defined a comparable Washington offense in 1991, and caselaw it said was dispositive on the issue. CP 96-100.

At the resentencing hearing on December 9, 2005, the prosecution admitted that the Court of Appeals had ordered the comparability analysis

on remand to be limited to “everything the State provided at the time of the sentencing, and using that and that alone.” 2RP 5. It nevertheless presented arguments based upon the additional evidence it had presented in its Memorandum. 2RP 4.

In response, Mr. Labarbera moved to strike the portions of the prosecution’s memorandum which included citation to the California robbery statute, because it had not been before the court at the original sentencing and was thus an improper effort to supplement the record. CP 101-105; 2RP 5. He also noted that the prosecution had not set out the elements of the relevant crimes, and that a case finding comparability the prosecution cited interpreted only the law in 1966, but that the prosecution had presented no evidence that the law was the same in 1991, the relevant time for this case. 2RP 5. He also argued that, even if the court were to consider the improper new evidence of the relevant foreign statutes, the California and Washington statutes were not identical, with the Washington statute “more expansive” and “different.” CP 101-105; 2RP 7. As a result, he noted, the determination of comparability required factual determinations which had to be presented to a jury and proven beyond a reasonable doubt under In re Personal Restraint of Lavery, 154 Wn. 2d 249, 111 P.3d 837 (2005). CP 102-105; see 2RP 7, 12.

The judge looked at the information charging Mr. Labarbera for the California crime and said it looked “quite a bit” like the definition of robbery in Washington. 2RP 6. A discussion ensued about whether the court conducting a comparability analysis was supposed to look at the elements of the crime as set forth in the statute or all of the elements of the

crime as caselaw had established them. 2RP 8.

Ultimately, the court stated:

Well, it appears to me that the statute - - the charging document clearly indicates Mr. Labarbera was charged in California with what would be robbery in the second degree in the state of Washington. He pled guilty to that. The sentencing scheme is somewhat different, but it appears to me that they're very comparable. The language is very similar. They're even the same degree.

Robbery in Washington is first degree if there's a deadly weapon or what appears to be a deadly weapon or infliction of bodily injury. That does not appear to be alleged in California. Other robberies basically are robbery in the second degree. Mr. Labarbera is charged with what is clearly robbery in the second degree, so I don't believe there's any change in the scoring.

2RP 10-12. Counsel then asked if the court had found the elements "to compare" by looking at the charging document from California, and the court indicated it had considered that as well as "the declaration of Mr. Labarbera there, similar to a plea of guilty." 2RP 11.

At that point, counsel argued that the standard of determining comparability was supposed to be "whether or not the elements of the crime. . . is the same as in Washington and California." 2RP 11. The court stated it believed robbery in the second degree "is the same in California as Washington, because the elements of the crime in California "include taking of personal property from another person by willfully, unlawfully, means of force." 2RP 11. The judge stated his belief that was "pretty much" the same as the definition of robbery in RCW 9A.56.190. 2RP 11. He again stated he was making the determination based upon the information contained in the packet submitted at the previous sentencing. 2RP 11-12. When counsel asked if Lavery applied, the court said it was

only “saying they’re comparable statutes and he was convicted to what’s comparable to robbery in the second degree.” 2RP 13.

The court then signed a written order which provided:

Having reviewed the documents filed by the court at the time of sentencing by the state. Court finds that the robbery statute in California is comparable to the robbery statute in Wa in 1991.

The sentence previously imposed remains unchanged.  
CP 129.

D. ARGUMENT

THE SENTENCE WAS ERRONEOUS AND ENTERED  
IN VIOLATION OF APPELLANT’S RIGHTS TO TRIAL  
BY JURY AND DUE PROCESS

At sentencing, the prosecution bears the burden of proving all prior convictions before those convictions can be used to increase an offender score. See State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). When a prior conviction is from out-of-state, the prosecution must prove not only the existence of the prior conviction but also that the conviction was “comparable” to one in Washington state. State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). Absent such proof or an affirmative acknowledgment of comparability, the out-of-state conviction may not be used to increase the defendant’s offender score, because the prosecution has failed to prove the prior conviction is a felony under Washington law. Id.; see also State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

In this case, this Court should reverse the sentence imposed by including the California conviction in the offender score, for several reasons. First, the prosecution failed to provide sufficient evidence to prove that the conviction was “comparable” to a Washington crime and

thus should be counted under RCW 9.94A.525(3). Second, Mr. Labarbera's due process rights were violated by imposition of a sentence unsupported by sufficient evidence. Third, the resentencing court applied the wrong standard for determining comparability. And fourth, the court's determination of "factual comparability" violated Mr. Labarbera's state and federal due process rights and rights to trial by jury under Lavery and Blakely.

First, the prosecution failed to present sufficient evidence to satisfy its burden of proving "comparability." Before a prior out-of-state conviction can be included in the offender score to increase the standard range, the prosecution must prove that the foreign conviction was "comparable" to a Washington felony. Ford, 137 Wn.2d at 475-78. The classification of a foreign conviction as comparable is not simply a matter of form, it is a "mandatory step in the sentencing process under the SRA." Ford, 137 Wn.2d at 482; RCW 9.94A.525(3) (out-of-state convictions "*shall* be classified according to the comparable offense definitions and sentences provided by Washington law") (emphasis added).

