

Original

NO. ~~34888-4-11~~ 34755-5

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

<p>IN RE THE PERSONAL RESTRAINT PETITION OF:</p> <p>JERALD W. DAVENPORT, JR.</p> <p>Petitioner.</p>
<p>FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE ROGER A. BENNETT CLARK COUNTY SUPERIOR COURT CAUSE NO. 00-1-02097-0</p>
<p>RESPONSE TO PERSONAL RESTRAINT PETITION</p>

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COURT OF APPEALS

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STATE OF WASHINGTON  
BY *CKM*  
CLERK

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## I. STATEMENT OF THE CASE

The State accepts the statement of facts submitted by the defendant relating to the underlying crime he was convicted of in the Superior Court.

As indicated, this defendant was sentenced to life without parole and appealed that matter. The matter went through appeal in Division II and then on to the State Supreme Court where it was remanded for reconsideration. State v. Davenport, 154 Wn.2d 1001, 110 P.3d 753 (2005). Because of subsequent case law, one of the two robbery convictions dealing with the underlying crime here was dismissed and the defendant was then resentenced on one count of robbery in the first degree.

At the time of the resentencing, the new defense attorneys filed a sentencing brief with the trial court arguing for the first time that the Oregon conviction did not meet all of the elements of the Washington offense for robbery. All of the arguments raised in the personal restraint petition filed herein were raised at that time by other attorneys at the trial court level. Apparently, this argument

was rejected at the trial court level. The defendant has not supplied transcript of that particular sentencing.

## II. BASIC PERSONAL RESTRAINT PETITION RULES

A personal restraint petition is not a substitute for an appeal. Collateral review undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. In re the Personal Restraint of Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983). To obtain relief through collateral review, the defendant must show that he was actually and substantially prejudiced by a violation of constitutional error or that non-constitutional error occurred constituting a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Markel, 154 Wn.2d 262, 267, 111 P.3d 249 (2005); In re Personal Restraint of Pirtle, 136 Wn.2d 467, 473, 965 P.2d 593 (1998). The defendant bears the burden of establishing prejudice by a preponderance of the evidence. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). It has repeatedly been held, that

as a threshold matter, a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. In re Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). The collateral attack by a personal restraint petition on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. In re Personal Restraint of Gentry, 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999).

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error in the personal restraint petition by Mr. Davenport is that his conviction in Oregon for second degree robbery should not count as a “strike” because its elements are not comparable to the elements of second degree robbery in Washington State.

As previously indicated, this matter was first raised by other attorneys at the time of the resentencing of the defendant.

Because he was resentenced in the trial court, and because the defense has not provided the basis of ruling at that time, it should be assumed that the trial court denied this particular approach.

Under the POAA, an out-of-state conviction may not be used as a strike unless the State proves by a preponderance of the evidence that the conviction would be a strike offense under the POAA. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To determine whether a prior out-of-state or Federal conviction is comparable to the Washington conviction, the sentencing court must compare the out-of-state or Federal offense with the potentially, comparable Washington offenses. At the time of the initial sentencing on July 5, 2002, the deputy prosecutor had provided to the court certified copies of the Oregon conviction for robbery in the second degree. He also at that time encouraged the court to enter into this comparability review so that the court could compare the elements. (RP 532- 533). The experienced defense attorney at that time indicated on the record that she was well aware of the prior Oregon conviction, that she had had an opportunity to examine it against the Washington matter and was not raising any objections to the use of it as comparable to the robbery conviction in Washington. (RP 535).

In determining whether foreign convictions are comparable to Washington State strike offenses, the State has devised a two part test for comparability. State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998). In Morley, it was determined that for the purposes of determining the comparability of crimes, the court must first compare the elements of the crimes. Morley, 134 Wn.2d at 605-606. In cases in which the elements of the Washington crime and the foreign crime are not substantially similar, the courts have held that the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, or other documentation, to determine if the conduct itself would have violated a comparable Washington statute. Morley, 134 Wn.2<sup>d</sup> at 606.

The court is advised that it must first look for comparability to the elements of the crime. More specifically, the elements of the out-of-state crime must be compared to the elements of a Washington Criminal Statute in effect when the foreign crime was committed. Morley, 134 Wn.2d at 605-606. If the elements of the foreign conviction are comparable to the elements of the Washington strike offense on their face, the foreign crime counts

toward the offender score as if it were a comparable Washington offense.

The State submits that the defense in this personal restraint petition is attempting to add elements to the concept of robbery in the second degree in the State of Washington that don't really exist. Second degree robbery, RCW 9A.56.190 and .210, require:

- (a) a theft;
- (b) the use or threatened use of immediate force or fear of injury; and
- (c) the force or fear be used to obtain or retain the property.

State v. McIntyre, 112 Wn.App. 478, 481, 49 P.3d 151 (2002).

The Oregon statutes for robbery begin with the concept of robbery in the third degree under ORS 164-395 which indicates, in part, as follows:

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

- (a) preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking or
- (b) compelling the owner of such property or another person to deliver the property or to engage in other

conduct which might aid in the commission of the theft;

Robbery in the second degree under ORS 164-405 is, in part, as follows

A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:

(a) represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon, or

(b) is aided by another person actually present.

