

No. – **37237-1**

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

IN RE PERSONAL RESTRAINT PETITION OF:

DARNELL KEENO CRAWFORD,

PETITIONER.

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Darnell Crawford (hereinafter “Crawford”), convicted in Pierce County of robbery and assault, challenges his persistent offender finding and “life without parole” sentence. Crawford (DOC # 764784) is currently incarcerated at the Washington State Penitentiary in Walla Walla, Washington.

Crawford’s conviction became final when the mandate from his direct appeal issued on January 2, 2007. This is his first collateral attack on his conviction and sentence.

B. FACTS

Introduction

Darnell Crawford was convicted of first degree robbery and second degree assault after stealing an MPEG-1 Audio Layer 3 (MP3) player from a Tacoma Best Buy store and showing a handgun to the store employees who pursued him into the parking lot.

Crawford does not raise any trial related issues in this PRP. Instead, his focus is exclusively on the persistent offender finding and resulting life sentence.

Pretrial Proceedings

Prior to his current convictions, Crawford was previously convicted of two separate offenses the sentencing court found constituted “most serious offenses” or “strikes.” In 1993, Crawford was convicted in Kentucky of “sex abuse in the first degree.” In 1998, he was convicted in Washington of second degree robbery.

Just two days after Christmas 2002, Crawford was charged with the current charges--robbery and assault. Because Crawford was indigent, counsel was appointed to represent him.

Although both the prosecutor and Crawford’s trial counsel were aware of Crawford’s criminal history prior to trial (including his Kentucky sex abuse conviction), the State did not view Crawford as a persistent offender. Quite the opposite, the State conveyed a “standard range” sentence plea offer. The Court’s opinion on direct appeal summarized the salient facts as follows: “Before trial, both the prosecutor and defense counsel knew about Crawford's previous Washington conviction for second degree robbery, as well as his previous Kentucky conviction for first degree sex abuse. Each realized that the Washington conviction was a “strike,” but neither investigated the Kentucky conviction enough to know that it might be a “strike” also. Accordingly, neither the State nor defense counsel provided Crawford with *any* notice that he might be subject to a mandatory minimum sentence of life without the possibility of parole.” *State v.*

Crawford, 128 Wn. App. 376, 378-79, 115 P.3d 387 (2005); *reversed by* 159 Wn.2d 86, 147 P.3d 1288 (2006).

The prosecutor calculated the standard range as 57-75 months and offered to recommend a 57 month sentence in exchange for a guilty plea--a recommendation that treated the sex abuse conviction as a non-strike. *See* Appedices E, F, G. When defense counsel communicated this offer to Crawford, she told him that the maximum punishment he faced, if he rejected the offer, was 75 months. *See* Appendix F, RP 301 (“We were still in a posture [after the prosecutor advised of the Kentucky conviction] where Mr. Crawford really only risked the high end of the standard range by proceeding to trial.”).

Based on the information provide to him by counsel, Crawford decided to reject the offer, not to initiate an offer himself, and to proceed to trial. *Id.* *See also* Appendix E, I. His counsel, unaware of both the risk and the tremendous benefit conferred by the plea offer, concurred with those decisions, reasoning that Crawford would probably receive a standard range sentence, and that the difference between the low and high ends of the standard range “was not much inducement to plea[d] rather than take a chance at prevailing at trial. RP 303-04.

Trial

On April 16, 2003, a jury found Crawford guilty as charged.

Post Trial Proceedings

By May 15, 2003, the prosecutor concluded and informed defense counsel that Crawford might have two prior “strikes.” In turn, defense counsel notified Crawford for the first time that he might be subject to a mandatory minimum sentence of life without parole. Appendix F; RP 303. Crawford filed a motion for new counsel, which was granted, and also a post-trial motion for dismissal or new trial.