Comparability requires proof not only of the foreign convictions themselves but also of the elements of the out-of-state crime and the Washington statute claimed to be "comparable" at the relevant time. Lavery, 154 Wn.2d at 255. This proof is required because, as the Ford Court stated, "[t]o properly classify an out-of-state conviction according to Washington law" as required under the Sentencing Reform Act (SRA), the sentencing court "*must* compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes." 137

Wn.2d at 479 (emphasis added). Absent evidence in the record to support such a comparison, “the sentencing court is without the necessary evidence to reach a proper decision” and the prosecution has failed in its burden of proof. 137 Wn.2d at 480-81; see e.g., State v. Rivera, 95 Wn. App. 961, 966, 977 P.2d 1247 (1999) (foreign state’s laws are a “fact issue” for which the proponent has the responsibility to present appropriate evidence).

Thus, in Ford, the prosecution failed to meet its burden of proof on comparability of California convictions where it failed to present the California judgments and sentences, the “California statutes under which Ford was convicted were not offered into evidence,” and the prosecution identified “[n]o comparable Washington statutes” at the original sentencing. Ford, 137 Wn.2d at 475, 480.

Similarly, here, the prosecution failed to present sufficient evidence at the original sentencing. The only evidence presented regarding the prior California conviction was as follows: prior Washington judgments and sentences including the conviction in the offender score calculation, a court minute indicating the conviction, a declaration with a probation officer’s recommendation indicating that Mr. Labarbera had been convicted of second-degree robbery, a “declaration by defendant” which appeared to be part of a plea, and the California charging document, called a complaint. Supp. CP \_\_\_\_ (copy of California materials, filed

6/18/04);<sup>4</sup> see 2RP 9-10.

That evidence was insufficient to prove the California conviction was “comparable” under RCW 9.94A.525(3). Evidence of a prior Washington judgment and sentence including the prior California conviction in the offender score is not sufficient because Mr. Labarbera objected to the sufficiency of the proof of comparability. Labarbera, 128 Wn. App. at 350; see Cabrera, 73 Wn. App. at 169.

Regarding the other evidence, aside from the complaint, none of those documents indicated anything about the elements of the crime of second-degree robbery as it was defined in California in 1991. See Appendix A. The court minute said nothing. CP 116. The declaration said nothing. CP 117. The abstract of judgment said nothing. CP 120. And unlike in Washington where the elements of the crime are contained in the plea, the “declaration by defendant” here said only that Mr. Labarbera pled guilty by stating “PC211 ct 1 admit PC 12022.7 great bodily injury.” CP 118-19.

The only evidence with any indication of elements of second-degree robbery in California was the felony complaint. Indeed, the resentencing court relied on that complaint as providing the required evidence for determining whether the Washington and California crimes required the same elements. 2RP 10-12.

That reliance was in error. The portion of the complaint charging

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<sup>4</sup>A supplemental designation of clerk’s papers designating this document was filed in the superior court on May 2, 2006. A copy of the California materials, which was attached to an already designated document below, is also attached as Appendix A.

the robbery offense provided, in relevant part:

the crime of SECOND DEGREE ROBBERY.. . a felony, was committed by LAWRENCE LEE LA BARRERA [sp] who did willfully, unlawfully, and by means of force and fear take personal property from the person, possession, and immediate presence of CHRISTOPHER BATES. . .

It is further alleged that in the commission and attempted commission of the above offense, the said defendant(s). . . personally used a deadly and dangerous weapon(s), to wit, a BILLY CLUB, said use not being an element of the above offense. . .

It is further alleged that in the commission of the above offense the said defendant(s). . . with the intent to inflict such injury, personally inflicted bodily injury upon CHRISTOPHER BATES, not an accomplice to the above offense[.]

CP 121.

Nothing in that document established the essential elements of the crime of second-degree robbery as defined in California in 1991. Instead, it simply established what Mr. Labarbera was charged with, presumably one of an unknown number of means of committing the California crime. But comparability analysis requires examination of the relevant *statutory scheme* and the elements of the crime as it is entirely defined, not simply as the defendant was charged. Otherwise, in Ford, it would not have been necessary for the prosecution to present evidence of the California statutory scheme - it would only have been required to provide a copy of the charging document and the relevant Washington statute to prove comparability. See Ford, 137 Wn.2d at 475, 480.

Apparently recognizing its failure to provide the required evidence at the original sentencing, on remand the prosecution attempted to remedy this problem by submitting evidence of what it claimed were the relevant

California statutes defining the California offense, and Washington statutes it now argued defined a “comparable” crime. See CP 96-100; 2RP 4 (noting its brief presented that evidence). It also submitted caselaw, including Mutch, supra, which it declared established that the California and Washington statutes had the same elements in 1991. CP 96-100. And at the hearing, the prosecutor declared that she had looked “to see if there had been any changes within the statute” since the 1966 statutes examined in the Mutch case, then averred, “the statutes have not changed.” 2RP 4.

Those submissions, and the prosecutor’s reliance on that evidence at the hearing, was highly improper. Where, as here, the defendant objected to the sufficiency of the evidence at the original hearing, it would violate fundamental principles of fairness and due process to permit the prosecution a second chance to provide sufficient evidence. See Ford, 137 Wn.2d at 485; State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). This Court’s decision followed that well-established rule and *specifically limited* the remand to the record as it existed at the time of the original sentencing. CP 86-95.