The elements of robbery in the second degree in the state of Oregon under ORS 164-405 and contained, specifically, in the indictment that the defendant pled guilty to in Oregon was as follows:

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

A copy of the Indictment is attached hereto and by this reference incorporated herein. If further clarification is needed as

to the conduct and actions of the defendant, at the time that he changed his plea to guilty, he made the following statement in writing to the court::

On October 17, 1992, I helped another person steal money from a store clerk. The other person pretended he had a gun.

A copy of the petition to plead guilty and waiver of jury trial signed by the defendant on March 30, 1993, is attached hereto and by this reference incorporated herein. A copy of the Judgment of Conviction and Sentence is also attached hereto and by this reference incorporated herein.

This type of comparability testing of the concepts of robbery in Oregon and Washington was done by Division II in State v. McIntyre, 112 Wn.App. 478, 49 P.3d 151 (2002). The defendant had pled guilty to second degree robbery and appealed the sentencing decision which had treated his Oregon third degree robbery conviction as equivalent to a second degree robbery under the Washington law and sentenced him to fifteen months of confinement. At sentencing, the defendant contested this offender score calculation, claiming that the third degree robbery was not equivalent to a Washington second degree robbery conviction. That his sentencing range should have been 12 to 14 months, not

15 to 20 months. He argued that the Washington statute for second degree robbery included additional requirements that the property be taken from the person of another or in his presence against his will. After examining this issue, Division II determined that the elements of the crimes in the two states were the same. The sentencing court, therefore, properly treated the defendant's 1995 Oregon third degree robbery conviction as a second degree robbery under Washington law.

The State submits that this matter was properly decided at the trial court level and that the crimes in Washington and Oregon are comparable.

#### **IV. RESPONSE TO SECOND ASSIGNMENT OF ERROR**

The second assignment of error raised by the defendant in this Personal Restraint Petition is that the sentence of life imprisonment with no possibility of parole is grossly disproportionate to the crime of robbery and violates the state constitution. It is interesting to note that he references this as robbery in the second degree when in fact our defendant was

convicted of robbery in the first degree dealing with the displaying of a firearm.

Nevertheless, this matter was thoroughly discussed by the Washington State Supreme Court in a series of three companion cases: State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), cert. denied 520 US 1201, 117 S.Ct. 1563, 137 L.Ed.2d 709 (1997); State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996); State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996).

Those three cases looked at various elements of the persistent offender (three strikes) law. Questions of disproportionality, cruel and unusual punishment, equal protection, and other types of constitutional and non-constitutional arguments were made. The State Supreme Court felt comfortable in ruling that the three strikes law was appropriate under the circumstances and represented the will of the people as voiced to the Legislature.

In State v. Thorne, 129 Wn.2d 736, supra, where a defendant had been convicted of first degree robbery and first degree kidnapping. He was eligible for the three strikes law and the Supreme Court concluded that the act was not unconstitutionally vague, nor did it violate the equal protection clause, the due process clause, or violate the prohibition against

cruel and unusual punishment. In fact, the court specifically, discussing robbery, made the following observation:

Under the Persistent Offender Accountability Act, all defendants who are convicted of a 'most serious offense' receive sentences of life imprisonment without possibility of parole. The offenses which are the basis for the convictions and sentence in this appeal are serious, violent offenses, which the people of this state have determined call for serious punishment. This court has previously held that a life sentence imposed upon a defendant who, after being convicted of robbery, was determined to be a habitual criminal was not cruel and unusual punishment. State v. Lee, 87 Wn.2d 932, 558 P.2d 236 (1976).

The Lee court held:

Appellant's sentence does not constitute cruel and unusual punishment. The life sentence contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime. Appellant's prior convictions were for robbery, two burglaries in the second degree and assault in the second degree. He received a life sentence for the second robbery conviction. His punishment is not disproportionate to the underlying offense. State v. Thorne, *supra* at 775-776.

In State v. Rivers, 129 Wn.2d 697, (*supra*), the defendant was convicted in King County for second degree robbery. It was also held in that case that the use of the Persistent Offender Accountability Act did not constitute cruel and unusual punishment.

The Rivers court referred to the Thorne decision and made some additional observations:

In the companion case, State v. Thorne, we upheld the constitutionality of this act. The issues raised by defendant Rivers with respect to any violation of equal protection, due process, separation of powers, and Article II, Secs. 19 and 37 of this state's constitution are answered in Thorne.

Like defendant Thorne, defendant Rivers argues his sentence violates the Eighth Amendment to the United States Constitution and Article I, Sec. 14 of this state's constitution. The Eighth Amendment to the United States Constitution bars cruel and unusual punishment. Article I, Sec. 14 of this state's constitution bars cruel punishment.

In State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980) and in State v. Thorne, this court held the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment. Because we hold that the sentence imposed upon defendant Rivers under the Persistent Offender Accountability Act does not violate the more protective state constitutional guarantee against cruel punishment, we do not additionally examine the defendant's claim under the Eighth Amendment. State v. Rivers, at 712.