At the motion hearing, Crawford's trial counsel testified that she had known of the Kentucky conviction before trial; that she had not realized until after trial that it might be a “strike”; and thus that she had not informed Crawford until “[a]pproximately three weeks after the verdict was rendered” that he might be facing a mandatory minimum sentence of life without parole. RP 303. The trial prosecutor testified by declaration that although she had known of the Kentucky conviction before trial, she had not known it was a “strike” when she offered to recommend 57 months, and that she had first realized it was a “strike” after Crawford had been convicted. A “mitigation specialist” for the public defender office testified that she had successfully mitigated all twelve third-strike cases in which she had participated, and that she would have prepared a mitigation package for Crawford if anyone had realized during plea bargaining that he was facing mandatory life without parole. RP 292-94. However, she did not know anything about Crawford or his case. RP 294 (“I have not

investigated this case.”). Further, she did not offer an opinion about the types of cases or mitigation that usually resulted in a charged reduction and a plea offer for less than life in prison. RP 293-95.

Crawford testified at the new trial motion that counsel told him of the States plea offer; that he faced a 57 to 75 month standard range sentence, if convicted; that “if we go to trial we could get the same amount of time;” and that he would have accepted a plea offer where he’d “have to serve 30 years,” if he had been told of the possibility of a life sentence. RP 273-77.

After testimony was completed, Crawford’s new trial motion was denied. RP 332.

Sentencing Hearing

At sentencing, immediately following the new trial motion, the State contended that Crawford was a persistent offender, focusing its argument on Crawford’s Kentucky conviction. The State’s sentencing memorandum included a copy of the indictment and judgment from that conviction. *See* Appendix D. Also included was a copy of a prosecutor’s plea offer from that case, which included a brief summary of facts presumably written by the prosecutor. Appendix C. After new trial counsel conceded comparability of the sex abuse offense, the trial court then found that Crawford was a persistent offender sentencing him to life without parole. RP 335.

Shortly thereafter, the trial court imposed a mandatory minimum sentence of life in prison without parole. RP 340, Appendix A.

Direct Appeal

Crawford appealed. This Court reversed, finding trial counsel ineffective. *State v. Crawford*, 128 Wash.App. 376, 115 P.3d 387 (2005) (No. 30650-6-II). The Washington Supreme Court accepted review and reversed this Court's decision reasoning that Crawford had not sufficiently proved prejudice. *State v. Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006) (No. 77532-0). The Supreme Court issued its mandate on January 2, 2007.

Crawford's New, Extra-Record Evidence

Attached to this PRP, Crawford presents new, extra-record evidence which primary focuses on the prejudice that resulted from the deficient performance of his trial-level attorneys. As new trial counsel's declaration attests, her failure to present this evidence was solely the result of her failure to conduct this investigation. Appendix G.

First, Crawford presents information about the filing and resolution of potential persistent offender cases. Then, Crawford presents relevant social history information similar to the types of information typically presented in three strikes mitigation packages.

Nearly 300 individuals have received life sentences under our state's three strikes law. Appendix J. An additional 67 have been sentenced to life in prison under the two strikes provision. *Id.* Crawford focuses his

arguments on the treatment of three strikes cases in Pierce County during the time that his case was filed and tried.

Most potential persistent offender cases filed in Pierce County over the last several years were resolved with plea agreements resulting in a less than life sentence. Only five defendants were sentenced to life as third strike persistent offenders in 2002. Three of those five were convicted of murder (including one convicted of Aggravated Murder). In 2003, only four defendants (including Crawford) were found to be persistent offenders.

Appendix J.

From the information Crawford received in response to a public disclosure request, twenty four defendants were identified as potential persistent offenders by the Pierce County Prosecutors office in 2004. Only four struck out. In 2005, thirty one defendants faced a potential third strike. Only four individuals struck out. Likewise, four struck out in 2006, a year during which twenty four potential third strike cases were filed. Appendix J, L.

Although these figures focus on the number of cases filed and resolved annually and Crawford does not specifically track each individual case, it is clear that a high percentage (roughly 85 %) of potential persistent cases result in plea agreements. This conclusion is further supported by a review of the individual case documents obtained from the Pierce County the Pierce County Department of Assigned Counsel (who represent the vast

majority of potential persistent offenders), demonstrating the large number of potential persistent offender cases which are plea bargained. *See* Appendix O. In short, the vast majority of persistent offender cases are plea bargained.

While this may not be the case for every crime (third strike murder cases appear to go to trial more often, for example), it is especially true for crimes such as robbery and assault—the crimes charged, here. Further, what is not clear from those robbery and assault cases that proceeded to trial and resulted in a persistent offender finding is whether those were cases where the defendant was offered and rejected a plea bargain (after being informed of the risk of a persistent offender finding) or whether no attempt was made by the defense to plea bargain.