The prosecution was well aware of the Court’s ruling, even noting to the resentencing court that the remand was limited to the evidence before the court at the original sentencing. 2RP 4-5. Yet the prosecution nevertheless submitted evidence to the court for the first time on remand in its “memorandum.” This flagrant violation of this Court’s very clear order of remand and settled law borders on sanctionable misconduct.

To its credit, the resentencing court tried not to rely on the new evidence, instead focusing on whether the facts it thought the charging

document showed would have amounted to second-degree robbery in Washington. 2RP 10. This focus is perhaps not surprising, given the prosecution's heavy reliance on Mutch in its Memorandum, as the holding of Mutch is that such analysis is sufficient. See CP 96-100.

The problem, however, is that the reasoning of Mutch, applied by the resentencing court at the prosecution's behest here, has been explicitly overruled as improper. See Lavery, 154 Wn.2d at 255-57. In Mutch, as here, the lower court focused on the question of factual comparability and held that proof of such comparability was sufficient, regardless whether there was proof of legal comparability. 87 Wn. App. at 439. In Lavery, the Supreme Court specifically rejected the analysis of Mutch as improperly having "blurred the distinction" between legal and factual comparability when it held comparability was proven where the foreign indictment contained language indicating that the acts committed would have amounted to a Washington crime, regardless whether there was legal comparability. Lavery, 154 Wn. 2d at 255-57. Instead, the Lavery Court said, the sentencing court must first compare the elements to determine legal comparability, then separately examine factual comparability if there is not legal comparability. 154 Wn.2d at 255-57.

Here, without the required evidence of the California statutes in 1991, and the Washington statutes defining an allegedly comparable offense in Washington in 1991, the court could not properly make the initial required determination of whether the elements of the California and Washington offenses were the same. See Ford, 137 Wn.2d at 479. Further, because robbery has nonstatutory essential elements in

Washington, proof of those elements would also have been required in order for the court to properly determine comparability. See State v. Bunting, 115 Wn. App. 135, 142-43, 61 P.3d 375 (2003).

Thus, because the prosecution failed to present evidence of the essential elements of the crime of second-degree robbery as it existed in California in 1991, and of the allegedly comparable crime as it existed in Washington in 1991 at the original sentencing hearing, the *comparability analysis could not be done*. Without the evidence of the California and Washington laws, the court simply could not ascertain whether the elements of the foreign crime were identical, more broad than or more narrow than those of a similar crime in Washington. And without the evidence to do the legal comparability analysis, the comparability analysis could not be complete, because *both* factual and comparability have to be proven. Lavery, 154 Wn.2d at 255-57.

The court's reliance on and application of the Mutch reasoning is also flawed because Mutch did not even compare the elements of the relevant state crimes. 87 Wn. App. at 439. And the elements it listed for the 1966 crimes did not include all the essential *non-statutory* elements of second-degree robbery in Washington - the intent to deprive another of his or her property and that a person other than the defendant had an ownership interest in the property. See, e.g., Bunting, 115 Wn. App. at 142-43; State v. Bacani, 79 Wn. App. 701, 704, 902 P.2d 184 (1995), review denied, 129 Wn.2d 1001 (1996).

The resentencing court's confusing conclusion that the "robbery statute in California is comparable to the robbery statute in Wa in 1991"

was unsupported by any evidence regarding those statutes in the proper record. CP 129. And the question was not whether the robbery statutes are comparable. The question was whether the *foreign crime* was comparable to a Washington crime and thus should be counted in the offender score. RCW 9.94A.525(3). That is only proven if either 1) the elements of the crimes in both states are identical or 2) the elements are not identical but the “defendant’s conduct as evidenced by the indictment or information” would have “violated a comparable Washington statute.” Lavery, 154 Wn.2d at 255.

There is another very significant problem with the court’s examination of what it thought was proven by the California information and drawing a conclusion of “comparability.” The information provided only that Mr. Labarbera “[d]id wilfully, unlawfully, and by means of force and fear take personal property from the person, possession and immediate presence of CHRISTOPHER BATES.” CP 121-22. The resentencing court looked at that language as proving that Mr. Labarbera’s acts in California in 1991 would have amounted to robbery in the second degree in Washington in 1991. 2RP 6, 10-11. But that language contained no information from which the court could have found that Mr. Labarbera’s acts were in relation to property for which someone other than Mr. Labarbera had an interest, or that he committed the acts with intent to steal or deprive another of the property, both essential elements of the offense in Washington. See Bunting, 115 Wn. App. at 142-43; Bacani, 79 Wn. App. at 704.

Further, the court’s act of making factual findings based upon the

language of the California information and concluding that those facts would have amounted to a particular crime in Washington was a violation of Mr. Labarbera's state and federal constitutional rights to trial by jury and due process. The Sixth Amendment and Article I, §§ 21 and 22 rights to trial by jury apply not only to proceedings at which a defendant is found guilty of an offense, but also to sentencing. See Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Where there is a fact which "increase[s] the prescribed range of penalties to which a criminal defendant is exposed," that fact is an "element" of the prosecution's case and, under the Sixth Amendment, must be found by a jury. 530 U.S. at 490; see Blakely, *supra*. In addition, due process demands that such facts are proved by the state beyond a reasonable doubt. Apprendi, 530 U.S. at 477; see also, In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (due process mandates such proof). The only exception for the requirements of proof beyond a reasonable doubt to a jury is the narrow fact of a "prior conviction." Apprendi, 530 U.S. at 490; Blakely, 124 S. Ct. at 2536-37.