The third case was State v. Manussier, 129 Wn.2d 652, (supra). In that case, the defendant was also convicted of second degree robbery in Pierce County. Because he had twice been convicted of 'most serious offenses' under the three strikes law, he was sentenced to a mandatory life imprisonment. The argument

raised in the Manussier case was dealing with the legislation enacting the statute and also that it violated equal protection. The Supreme Court found both claims to be without merit and affirmed the inmate's sentence.

The defense in this case argues that this entire line of reasoning must be re-evaluated because of State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). The State disagrees with this analysis. State v. Thomas, supra, dealt with the elements of the crime in a capital murder case and also with the Apprendi problem. As the Supreme Court notes in Thomas, the River's decision did not have an Apprendi problem since the aggravators and the three strikes context are prior convictions and are, therefore, not at issue under the Apprendi rule. (Thomas, supra at 848). There is nothing in the discussion in the Thomas case that would lead one to believe that they are advocating a re-examination of the three strikes legislation or that they are finding that it constitutes cruel and unusual punishment or is subject to some type of comparability with other states. The Thomas decision dealt specifically with capital murder and the discussion was in reference specifically to that. This is demonstrated by their conclusion at the end of the analysis of this particular section of the Opinion:

We hold that 'to convict' instructions may be subjected to harmless error analysis to affirm convictions without aggravating circumstances. Thus, for purposes of Thomas' underlying convictions for first degree murder and residential burglary, we find that the errors in the 'to convict' and accomplice liability instructions are harmless beyond a reasonable doubt. For purposes of affirming Thomas' conviction for aggravated first degree murder and his death sentence, we do not perform a harmless error analysis since to do so would violate the Supreme Court's holdings in Apprendi and Ring. We, therefore, affirm Thomas' convictions for first degree murder and residential burglary, reverse his conviction for aggravated first degree murder and the death sentence, and remand for either a new trial on aggravated first degree murder or re-sentencing on first degree murder in accordance with this opinion. (Thomas at 849-850).

The State submits that the defense has not offered any compelling arguments to allow a re-examination of the Persistent Offender Accountability Act. It has been found to be constitutional and has been found not to be in violation of the state constitution on numerous occasions.

#### **V. RESPONSE TO ASSIGNMENT OF ERROR NO. 3**

The third assignment of error raised by the defendant in this personal restraint petition is that the warrantless arrest in the State of Oregon was improper.

This argument was raised in the direct appeal under Division II No. 29072-3-II. By unpublished opinion, it was decided against the defendant. In that appeal, the defense couched it in terms of ineffective assistance of counsel because he failed to seek suppression based on the warrantless Oregon arrest. The court of appeals indicated that he had to show that if counsel had made the motion, the court probably would have granted it. They indicate that he could not demonstrate that the court would have granted a motion to suppress. The court of appeals found exigent circumstances existed which justified the arrest. In fact, they indicate that the record supported all six factors for the warrantless entry and arrest. A copy of the earlier decision from Division II is attached hereto and by this reference incorporated herein.

As previously indicated, the burden is on the defendant in a personal restraint petition. The State submits that he has had his opportunity for direct review of this matter and has shown no basis to re-litigate this matter in the appellate system.

VI. CONCLUSION

The State submits that the defendant was properly sentenced in this matter. The trial court should be affirmed in all respects and the personal restraint petition should be dismissed.

DATED this 31 day of May, 2006.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:   
Michael C. Kinnie, WSBA #7869  
Senior Deputy Prosecuting Attorney

**APPENDIX "A"**

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

FILED  
2 NOV 19 PM 2:11  
JUDICIAL DISTRICT

THE STATE OF OREGON,	)	C	92-11-36764
	)	DA	479344
Plaintiff,	)	PPB	92-92691
	)		
v.	)		INDICTMENT FOR VIOLATION OF
	)		
JERALD WAYNE DAVENPORT,	)	ORS	164.405 (1,2)
DOB: 3/20/72	)		
Defendant.	)		

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

COUNT 1

ROBBERY IN THE SECOND DEGREE

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

COUNT 2

ROBBERY IN THE SECOND DEGREE

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

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

Witnesses

Examined Before the Grand Jury:

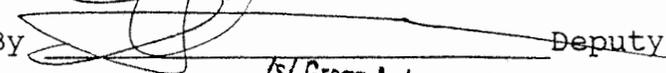
A TRUE BILL

Laura Rusk  
Donald Lind

ENTERED  
NOV 19 1992  
IN REGISTER BY SB

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

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

By  Deputy

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

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

**APPENDIX "B"**

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

93 APR 14 AM 11:34

STATE OF OREGON,

Plaintiff,

C 92-11-367164  
DA No. 479344  
Citation No. \_\_\_\_\_

v.

Jerald Wayne Davenport, Jr.

Defendant.