The reasons for the plea agreements in potential three strike cases vary from case to case. The Pierce County Prosecutor’s Office does not have any “filing and/or disposition standards” relating to “Persistent Offender Accountability Act cases.” *See* Appendix K. Thus, it appears cases are resolved on an *ad hoc* basis.

However, a review of the cases reveals some common reasons that lead to a “less than life” resolution. Those reasons include: proof problems with the current case; questions about the comparability of prior convictions; and “mitigating” evidence regarding the life history of the defendant. *See* Appendix M. Some cases are resolved for reasons

unknown—at least based on the information that Crawford was able to compel without the aid of the discovery rules, which would apply if this case was remanded.

For example, in the *Danny Neeley* case (No. 04-1-00241-1), the listed reason for the plea agreement, reducing the charge from Robbery in the First Degree to Theft in the First Degree was to “preserve state and judicial resources” where the defendant agreed to a 10 year sentence.

Prince Alexander, No. 05-1-05373-1, was originally charged with Robbery in the First Degree. The prosecutor’s office originally rejected any plea bargain, citing Alexander’s “eleven prior felony convictions, including two prior strike offenses,” along with the fact that “he was already given a break in 2004,” when a third strike offense was reduced to a non-strike. The prosecutor notes that offense was “only two years ago,” and “should have served as a wake up call,” but Alexander committed “this bank robbery less than three days after he was released from prison.” Nevertheless, the prosecutor ultimately offered Alexander a plea bargain: plead guilty to Burglary 2° and Theft 1° and agree to exceptional sentences totally 20 years. Alexander accepted the plea bargain.

In *State v. Rosa Williams*, No. 07-1-01500-2, Williams originally faced a life sentence for a charge of second-degree assault. The charge was reduced because the victim “does not want the State to persue (*sic*) criminal charges and because the defendant “has a nine year old son” living with

“the defendant’s terminally ill sister.” Williams agreed to a plea bargain that reduced her potential sentence from life without parole to 9 months.

There are numerous other cases where the prosecutor cited to some potential proof problem, sometimes listed simply as having notified the victim of the reduction, in return for a plea agreement resulting in an exceptional or high-end sentence to a reduced charge. *See* Appendix M.

Questions about a defendant’s criminal history also can result in a plea agreement not to seek a life sentence. For example, in *State v. William McKinney*, No. 06-1-01232-2, a robbery case similar to the instant case, the parties agreed that “defects” in the plea and judgment of McKinney’s 2003 prior robbery conviction meant that it “does not qualify as a “strike” offense. Since these defects are not described, it is impossible to determine whether the defects would render the conviction “facially invalid.”

McKinney was sentenced to 72 months in prison.

In *State v. Tiki McCollum*, No. 06-1-04524-8, the parties agreed to treat his prior Robbery conviction from Nevada as an Attempted Theft in the First Degree. In *State v. Benavides*, No. 06-1-04173-1, despite 11 prior out-of-state convictions for crimes such as “assault with a firearm on a person,” and “battery with a deadly weapon,” not only did the defendant escape persistent offender liability, the court found that he had an offender score of “0,” resulting in a 3-9 month sentence range.

Finally, it appears that information regarding a defendant's troubled life history and/or questions about his mental health may also play a difference, even where those problems fall far short of providing a defense. For example, in *State v. Michael Rae Gordon*, No. 04-1-00398-1, the *Findings of Fact* assert that, "despite the fact that the State could prove its case beyond a reasonable doubt," there were "mitigating circumstances," not described in that document, which the prosecutor found sufficient to reduce the original charge of Assault in the First Degree to Assault in the Third Degree and Felony Harassment. Gordon, whose prior strikes included Indecent Liberties and Assault in the Second Degree, did not even need to agree to an exceptional sentence. Instead, he agreed to the "high end of the statutory" range.