In Lavery, *supra*, the Washington Supreme Court addressed the implications of Apprendi and Blakely on the comparability determination, in light of the "prior conviction" exception. The Court concluded that where the prior foreign crime is "identical" on its face to a crime in Washington, the "prior conviction" exception of Apprendi applies and the fact of the prior conviction need not be proved to a jury beyond a reasonable doubt. 154 Wn.2d at 257. In contrast, the Court held, where a foreign crime is not identical on its face, the "prior conviction" exception

does not apply because the court is in essence examining a *different* crime. 154 Wn.2d at 257. Where in the past it was permissible for a court to look at the foreign charging document to determine whether the acts the defendant committed would have amounted to a comparable crime in Washington, the Court noted, that practice was effectively upset by Apprendi and its progeny, because “[a]ny attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted nor stipulated to, nor proved to a trier of fact beyond a reasonable doubt in the foreign conviction, proves problematic” under that case. 154 Wn.2d at 257.

Thus, prior interpretations of RCW 9.94A.525(3) as permitting a sentencing court to make factual findings to support comparability where a foreign crime is not identical to a Washington crime have been seriously limited. Unless the required facts which would prove the Washington crime have been admitted, acknowledged, or proved to a jury beyond a reasonable doubt in the prior proceeding, the Washington court cannot make a comparability determination based on those facts without violating the defendant’s rights to trial by jury and due process, under Apprendi and Blakely.

Here, even if there had been sufficient evidence for a finding of legal comparability to be made, no factual comparability analysis could be done on this record. Nothing in any of the documents submitted by the prosecution in any way could be seen as proving that the required elements of the crime of second-degree robbery as defined in Washington in 1991 had been admitted, acknowledged or proved to a jury beyond a reasonable

doubt, especially the essential elements that someone other than Mr. Labarbera had an interest in the property and that the taking was done with intent to steal. Nor could the error be harmless. Hughes, supra.

The prosecution failed to present sufficient evidence to prove comparability at the original sentencing, despite Mr. Labarbera's objection. It then violated this Court's clear order of limited remand by trying to submit that missing evidence. The court's decision, based upon insufficient evidence, violated due process, and, on this record, a proper analysis of comparability simply could not be made. Finally, the court's finding of facts which were unsupported by the record and not proven to be admitted, acknowledged, or proved to a jury beyond a reasonable doubt violated Mr. Labarbera's rights to trial by jury and due process. This Court should reverse.

E. CONCLUSION

This Court has already reversed one improper sentence in this case. It should do so again. This time, this Court should hold that the resentencing court erred in relying on the California conviction, for all the reasons stated herein. And because the prosecution failed to present sufficient evidence from which the sentencing court could have made a proper comparability finding, this Court should remand with instructions for a sentence to be entered based upon an offender score which is *not* improperly increased by the California conviction.

DATED this 4th day of May, 2006.

Respectfully submitted,



---

KATHRYN RUSSELL SELK, No. 23879

Counsel for Appellant

RUSSELL SELK LAW OFFICE

1037 Northeast 65<sup>th</sup> Street, Box 135

Seattle, Washington 98115

(206) 782-3353

FILED  
COURT OF APPEALS

06 MAY -5 PM 12:44

STATE OF WASHINGTON

BY Cmm

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;  
to Mr. Lawrence Labarbera, DOC 719680, Clallam Bay Corr.  
Center, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 4th day of May, 2006.



KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO  
MINUTE ORDER - 0A

ACIS CASE NO: F-0080949  
CASE NO: SCR54132  
FSB274702  
DEPT: 12

JUDGE: BARRY L PLOTKIN  
CLERK: ELIZABETH EDGHILL  
SALIFF: CARLOS MERAZ

DATE: 02/25/2006 10:08:30 AM  
COUNSEL: J. GARFALO  
M. OSACHE  
R. ALVARENGA

REPORTER: CYNTHIA SMITH  
CASE TITLE: PEOPLE VS LABARBERA LAWRENCE LEE ✓  
DEF 001

MAR 09 1992

CASE CUSTODY: Custody Deputy Probation Officer

NATURE OF PROCEEDINGS  MOTION FOR NEW TRIAL  PROBATIONARY HEARING  
 PRONOUNCEMENT OF JUDGMENT  CERTIFIED UNDER SECTION 859 P.C.