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

ENTERED  
APR 15 1993

The defendant represents to the Court:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3/30/93  
(Date)

Jerald W. Davanport Jr.  
(Defendant's Signature)

CERTIFICATE OF COUNSEL

I am the lawyer for the defendant and I certify:

1. I have read and explained fully to the defendant the allegations contained in the accusatory instrument(s). I believe defendant understands the charges and all possible defenses to them. I have explained alternatives and trial strategies to defendant.

2 I have explained to the defendant the maximum and minimum penalties that could be imposed for each charge and for all charges together.

3. The plea(s) offered by defendant is (are) justified by my understanding of the facts related to me.

4. To the best of my knowledge and belief, the declarations made by defendant in the foregoing petition are true and accurate.

5. Defendant's decision to enter the plea is made voluntarily, intelligently, and knowingly. I recommend that the Court accept the plea.

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

3/30/93  
(Date)

Scott Naim  
(Lawyer's Signature)

81093  
(Bar No.)

.

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## APPENDIX "C"

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

STATE OF OREGON

CASE # C9211-36764

D.A.# 479344

V.

JERALD DAVENPORT, JR.

Defendant

**JUDGMENT OF CONVICTION  
AND SENTENCE (SINGLE COUNT)**

Reporter/Tape No. CTA175151-884

175692

OSB # 78015

OSB # 81093

1. Hearing Date: APRIL 12, 1993

2. District Attorney: CHARLES BALL

3. Defense Attorney: SCOTT RAIVIO

4. Defendant is convicted of the following offense:

Offense

ROBBERY II (Count I)

Date of Incident

10/17/92

Offense involved operation of a motor vehicle.

Defendant's: DOB \_\_\_\_\_

Defendant is unrepresented and knowingly waived counsel.

Defendant waived two-calendar-day delay before sentencing.

5. Defendant is:  in custody  on recognizance

on security release  on sheriff's population release.

6. IT IS ADJUDGED THAT DEFENDANT HAS BEEN CONVICTED on defendant's plea of:

guilty.

no contest.

not guilty and verdict of guilty, by jury trial.

not guilty and finding of guilty, by court trial.

7a. Defendant is acquitted of the following count: \_\_\_\_\_

b. All other counts contained in the charging instrument in this case are hereby dismissed on motion of the District Attorney in the interests of justice.

8. The security posted is to be:

applied to other court-ordered obligations owed by the defendant or surety in this or any other case, and the balance, if any, is to be refunded.

refunded to the person who posted it less the applicable security release fee.

9. Defendant was advised of the right to appeal (ORS 137.020).

10. Security on appeal (to guarantee the appearance of the defendant)

is set at \$ \_\_\_\_\_ (ORS 135.285).

is denied.

Bond on appeal (to guarantee payment of fines and costs (ORS 161.665) is set at \$ \_\_\_\_\_ (ORS 138.135).

ENTERED  
APR 16 1993  
REGISTER BY JKT

FILED 4TH JUDICIAL DISTRICT  
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# DISPOSITION

**SGL**

(On or after 11/1/89)

## IT IS ORDERED THAT THE FOLLOWING SENTENCE IS IMPOSED:

### 11. DEPARTURE SENTENCE OR PRESUMPTIVE SENTENCE

- This sentence is a durational departure,
- This sentence is a dispositional departure, and the Court finds substantial and compelling reasons as stated in the record for this departure.
- This is a presumptive sentence. The sentencing guideline grid coordinates are 6 and I.

### 12. PROBATION

Defendant is placed on probation for 36 months subject to the standard conditions, any special conditions indicated on the Special Probationary Conditions attached hereto, and any financial obligations imposed in the Money Judgment.

Defendant shall be supervised by:

- Oregon State Corrections Division.
- Multnomah County Probation Office.
- Bench Probation.
- This case is transferred to Judge \_\_\_\_\_ for all judicial supervision of probation.

MULTNOMAH COUNTY DEPARTMENT OF COMMUNITY CORRECTIONS

### 13(a). IMPRISONMENT

- A term of imprisonment for \_\_\_\_\_ months, and a period of post-prison supervision for \_\_\_\_\_ months. If the defendant violates the conditions of post-prison supervision, the defendant shall be subject to sanctions including the possibility of additional imprisonment in accordance with the rules of the State Sentencing Guidelines Board. Defendant is committed to the custody of the Oregon State Corrections Department.
- A gun minimum of \_\_\_\_\_ is imposed. ORS 161.610.
- Defendant is found to be a dangerous offender. ORS 161.725.

13(b). The Court recommends the Defendant enter the following Corrections treatment programs:

- Social Skills Unit                       Sexual Offender Unit
- Mentally and Emotionally Disabled Unit                       Drug and Alcohol Unit (Cornerstone)

### 13(c). JAIL

- A jail term of \_\_\_\_\_; Defendant is committed to the custody of the Multnomah County Sheriff.
  - i. the term is to:
    - commence immediately.
    - commence on \_\_\_\_\_
  - ii. and, as provided by ORS 137.520:
    - work release authorized.
    - passes as authorized by counselor.
    - release on pass, furlough, leave, work, or educational leave prohibited.