The documents obtained from the Pierce County Department of Assigned Counsel (redacted to remove the names) also reveal that in a high percentage of potential three strikes cases the State agrees to reduce the current charge in return for a plea to a lesser, non-strike charge. *See* Appendix O (including summary chart). The mitigation packages submitted in those cases tend to focus on issues related to mental retardation (MR), mental illness (MI) and drug and alcohol problems (D/A), medical and trauma history, and comparability issues, as the summary chart documents. There are a number of cases where the State offered a defendant, originally charged with Robbery in the First Degree, a

plea to a lesser charge. For example, in Case Number 5, the defendant (charged with Robbery 1°, with a prior robbery and rape of a child convictions) submitted a “mitigation package” indicating he suffered from mental illness and a substance addiction. The State reduced the charge to Burglary 2°. In Case Number 46, the defendant suffered from mental illness, addiction, and an assortment of medical problems. The State reduced the robbery charge to Theft in the First Degree. In Case Number 4, the State apparently agreed that the at least two of defendants prior California convictions for “involuntary manslaughter,” “robbery” and “vehicular manslaughter” were not comparable because the State agreed to a non-life sentence after the defendant pled guilty to Attempted Robbery 1°, a strike offense.

Although a number of “mitigation reports” make reference to supporting documents (such as court and institutional records), many are based on self-reported social histories.

In sum, the documents obtained by post-conviction counsel demonstrate that the large majority of potential three strike cases are plea bargained to lesser charges, often in exchange for agreed exceptional sentences. In addition to proof problems with the current charge, the most common reasons for a plea bargain include questions about comparability of prior convictions, a mitigating social history, and the desires of the victims.

Crawford's current crimes and his criminal history are similar to cases commonly plea bargained. In addition, his life history contains the type of "mitigation" common in those cases resolved by a plea to a lesser charge.

Crawford's life history is tragic. *See* Appendix I. When Crawford was six years old he witnessed his step-father kill his mother. He was then placed into an abusive foster care household. Ultimately, Crawford began living on his own prior to completing high school. As a result of this trauma and dislocation, Crawford likely suffers from depression and/or post-traumatic stress disorder. He is willing to participate in a mental health evaluation, something that he can seek funds for if this case is remanded. Not surprisingly, given this history of trauma, Crawford developed a substance addiction. *Id.*

Despite these difficulties, Crawford has held steady jobs and has provided for his family, when not incarcerated. He has tried his best to overcome these problems. Sometimes Crawford has been successful-- sometimes not. *Id.*

Crawford committed the current offenses at a time when he felt he could not cope with the pressures of life. *Id.* Crawford's description of the current crime is one that was committed impulsively, as an act of desperation. Crawford's life history, coupled with the treatment of his depression while in prison, certainly supports the inference that Crawford

mental condition was a contributing factor to his criminal history, including his current offense. Once again, this is an issue that should have been investigated by trial or new trial counsel (who had access to expert funds) and can be further explored by post-conviction counsel (who agreed to do this case for a significantly reduced rate due to the importance of the issues presented), if this issue is remanded to the trial court.

C. ARGUMENT

1. CRAWFORD’S KENTUCKY “SEX ABUSE” CONVICTION IS NOT COMPARABLE TO A MOST SERIOUS OFFENSE. CRAWFORD WAS DENIED EFFECTIVE ASSISTANCE WHEN COUNSEL FAILED TO CONTEST COMPARABILITY.

Introduction

Without any objection from Crawford’s counsel, the trial court found that Darnell Crawford’s prior convictions made him a persistent offender. RP 335. This Court and the Supreme Court understandably accepted this conclusion on direct appeal, given that it was unquestioned by appellate counsel.

In fact, Crawford is not a persistent offender because his Kentucky sex abuse conviction is not comparable to a “strike.” Counsel’s failure to object to the comparability determination constitutes ineffective assistance of counsel. Caselaw provides that ordinarily when a defense attorney fails to object to a comparability determination an appellate court should vacate the persistent offender finding and remand this case to the trial court where

both parties will be permitted an opportunity to prove the comparability (or lack thereof) based on facts found beyond a reasonable doubt by the Kentucky court. However, Crawford's Kentucky offense is not comparable as a matter of law because certain defenses available in Washington (to the crime of child molestation) are unavailable in Kentucky (to the crime of sex abuse). Thus, the two crimes can never be comparable. Remand in this case is unnecessary. This Court should instead simply find that Crawford's Kentucky is not a strike.

Facts

At Crawford's sentencing hearing, the State argued that his Kentucky conviction for "sexual abuse" was comparable to the Washington most serious offense of Child Molestation in the First Degree. *See State's Sentencing Memorandum* attached as Appendix D. Defense counsel did not object, but instead conceded comparability. RP 335.