DISPOSITION OF REMAINING COUNT(S)  
CONVICTED CHARGES G.I. Mail Waiver - Felony

- 198/199  Interpreter \_\_\_\_\_ Day.
- 92  Defendant's motion for new trial is  (A) Heard  (B) Submitted  (C) Denied  (D) Granted
- 516  Public Defender appointed.  Attorney \_\_\_\_\_
- 276  Criminal proceedings are suspended and Defendant placed in Department of Corrections Diagnostic Facility for a period not to exceed 90 days pursuant to Section 1203.03 P.C.
- 20V  Referred to Probation for Supplemental Report.
- 23  Defendant  (B) Waives Probation Referral  (C) Requests immediate sentencing.  
 Court accepts waiver and fixes this as time for sentence. SCPRB  Probation Hearing Held
- 816  Defendant waives statutory time for  (A) Trial  (B) Sentencing  
 Defendant waives formal arraignment for Pronouncement of Judgment  
 The Court has read and considered the Probation Officer's report  
 \_\_\_\_\_ indicate no legal cause why Judgment should not now be pronounced
- 263  Probation \_\_\_\_\_ and the Court states reasons
- 265A  Defendant is \_\_\_\_\_mitted to State Prison for the term prescribed by Law.
- 289  Defendant is committed to State Prison for a total determinate period of 5 years  
(itemized as attached and made a part hereof)
- 293  Court recommends sentence pursuant to provisions of P.C. 1170(d).
- 265B  Defendant is committed to California Youth Authority
- 267  Defendant is sentenced to San Bernardino County Jail for a period of \_\_\_\_\_
- 396  With Credit for 605 days served; 151 actual + 68 conduct
- 273  Counts \_\_\_\_\_ to run  (A) Consecutively/  (B) Concurrently, with \_\_\_\_\_
- 274  Sentence to run  (A) Consecutively/  (B) Concurrently with \_\_\_\_\_
- 294  (A) Execution/Imposition of \_\_\_\_\_ is suspended.
- 270  Pronouncement of Judgment withheld as  (A) Misdemeanor:  (B) Felony
- 271  \_\_\_\_\_ Probation granted for a period of \_\_\_\_\_ years on following terms and conditions (see attached)  96  Defendant accepts probation and  (A) is given a copy of the terms and conditions  (B) Will receive a copy of the terms and conditions
- 363  Stay of execution of sentence is granted, defendant to surrender on \_\_\_\_\_ for remand to Custody.  
at \_\_\_\_\_ in Court \_\_\_\_\_ in Dept. \_\_\_\_\_
- 282  On Motion of People, Counts 2-3 are dismissed  (A) in the furtherance of Justice  
 (B) Per Plea Agreement  (C) Insufficient evidence  (D) \_\_\_\_\_
- 283  The Court fully advises Defendant of his  (A) Appeal Rights -  (B) Parole Rights
- 107  The Court finds Defendant is  (A) Able  (B) Unable to reimburse the County for attorney fees
- 109  The Court finds Defendant is  (A) Able  (B) Unable to pay cost of presentence report
- 366  Court orders Restitution Fine in the amount of \$ 1000  (A) stayed pending successful completion of probation.
- 24  Defendant fails to appear as previously ordered.
- 278  Pursuant to Section 13202B, Vehicle Code, the Court finds a Motor Vehicle  
 (A) Was  (B) Was not used in the commission of the offense.
- 278  Pursuant to Section 13650, Vehicle Code, the Court finds a Motor Vehicle  
 (C) Was  (D) Was not used in the commission of \_\_\_\_\_ offense.
- 25E  Bench Warrant ordered recalled 28B  Quashed prior to issuance. 30E  Bail/Bond exonerated
- 25A  Bench Warrant ordered issued 26B  Held until \_\_\_\_\_ 30L  Bail/Bond forfeited  
25D  Bail fixed at \$ \_\_\_\_\_
- 230  Defendant ordered to  (A) Report to Probation Officer  (B) Appear on hearing date
- 30  Defendant  (A) Remanded  (B) Released
- 87G  Referred to Probation Office for report and determination of credit for time served
- 9A  Action continued to \_\_\_\_\_ at \_\_\_\_\_ in \_\_\_\_\_ Court \_\_\_\_\_ in Dept. \_\_\_\_\_  
for \_\_\_\_\_
- 803  Case custody  Remains  (A) Changes to: STATE PRISON
- 32  \_\_\_\_\_

White - System Copy  
Pink - File  
Yellow - Facility Copy

RESTITUTION FINE:

It is therefore respectfully recommended that the defendant, Lawrence Lee LaBarbera, be ordered to pay a Restitution Fine in the amount of \$5,000.00, for the offense of Robbery, Second Degree, a Felony.

PROBATION OFFICER'S RECOMMENDATION:

It is therefore respectfully recommended that probation be denied and the defendant, Lawrence Lee LaBarbera, be sentenced to the California State Prison as follows:

COUNT I:

Robbery, Second Degree - in violation of Section 211 PC, for the aggravated term of ~~2~~ <sup>2</sup> years

To be consecutive to above; Enhancement of Infliction of Great Bodily Injury, PC 12022.7 3 years

The commitment to State Prison is for a total of ~~eight (8)~~ <sup>five (5)</sup> years, with credit for time served, a matter of two hundred five (205) days (one hundred thirty-seven (137) days actual, sixty-eight (68) days conduct), and may be followed by parole for a period of three (3) to four (4) years.

Respectfully submitted,

BARBARA J. FRANK  
CHIEF PROBATION OFFICER

By: *David J. Sultzbaugh*

David J. Sultzbaugh  
Probation Officer II

DJS:la

APPROVED:

*Audulio L. Ricketts, Jr.*

Audulio L. Ricketts, Jr.  
Supervisor

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN BERNARDINO**

FILE STAMP  
San Bernardino County Clerk

JAN 27 1992

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff, *(001)*  
Lawrence Lee La Barbera  
vs.  
Defendant  
LA BARBERA

No. CR 56132 F0080949  
CHANGE OF PLEA (GUILTY)

**DECLARATION BY DEFENDANT**

RUSH

- My true name is Lawrence Lee La Barbera, born 10 20 1967
- The information filed herein accuses me of the offense(s) of:  
PC 245A-1 Assault - PC 1320B  
failure to appear
- I desire to change my plea(s) and plead guilty/nolo contendere (no contest) to:  
(Set forth count and code section(s) including lesser offense(s) to which plea to be made):  
PC 245A-1  
Admit PC 1320B & great bodily injury