The sentence to imprisonment or jail is to run:

- concurrently with \_\_\_\_\_
- consecutive to \_\_\_\_\_
- with credit for all time served.

### 13(d). FINE

Defendant shall pay the fine, if any, listed in the Money Judgment.

13(e). OTHER \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

### MONEY JUDGMENT

14. IT IS ADJUDGED THAT DEFENDANT PAY THE FOLLOWING OBLIGATIONS:

JUDGMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR: DEFENDANT

15. RESTITUTION

- Restitution will be ordered when the amount is determined.
- Restitution is ordered now to the persons named below (addresses should be sent by separate cover to Criminal Department):

	NAME	AMOUNT	CLAIM NO.
(1)	<u>Laura Rusk</u>	<u>\$750</u>	<u>Compensatory Fine</u>
(2)	_____	_____	_____
(3)	_____	_____	_____
(4)	_____	_____	_____

Victims are to be paid so:

- they are satisfied in the sequence listed.
- each receives an equal amount of each payment made.
- each receives a proportional amount of each payment made.

16.	OBLIGATION	TOTAL IMPOSED	WAIVED
	* (1) Penalty Assessment (CIC) .....	\$ _____	..... <input type="checkbox"/>
	(2) Restitution (REST) .....	\$ _____	..... <input type="checkbox"/>
	(3) Indigent Defense Recovery (IDRC) .....	\$ <u>350</u>	..... <input type="checkbox"/>
	(4) Fine (FINE) .. <u>Compensatory</u> .....	\$ <u>750</u>	..... <input type="checkbox"/>
	* (5) BPST (BPAS) .....	\$ _____	..... <input type="checkbox"/>
	* (6) DUII Conviction (DMVC) .....	\$ _____	..... <input type="checkbox"/>
	* (7) DMV Records (MVRA) .....	\$ _____	..... <input type="checkbox"/>
	* (8) Jail Assessment (CJAS) .....	\$ _____	..... <input type="checkbox"/>
	(9) Other: <u>Unitary Assessment</u> .....	\$ <u>85</u>	..... <input type="checkbox"/>
	_____ .....	\$ _____	..... <input type="checkbox"/>
	_____ .....	\$ _____	..... <input type="checkbox"/>
	TOTAL MONEY JUDGMENT .....	<u>\$1,185.00</u>	

\* Unless a waiver is indicated, those fees and assessments marked are to be imposed administratively if the amount is left blank, and will be a condition of probation, and will not be subject to judgment docketing.

17. PRIORITY OF PAYMENTS

- As listed in Section 16.
- As follows: \_\_\_\_\_

18. TERMS OF PAYMENT: The amount of the money judgment is:

- suspended until defendant is released from custody.
- to be paid immediately.
- to be paid in full by \_\_\_\_\_
- to be paid in installments of \$ \_\_\_\_\_ per month, beginning on per p.o. and due each month thereafter on that date until satisfied. Compensatory fine paid first;
- restitution is joint and several with defendant(s) in case(s): \_\_\_\_\_

APRIL 13, 1993  
DATE OF JUDGMENT

  
SIGNATURE

MICHAEL H. MARCUS  
Name of Judge Typed or Printed

**SPECIAL CONDITIONS OF PROBATION**

IT IS ORDERED THAT THE FOLLOWING CONDITIONS OF PROBATION REFERRED TO IN SECTION 12 ARE IMPOSED:

19. It is ordered that the defendant serve a total of 180/90<sup>reserved</sup> custody units in a correctional facility or as part of a custody program as set forth in this section, and Defendant is committed to the custody of the appropriate supervisory authority.

- a. \_\_\_\_\_ custody units in jail.
  - i. the term is to:
    - commence immediately.
    - commence on \_\_\_\_\_.
  - ii. and, as provided by ORS 137.520:
    - work release authorized.
    - passes as authorized by counselor.
    - release on pass, furlough, leave, work, or educational leave prohibited.

The court finds that space is available and that the defendant is eligible for the programs indicated below:

- b. \_\_\_\_\_ custody units at a work release center.  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

- c. \_\_\_\_\_ custody units at a 24-hour residential custodial treatment facility:  Drug  Alcohol  Mental Health  
 \_\_\_\_\_ treatment.  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

- d. \_\_\_\_\_ custody units at a restitution center.  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

- e. \_\_\_\_\_ custody units at a community service center: \_\_\_\_\_  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

- f. \_\_\_\_\_ custody units of house arrest.  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

- g. \_\_\_\_\_ custody units of community service work (each custody unit equals twenty-four hours of community service).  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

- h. \_\_\_\_\_ custody units at \_\_\_\_\_  
To be served as follows: \_\_\_\_\_  
\_\_\_\_\_

20. OTHER SPECIAL CONDITIONS OF PROBATION:

- a.  submit to polygraph examination by a qualified polygraph examiner designated by the court or probation officer under terms and conditions as follows: \_\_\_\_\_  
\_\_\_\_\_

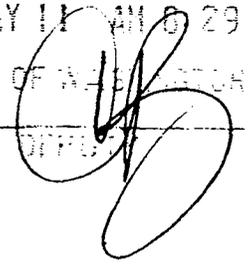


**APPENDIX "D"**

FILED  
COURT OF APPEALS  
DIVISION II

04 MAY 11 AM 8 29

STATE OF WASHINGTON  
BY \_\_\_\_\_



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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JERALD WAYNE DAVENPORT, JR.,

Appellant.