In support of its assertion that sexual abuse constitutes a strike, the State presented an indictment, a plea offer, and a judgment. The indictment alleged that Crawford "subjected [L.K.], a person less than twelve years of age, to sexual contact." Although the judgment indicates that Crawford pled guilty, the State did not present a copy of the guilty plea. Likewise, the State did not present a copy (certified or otherwise) of the case docket. Instead, the State argued that the sentencing court should

reply on the facts stated in the prosecutor's plea offer ("Δ digitally penetrated the vagina of his 7 year old niece"). In addition, the State argued that the sentencing court could find for the first time that Crawford was more than 36 months older than the victim by taking the facts asserted in the plea offer and then calculating defendant's age based on independent, extra-record evidence of his date of birth. Finally, the State argued that the sentencing court could find the non-marriage requirement because "the State is not aware of any jurisdiction in the United States that would allow the legal marriage between a 25 year old male and his seven year old niece." Appendix D, p. 6.

While the Kentucky crime of sexual abuse is similar to Washington's crime of child molestation, it is possible to commit sexual abuse without committing child molestation. Thus, the State must show that Crawford admitted to a narrower set of facts in Kentucky constituting the comparable Washington crime.

However, in making its comparability argument, the State relied, in part, on facts neither admitted nor proved at the time of Crawford's plea. Finding these facts for the first time at sentencing runs afoul of the Sixth and Fourteenth Amendments.

Comparability Analysis

Comparability analysis involves examining the legal and factual similarity of two crimes. A court must first determine whether the foreign

offense is legally comparable--that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable--that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *Id.*; *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

In making its factual comparison, the sentencing court may rely only on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *In re Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005); *State v. Farnsworth*, 133 Wn.App. 1, 22, 130 P.3d 389 (2006); *State v. Ortega*, 120 Wn. App. 165, 174, 84 P.3d 935 (2004) (“We conclude that *Apprendi* prohibits a sentencing court's consideration of the underlying facts of a prior conviction if those facts were not found by the trier of fact beyond a reasonable doubt.”). If a court concludes that a prior, foreign conviction is neither legally nor factually comparable, it may not count the conviction as a strike under the POAA. *Lavery*, 154 Wn.2d at 258 (“We conclude that Lavery's 1991 foreign robbery conviction is neither factually nor legally comparable to Washington's second degree robbery and therefore not a strike under the POAA.”).

The key inquiry is whether under the Washington statute, the defendant could have been convicted if the same acts were committed in Washington. While the sentencing court can examine the indictment as evidence of the underlying conduct, the elements of the crime remain the focus of the analysis. The *Ortega* opinion is instructive. The issue in *Ortega* was whether a Texas conviction for “indecent with a child” (which prohibited “sexual contact” with a “child younger than 17 years and not his spouse) was comparable to child molestation in the first degree. Because first-degree child molestation requires proof that the victim “was under the age of 12,” the State offered testimony by the “director of administrative services” from the Texas county of conviction who reviewed and identified documents from the court file which led him to conclude that the victim was 10 years old. 120 Wn. App. at 173-74. The Court of Appeals affirmed the trial court’s refusal to consider these facts: “We conclude that *Apprendi* prohibits a sentencing court's consideration of the underlying facts of a prior conviction if those facts were not found by the trier of fact beyond a reasonable doubt.” *Id.* The Supreme Court explained the error in the approach advanced by the State in *Ortega*: “Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.” *In re Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

On the record submitted by the State, it is impossible to conclude that Crawford admitted in the Kentucky proceedings to a number of the facts (his age, the age of the victim, the difference in ages, and non-marriage) relied on by the State in conducting their comparability analysis. *See State v. Thomas*, 135 Wash.App. 474, 144 P.3d 1178 (2006) (“On this record, we cannot conclude that Thomas, in his 1980 guilty plea, either stipulated to or admitted that his entry was unlawful, or that the jury, in the 1982 burglary conviction, found this fact beyond a reasonable doubt. Because the State did not carry its burden of proving the 1980 or 1982 California burglary convictions were factually comparable to Washington's burglary statute, the trial court's decision to include the 1980 and 1982 California burglary conviction in Thomas's offender score was error.”). In fact, given that the State (in its *Memorandum*) urges the current sentencing court to find these facts for the first time, it appears that the State is simply unable to fill in the missing elements based on the Kentucky record.