4. I understand that the maximum punishments I could receive for each crime are:

COUNT NUMBER	NAME OF CRIME	MAXIMUM PERSONAL COMMITMENTS	INITIAL AFTER READING
<u>2/31</u>	<u>245A-1 Assault</u>	<u>4 yrs 4 mos 1 day</u>	<u>LLL</u>
<u>2/31</u>	<u>PC 1320B</u>	<u>2 yrs 6 mos</u>	<u>LLL</u>

- I also understand the maximum punishments I could receive for each of the above offenses also includes the following additional penalties:
  - A FINE up to \$10,000.00 AND a Restitution fine up to \$10,000.00. LLL 5a.
  - Any State Prison Commitment will be followed by a period of PAROLE of 3 to 4 years. Any violation of the terms of parole could result in up to an additional year in custody for each violation, up to a maximum of 4 years. LLL 5b.
  - IF I am found to be addicted to the use of narcotics or in the imminent danger of becoming so addicted, I may be committed to the Department of Corrections Narcotic Rehabilitation Program for a period of time equal to that which I would otherwise have to spend in state prison. NA 5c.
  - IF I plead guilty to any drug offense covered by Health & Safety Code Section 11590, I will be required to register as a controlled substance offender with the chief of police of the city in which I reside or the sheriff of the county if I reside in an unincorporated area. NA 5d.
  - IF a motor vehicle is found to be involved in or incidental to the commission of the offense, my driving privileges may be revoked by the Court and/or Department of Motor Vehicles. LLL 5e.
  - IF I plead guilty to any sex crime covered by Penal Code Section 290, I will be required to register as a sex offender with the chief of police of the city in which I reside or the sheriff of the County if I reside in an unincorporated area. NA 5f.
  - Federal and State Law prohibit a convicted felon from possessing firearms. LLL 5g.
- I understand that, as to the charge(s) against me, my Constitutional rights include:
  - The right to a speedy and public trial by jury. LLL 6a.
  - The right to see, hear and question all witnesses against me. LLL 6b.
  - The right to have the Judge order into Court all the evidence and to order my witnesses to attend the trial without cost to me. LLL 6c.
  - The right at the trial to present evidence in my favor. LLL 6d.
  - The right to remain silent, or if I wish, to testify for myself. LLL 6e.
- As to each crime, I now intend to plead guilty/nolo contendere (no contest) to:
  - I waive and give up each of the above Constitutional rights. LLL 7a.
  - I understand that I will continue to have the right to the aid of an attorney at all further proceedings before the Court and that if I cannot afford an attorney, the Court will appoint an attorney to represent me. LLL 7b.
- I understand that the Court will not decide whether to impose sentence or extend probation until a probation officer makes an investigation and reports on my background, prior record (if any) and the circumstances of the case. LLL 8a.
  - I understand that if I am now on probation/parole my plea of guilty/nolo contendere (no contest) in this case may constitute a violation of my probation/parole and result in its revocation and the imposition of sentence. LLL 8b.
  - I understand that I am not eligible for probation in this case. LLL 8c.
- I am freely and voluntarily entering the plea(s) of guilty/nolo contendere (no contest) as indicated:
  - Because I am guilty (and for no other reason), and/or LLL 9a.
  - As a result of plea bargaining after discussing with my attorney the possibility of my being convicted on other or more serious charges and risking the possibility of a longer sentence, and/or LLL 9b.
  - Because the District Attorney's Court has agreed to: LLL 9c.

SUP Total STD PC 245A-1 + PC 1320B To become plea  
PC 245A-1 + PC 1320B To become plea  
Parole on PC 245A-1 + PC 1320B - A minimum state sentence  
PC 14601 be done.

JAN 31 1992

- 10. Except as otherwise stated herein, no one has promised or suggested to me that I will receive a lighter sentence, probation, reward, immunity or anything else to get me to plead guilty/nolo contendere (no contest) as indicated. LLL 10.
- 11. No one has used any force or violence or threats or menace or duress or undue influence of any kind on me or anyone dear to me to get me to plead guilty/nolo contendere (no contest) as indicated. LLL 11.
- 12. I am not now under the influence of alcohol, or of any drugs, narcotics, medicine, or any other substance which could interfere with my ability to understand what I am doing; nor am I suffering from any condition which could have that effect. LLL 12.
- 13. I understand that if I am not a citizen of the United States, deportation, exclusion from admission to the United States or denial of naturalization may result from a conviction of the offense(s) to which I plead guilty/nolo contendere (no contest). LLL 13.
- 14. a. I understand that even though the Court may approve the agreement for sentence set forth, the Court is not bound by the agreement, and that the Court may withdraw its approval at any time before pronouncement of judgment, in which case I shall be able to withdraw my plea should I desire to do so. LLL 14a.  
 b. I also understand the agreement for sentence set forth herein is expressly conditioned upon the representations made to the Court re: the facts of my case and my background. I understand that if the probation report reveals facts about my case or facts about my background materially different from what has been reported to the Court, the Court will no longer be bound by the agreement; and may then sentence me based upon the actual facts (per *People vs. Jackson* (1980) 103 C.A. 3rd. 636). LLL 14b.  
 c. I understand that any agreement as to sentence applies only in the original sentence and that a violation of probation may cause the Court to send me to state prison or county jail for the maximum term provided by law. LLL 14c.  
 d. I waive my rights regarding dismissed counts to the extent that the Court may consider such dismissed counts in deciding whether or not to grant probation and in deciding whether or not to impose a midterm, aggravated or mitigated prison term, and as to restitution. LLL 14d.
- 15. I understand that I have the right to be sentenced by the judge who accepted my plea, but I agree that any judge of the Superior Court may impose sentence in this case. LLL 15.
- 16. I have had sufficient time to consult with my attorney concerning my intent to plea guilty to the above charge(s). My lawyer has explained everything on this Declaration to me, and I have had sufficient time to consider the meaning of each statement. I have personally placed my initials on certain boxes on this declaration to signify that I fully understand and adopt as my own each of the statements which correspond to those boxes. LLL 16.
- 17. I can read and understand English. LLL 17.  
 OR
- 17a. I cannot read/understand English, but I have had the assistance of an interpreter to read this form to me and I now understand all of the contents of this form.  17a.