No. 29072-3-II

UNPUBLISHED OPINION

HOUGHTON, P.J. -- Jerald Davenport, Jr. appeals his conviction of two counts of first degree robbery, arguing trial court error, insufficiency of the evidence, and ineffective assistance of counsel. We affirm.

**FACTS**

On November 19, 2000, Janna Wiseman and Ricki Singleton worked at a Vancouver convenience store. Wiseman stood at the cash register and Singleton stood close by when a man entered the store twice. The first time, he lingered for about ten minutes. The second time, he approached the counter, pointed a gun at the women, and demanded money. Wiseman gave the man bills from the cash register as Singleton watched.

The man fled in a car. The two women described the robber and a third witness described the car to police dispatch. A Vancouver police officer saw the vehicle driven by a man

matching the robber's description and gave chase. The high-speed chase ended in Oregon, where the robber abandoned the vehicle.

Police officers who searched the abandoned vehicle found handgun ammunition. The officers also found Davenport's birth certificate and a photograph of two males. At that time, they did not recover the gun displayed during the robbery.

About 90 minutes after the robbery, an officer showed the photograph found in the car to Wiseman. She identified the man on the right as the robber. Another officer showed the same photograph to Singleton a couple hours after the robbery, but she was unable to conclusively identify which male was the robber. The next morning Singleton contacted the police and expressed certainty that the man on the right was the robber. Later, the police verified that Davenport was the man on the right in the photograph.

On November 20, Vancouver officers showed Wiseman and Singleton a black and white six-man photographic montage. The women viewed the montage separately. Both identified Davenport's photograph as depicting the man who had robbed them.

On November 22, Portland police officers learned where Davenport might be staying. The officers knew Davenport had an outstanding out-of-state felony arrest warrant and did not obtain another one before seeking Davenport at the home.

When the officers arrived at the home and knocked on the door, an occupant gave permission to enter. Once inside, they called for Davenport, who responded and said that he had cut his neck in a suicide attempt.

The officers took Davenport to the hospital for medical care. A doctor administered morphine and a local anesthetic before suturing Davenport's neck wound. Laboratory tests

disclosed a 37.6 hematocrit,<sup>1</sup> minimal blood alcohol and cannabis levels, and a threshold blood amphetamine/methamphetamine level.

The doctor released Davenport from the hospital at midnight, about three hours after he received the morphine and local anesthetic. The police then took him to the Vancouver jail.

At 12:40 A.M., Vancouver police officers Wallace Stefan and Jane Easter interviewed Davenport after they read him his *Miranda*<sup>2</sup> rights and he waived them in writing. According to the officers, Davenport remained coherent and cooperative during the 60-90 minute interview. They did not observe any problems with Davenport's motor skills, ability to follow directions, or speech patterns.

Davenport confessed to entering the convenience store with a .357 Taurus handgun and demanding money from the clerks. He drew a map to aid in searching for the firearm. About a month later, the police recovered the firearm in the area Davenport described.

The State charged Davenport with two counts of first degree robbery, violating RCW 9A.56.190 and RCW 9A.56.200(1)(b). He moved to suppress his statements at a CrR 3.5 hearing. At the hearing, a police officer and the emergency department doctor testified that Davenport's mental state remained unaffected by his wound and treatment. Davenport argued that the illegal substances in his system and his possible use of alcohol, "synergistic[ally] interact[ed]" with the medications he received in the emergency department, causing his statements to be involuntary. Report of Proceedings (RP) at 26. The trial court found that Davenport freely and voluntarily waived his *Miranda* rights and denied his motion to suppress.

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<sup>1</sup> An hematocrit measures the percent of whole blood comprising red blood cells. A low hematocrit may indicate blood loss. A doctor testified that a normal hematocrit ranged from 35 to 45 in a male. Report of Proceedings at 47.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

On the day set for trial, Davenport asked to waive his right to a jury trial. He engaged in a colloquy with the judge about his rights. The judge allowed Davenport to proceed with trial to the bench.

The court first held a hearing on the identification evidence. Neither Wiseman nor Singleton saw Davenport in the courtroom during this hearing because, at his request, he watched via closed circuit television. The trial court suppressed Singleton's testimony about the single photograph that she was shown shortly after the robbery because of her inability to conclusively identify a person in the single photograph. The trial court also suppressed her telephonic identification statement made the day after the robbery because her identification of the suspect was too tentative to be reliable.

At trial, both victims identified Davenport as the robber. They testified that their positive identifications arose from seeing Davenport in court and not from any influence by the earlier photographs.

The court convicted Davenport as charged and he appeals.