SIGNED on 1-27-92 at San Bernardino, California.

Luanna G. Badena  
 Signature of Defendant

D. A. states that he is the above-named defendant's attorney in the above-entitled criminal action; that he personally read and explained the contents of the above declaration to the defendant; that he personally observed the defendant sign said declaration; that he concurs in the defendant's withdrawal of his plea(s) of not guilty; and that he concurs in the defendant's plea(s) of guilty/nolo contendere (no contest) to the charge(s) as set forth by the defendant in the above declaration.

Dated this 27 day of Jan, 1992 D. A. Nauman  
 Attorney's Signature

Dated this 27 day of Jan, 1992 Approved: [Signature]  
 Deputy District Attorney

**ORDER**

In compliance with the requirements of Boykin and Tahl, the Court finds that (1) the defendant fully understands his constitutional rights, the nature of the crime(s) charged in the information/indictment and those to which he has pleaded, and the consequences of his plea; (2) the defendant understandingly and voluntarily pleads guilty/nolo contendere (no contest) and expressly waives his constitutional rights; and (3) that there is a factual basis for the plea of guilty/nolo contendere (no contest) or that the plea is made on the basis of a plea agreement.

IT IS ORDERED that the defendant's plea(s) of guilty/nolo contendere (no contest) be accepted and entered in the minutes of the Court, and the defendant is adjudged guilty.

Dated Jan 27, 1992 [Signature]  
 Judge of the Superior Court

3848 6/22/2004 120854

# ABSTRACT OF JUDGMENT - PRISON COMMITMENT SINGLE OR CONCURRENT COUNT FORM

FORM DSL 290.

(Not to be used for Multiple Count Convictions nor Consecutive Sentences)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO  
BRANCH CENTRAL

FILED - Central District  
San Bernardino County Clerk

MAR 12 1992

*Deborah Ringen*  
Deputy

COUNT L.D.  
36100

CASE NUMBER

PEOPLE OF THE STATE OF CALIFORNIA versus  
DEFENDANT: LABARBERA, LAWRENCE LEE (001)  
AKA:

PRESENT  
 NOT PRESENT

COMMITMENT TO STATE PRISON  
ABSTRACT OF JUDGMENT

AMENDED  
ABSTRACT

SCR56132

FO080949

DATE OF HEARING (MO) (DAY) (YR) 02-25-92 DEPT. NO 12 JUDGE BARRY L. PLOPKIN CLERK ELIZABETH BOCHILLI  
REPORTER CYNTHIA SMITH COUNSEL FOR PEOPLE J GARAFALO COUNSEL FOR DEFENDANT R ALVARENGA PROBATION NO. OR PROBATION OFFICER

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONY (OR ALTERNATE FELONY/MISDEMEANOR):

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CONVICTED	DATE OF CONVICTION			CONVICTED BY			TIME IMPOSED YEARS MONTH
					MO	DAY	YEAR	JUDGE	CLERK	PROBATION	
1	PC	211	SECOND DEGREE ROBBERY	91	01	27	92		X	I	2 00

2. ENHANCEMENTS charged and found true TIED TO SPECIFIC COUNTS (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:  
For each count list enhancements separately. Enter time imposed for each or 'S' for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1395.  
Add up time for enhancements on each line and enter the total in right-hand column.

Count	Enhancement	Yrs or 'S'	Total								
1	12022.7	3									3 00

3. ENHANCEMENTS charged and found true FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS (mainly § 667-series) and OTHER.  
List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) 2 times). Enter time imposed for each or 'S' for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1395. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

Enhancement	Yrs or 'S'	Total								

4. OTHER ORDERS:

5. TIME STAYED § 1170.1(b) (DOUBLE BASE LMT):  
6. TOTAL TERM IMPOSED: 5 00

7.  THIS SENTENCE IS TO RUN CONCURRENT WITH ANY PRIOR UNCOMPLETED SENTENCE(S):

8. EXECUTION OF SENTENCE IMPOSED:

A.  AT INITIAL SENTENCING HEARING B.  AT RESENTENCING PURSUANT TO DECISION ON APPEAL C.  AFTER REVOCATION OF PROBATION D.  AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170(e)) E.  OTHER

9. DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR) 02-25-92 CREDIT FOR TIME SPENT IN CUSTODY 205 INCLUDING: ACTUAL LOCAL TIME 137 LOCAL CONDUCT CREDITS 68 STATE INSTITUTIONS  DMH  CDC

10. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:  
 FORTHWITH INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:  
 AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS  
 CALIF. INSTITUTION FOR WOMEN - FRONTIERA  CALIF. MEDICAL FACILITY - MCKEVILLE  CALIF. INSTITUTION FOR MEN - CHINO  DEVEL. VOC. INST.  
 OTHER (SPECIFY):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE

MICHELLE HUBBS

*Michelle Hubbs*

FEBRUARY 28, 1992

This form is prescribed under Penal Code § 213.5 to satisfy the requirements of § 1213 for domestic violence sentences under Penal Code § 262.5. All documents prepared must be referred to in this document.

Receipt is hereby acknowledged  
ABSTRACT OF JUDGMENT  
SINGLE OR CONCURRENT COUNT FORM  
(Not to be used for Multiple Count Convictions nor Consecutive Sentences)

FORM DSL 290.1

002637  
MAR 26 1992

SAN BERNARDINO COUNTY MUNICIPAL COURT DISTRICT  
CENTRAL DIVISION  
COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

BLP  
12-27-91  
D-12  
FLAND

FSB274702

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

Case No. ~~SCR~~ 56132

FILED - Central District  
San Bernardino County Clerk

Atty. R. Alvarenga  
FELONY COMPLAINT

C/TN

LA Barbera

LAWRENCE LEE LA BARRERA

DEC 23 1991

Defendant(s)

FC080949

By: Jacquelin Hart Deputy

FILED  
AUG 13 1991  
BY SAN BERNARDINO COUNTY MUNICIPAL COURT DISTRICT CLERK

The undersigned is informed and believes that:

COUNT 1

On or about June 25, 1991, in the above named Judicial District, the crime of SECOND DEGREE ROBBERY, in violation of PENAL CODE SECTION 211, a Felony, was committed by LAWRENCE LEE LA BARRERA, who did willfully, unlawfully, and by means of force and fear take personal property from the person, possession, and immediate presence of CHRISTOPHER BATES. It is further alleged that the above offense is a serious felony within the meaning of Penal Code Section 1192.7(c)(19).

It is further alleged that in the commission and attempted commission of the above offense, the said defendant(s), LAWRENCE LEE LA BARRERA, personally used a deadly and dangerous weapon(s), to wit, a BILLY CLUB, said use not being an element of the above offense, within the meaning of Penal Code Section 12022(b) and also causing the above offense to be a serious felony within the meaning of Penal Code Section 1192.7(c)(23).

JAN 3 1992

002636

It is further alleged that in the commission of the above offense the said defendant(s), LAWRENCE LEE LA BARRERA, with the intent to inflict such injury, personally inflicted great bodily injury upon CHRISTOPHER BATES, not an accomplice to the above offense, within the meaning of Penal Code Section 12022.7 and also causing the above offense to become a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

\* \* \* \* \*

COUNT 2

On or about June 25, 1991, in the above named Judicial District, the crime of ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245(a)(1), a Felony, was committed by LAWRENCE LEE LA BARRERA, who did willfully and unlawfully commit an assault upon CHRISTOPHER BATES with a deadly weapon, to wit, a ~~BILLY~~ CLUB, and by means of force likely to produce great bodily injury.

It is further alleged that in the commission of the above offense the said defendant(s), LAWRENCE LEE LA BARRERA, with the intent to inflict such injury, personally inflicted great bodily injury upon CHRISTOPHER BATES, not an accomplice to the above offense, within the meaning of Penal Code Section 12022.7 and also causing the above offense to become a serious felony within the meaning of Penal Code Section 1192.7(c)(8).

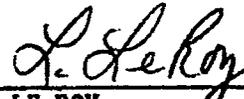
\* \* \* \* \*

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

Further, attached hereto and incorporated herein are official reports and documents of a law enforcement agency which the undersigned believes establish probable cause for the arrest of defendant(s) LAWRENCE LEE LA BARRERA, for the above-listed crimes. Wherefore, a warrant of arrest is requested for LAWRENCE LEE LA BARRERA.

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

Executed at San Bernardino, California, on August 13, 1991.



L. LE ROY  
DECLARANT AND COMPLAINANT

AGENCY: SBPD

PRELIM TIME EST.: 1 Hrs.

DEFENDANT	CII NO.	DOB	BOOKING NO.	BAIL RECOM'D	CUSTODY R'TN DATE	NCIC
LA BARRERA, LAWRENCE	A08376517	10/20/67				N

STATE OF CALIFORNIA  
COUNTY OF SAN BERNARDINO

FELONY COMPLAINT - ORDER HOLDING TO ANSWER - P.C. SECTION 872

It appearing to me from the evidence presented that the following offense(s) has/have been committed and that there is sufficient cause to believe that the following defendant(s) guilty thereof, to wit:

(Strike out or add as applicable)

LAWRENCE LEE LA BARRERA

<u>COUNT NO.</u>	<u>CHARGE</u>	<u>SPECIAL ALLEGATION</u>
1	PC211	PC12022(b) PC12022.7
2	PC245(a)(1)	PC12022.7

I order that defendant(s) be held to answer therefor and be admitted to bail in the sum of:

LAWRENCE LEE LA BARRERA

\$20,000.00

Dollars

and be committed to the custody of the Sheriff of San Bernardino County until such bail is given. Date of arraignment in Superior Court will be:

LAWRENCE LEE LA BARRERA

12/27/91

in Dept: 12

at: 8:30 A.M.

Date:

12/18/91



*Eric L. Spill*  
Committing Magistrate