## ANALYSIS

### *Miranda* Rights Waiver

Davenport first contends that the trial court erred in denying his CrR 3.5 motion to suppress his confession. He asserts that because he lost a moderate amount of blood from his neck wound and he received narcotic pain medicine before the interview, he could not have freely, intelligently, and voluntarily waived his *Miranda* rights.

We review a trial court's CrR 3.5 findings of fact to determine if substantial evidence supports them. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*,

149 Wn.2d 1025 (2003). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *Solomon*, 114 Wn. App. at 789.

Before a court may admit a confession, the State must prove, by a preponderance of the evidence, that the police properly advised a defendant of his *Miranda* rights and that he knowingly, voluntarily, and intelligently waived those rights. *State v. Burkins*, 94 Wn. App. 677, 694-95, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999). In determining the voluntariness of a confession, the trial court evaluates the totality of circumstances. *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984), *cert. denied*, 486 U.S. 1061 (1988). A court may consider factors such as the defendant's physical condition, age, experience, and police conduct. *Rupe*, 101 Wn.2d at 679; *Burkins*, 94 Wn. App. at 694. The court may also consider a defendant's drug use at the time of a confession, but drug use does not, by itself, render a confession involuntary. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). If substantial evidence supports finding a voluntary confession, we do not disturb the trial court's determination. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Here, substantial evidence supports the trial court's findings. The officers advised Davenport of his rights, which he waived. According to the officers, Davenport remained coherent and cooperative, displayed good motor skills, and gave a detailed account of the robbery. And the emergency department doctor testified that Davenport's blood alcohol level was negligible and that he administered that last morphine dose more than three hours before Davenport's interview.

[State]: Throughout your contacts with [Davenport], did he appear to understand what was happening?

[Doctor]: Yes.

Q. Did [Davenport] follow your requests and demonstrate activities consistent with what you asked him to do?

A. Absolutely.

RP at 43. Davenport's argument fails.

Jury Waiver

Davenport next contends that he did not intelligently, knowingly, and voluntarily waive his right to a unanimous jury verdict. He asserts that he waived only his right to a 12-person jury.

Our constitution preserves a criminal defendant's right to a 12-person jury. WASH. CONST. art. I, § 21; CrR 6.1(b); *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979 (1994). But this right may be knowingly, intelligently, and voluntarily waived. *State v. Treat*, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001). The State must prove a valid waiver.<sup>3</sup> *Treat*, 109 Wn. App. at 428. We review this question de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303 (2002).

Davenport signed a waiver specifically relinquishing his right to a jury trial and to a 12-person jury. The record clearly demonstrates not only that Davenport spoke with his attorney before signing the waiver but also that he engaged in a colloquy with the judge before agreeing to proceed to a bench trial. His argument fails.

Trial Court Evidence Rulings

Davenport further contends that the photographic montage impermissibly suggested him as the suspect. Therefore, he asserts that the State violated his due process rights.

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<sup>3</sup> Waiver of a jury trial only requires the defendant's personal expression. *Stegall*, 124 Wn.2d at 725. But waiver of the right to a 12-person jury requires either (1) a personal statement from the defendant expressly agreeing to the waiver or (2) an indication that the trial court judge or defense counsel has consulted the issue with the defendant before the attorney's own waiver. *Stegall*, 124 Wn.2d at 728-29.

A defendant receives due process where an out-of-court photographic identification process does not so impermissibly suggest irreparable misidentification. *State v. Kinard*, 109 Wn. App. 428, 432-33, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022 (2002). We employ a two-step analysis in determining whether a procedure impermissibly suggests misidentification. *Kinard*, 109 Wn. App. at 433.

First, the defendant must show that the identification process suggestively “direct[ed] undue attention to a particular photo.” *Kinard*, 109 Wn. App. at 433 (quoting *State v. Linares*, 98 Wn. App. 397, 403, 989 P.2d 591 (1999), *review denied*, 140 Wn.2d 1027 (2000)). And if so, the defendant must show that under the totality of the circumstances, the particular suggestiveness “created a substantial likelihood of irreparable misidentification.” *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); *Kinard*, 109 Wn. App. at 433.

We consider several factors in reviewing the second part of the analysis: (1) the witness’s opportunity to observe the defendant at the crime scene; (2) the witness’s attention to the surrounding circumstances; (3) the accuracy of the witness’s prior description; (4) the level of certainty of the identification at the confrontation; and (5) the length of time between the crime and the confrontation. *Kinard*, 109 Wn. App. at 434.

In reviewing these factors, we first note that Wiseman and Singleton had ample time to observe Davenport because he walked into the store shortly before coming back into the store a second time with a firearm. Although the robbery lasted fewer than three minutes, Singleton and Wiseman stood only a few feet from Davenport. Singleton had a side view and Wiseman looked at Davenport’s face. Both gave the police accurate and nearly identical physical descriptions.

After the robbery, the police showed Wiseman and Singleton a photograph found inside the abandoned vehicle. The photograph depicted two men. Wiseman, who had looked directly

at Davenport's face, immediately identified the robber as the man on the right. Singleton, although unsure of the assailant's identity the night of the robbery, called the police the next morning stating that she was fairly certain that the man on the right of the photograph was the robber.

Then two days later, Wiseman and Singleton unequivocally chose Davenport from a black and white photographic six-man montage. The photographs depicted similarly unsmiling men with minimal skin tone differences: three appeared to have a small amount of facial hair, all had very short hair and wore T-shirts, and four of the men had a second shirt or jacket over their T-shirts.

This photographic montage did not impermissibly suggest identification. Davenport received due process and his argument to the contrary fails. Thus, we do not address Davenport's assertion that suggestiveness created a substantial likelihood of misidentification.

#### Sufficiency of the Evidence

Davenport next contends that insufficient evidence supported convicting him of first degree robbery of Singleton. Citing *State v. Molina*, 83 Wn. App. 144, 920 P.2d 1228 (1996), Davenport asserts that he pointed his gun at and demanded money from Wiseman and, thus, that he could be convicted only of robbing her.

We declined to follow *Molina*, a Division One case, in *State v. Tvedt*, 116 Wn. App. 316, 65 P.3d 682, *review granted on other grounds*, 150 Wn.2d 1009 (2003). Instead, we define a robbery's unit of prosecution as "each forcible taking of property . . . from the person or presence of a person who possesses the property or is charged . . . with care, custody or control of the property." *Tvedt*, 116 Wn. App. at 321. Davenport's argument fails.

Ineffective Assistance of Counsel

Davenport finally contends that he received ineffective assistance where counsel failed to seek suppression based on his warrantless Oregon arrest. Citing *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990), Davenport argues that counsel's failure was not based on trial tactics or strategy.

A defendant retains the right to effective representation through the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). In order to prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient representation prejudiced the defendant. *State v. Blakely*, 111 Wn. App. 851, 873, 47 P.3d 149 (2002), *review denied*, 148 Wn.2d 1010 (2003). The actual prejudice must appear in the record; mere allegations do not suffice. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

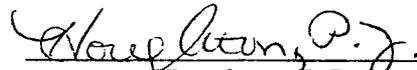
We strongly presume counsel's effectiveness. *Blakely*, 111 Wn. App. at 873. Moreover, counsel's legitimate trial strategy and tactics cannot form the basis of an ineffectiveness claim. *State v. Hughes*, 118 Wn. App. 713, 730, 77 P.3d 681 (2003).

Davenport's citation to *McFarland* is misplaced. In *McFarland*, our Supreme Court overruled *Tarica*, which Davenport claims supports his contention. The *McFarland* court did hold that there may be legitimate strategic or tactical reasons why an attorney does not seek a suppression hearing before trial. 127 Wn.2d at 336-37. But before we can deem counsel's performance deficient, the defendant must show that if counsel had made the motion, the court "probably" would have granted it. *McFarland*, 127 Wn.2d at 337 n.4; *State v. Contreras*, 92 Wn. App. 307, 319, 966 P.2d 915 (1998). He cannot demonstrate that the court would have granted the motion to suppress here.

Davenport asserts that no exigent circumstances supported his arrest. We disagree. A warrantless entry and arrest may be supported when: (1) it involves a grave offense, particularly a violent crime; (2) a reasonable belief supports concluding that the suspect is armed; (3) reasonably trustworthy information supports the suspect's guilt; (4) strong evidence supports believing that the suspect remains on the premises; (5) the suspect will likely escape if not swiftly apprehended; and (6) peaceable entry. *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986) (citing *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970)), *cert. denied sub nom. Terrovona v. Kincheloe*, 499 U.S. 979 (1991). Here, the record supports all six factors and Davenport's claim based on ineffective assistance of counsel fails.

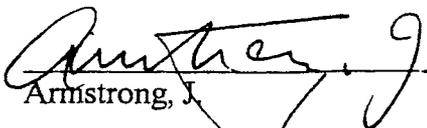
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Houghton, P.J.

We concur:

  
Bridgewater, J.

  
Armstrong, J.

FILED  
COURT OF APPEALS

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STATE OF WASHINGTON

BY *CMM*  
DEPUTY

IN THE COURT OF APPEALS  
DIVISION II

STATE OF WASHINGTON,  
Respondent,

No. 34666-4-II

v.

Clark Co. Cause No. 00-1-02097-0

JERALD W. DAVENPORT, JR.,  
Petitioner.

DECLARATION OF TRANSMISSION  
BY MAILING

STATE OF WASHINGTON )

: ss

COUNTY OF CLARK )

On June 1, 2006, I deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 1st day of June, 2006.

Jerald W. Davenport, Jr. Doc #708898 c/o Florence Correctional Center PO Box 6900 Florence, AZ 85232	Sheryl Gordon McCloud Attorney at Law 1301 Fifth Avenue Suite 3401 Seattle, WA 98120-2605
TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	

DOCUMENTS: RESPONSE TO PERSONAL RESTRAINT PETITION

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

*Carol J. Appard*  
Date: June 1, 2006.  
Place: Vancouver, Washington.