Defense counsel's failure to object constitutes ineffective assistance of counsel:

We hold that Thieffault received ineffective assistance of counsel under *Strickland*. The Court of Appeals correctly concluded that the Montana attempted robbery statute is broader than its Washington counterpart. The Court of Appeals also correctly found that the motion for leave to file information, the prosecutor's affidavit, and the judgment were insufficient to establish factual comparability. Thus, Thieffault's attorney provided deficient representation under *Strickland's* first prong when he did not object to the superior court's

comparability analysis. The Court of Appeals improperly found that such deficient representation did not prejudice Thiefault. Although the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable; in which case, the superior court could not have deemed the Montana conviction a “strike” for purposes of the POAA. We therefore vacate Thiefault's sentence and remand the case to superior court to conduct a factual comparability analysis of the Montana conviction.

State v. Thiefault, 160 Wn.2d at 417.

Normally where a defense attorney fails to object to comparability, the remedy is to remand to the trial court where both parties can present evidence on the issue. For example, in *Ford*, the State alleged that the defendant's out-of-state crimes were properly classified as felony crimes under Washington law. 137 Wn.2d 472, 475, 973 P.2d 452 (1999). The defense did not object, and the State did not present evidence to support the classification. *Id.* On appeal, Ford challenged the classification and this court reversed and remanded, permitting the State to present new evidence at resentencing because the defendant failed to specifically put the court on notice of any apparent defects. *Id.* at 476; *State v. Bergstrom*, ___ Wn.2d ___, ___ P.3d ___, 2007 WL 3105095 (2007).

However, this case should not be remanded because there are differences in the crimes which would preclude the State from ever establishing the comparability of the two crimes. This argument is based on the statement in *Lavery* that where, as here, the elements of the foreign

crime are broader, there may be no incentive for a defendant to prove that he is guilty of more narrow conduct. *Lavery*, 154 Wn.2d at 258. For example, in *Lavery* the Supreme Court noted that because federal bank robbery was a general intent crime (as opposed to the state crime which requires specific intent) that certain defenses were not available in federal court, which would have been available in state court. However, it is not possible to examine the record of the foreign conviction for evidence of the defense because a defendant, like *Lavery*, would have no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution. *Id.* at 257-58.

Legal comparability analysis is not an exact science, but when, for example, an out-of-state statute criminalizes more conduct than the Washington strike offense, or when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable. *State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82 (2007).

The Kentucky crime of sex abuse, like the federal bank robbery charge in *Lavery*, is a general intent crime. As a result, certain defenses like intoxication are inapplicable. *See Hatfield v. Commonwealth*, 473 S.W.2d

104 (1971) (carnal abuse of a child is a crime without regard to the reasons or the intent with which it was done and as a result intoxication is not a defense). *See also Coots v. Commonwealth*, 418 S.W.2d 752 (1967) (where the doing of the act constitutes a crime regardless of the intention with which the act was done, the defendant is not entitled to an instruction on lack of mental capacity to form an intent to commit the crime due to intoxication); *Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993) (sexual abuse in the first degree is a lesser-included offense of both rape in the first degree and sodomy in the first degree).

In contrast, the defense applies in Washington. *State v. Stevens*, 158 Wn.2d 304, 312, 143 P.3d 817 (2006) (defendant is entitled to an instruction on voluntary intoxication in a child molestation case where evidence exists to support the defendant's theory).

For that reason, this Court should conclude that Crawford's Kentucky offense is not legally comparable to any Washington "most serious offense." As a result, Crawford is not a persistent offender. Trial counsel's erroneous concession of comparability constitutes ineffective assistance of counsel. In the alternative, this Court should remand for a hearing where the State's proof of comparability must be limited to those facts admitted or proved at the time of the Kentucky conviction, rather than alleged or found from other sources.

2. CRAWFORD WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ADVISE HIM OF THE RISK OF A LIFE SENTENCE WHEN THE STATE MADE A PLEA OFFER TREATING HIS KENTUCKY CONVICTION AS A NON-STRIKE. IF GIVEN COMPETENT ADVICE, CRAWFORD WOULD HAVE PLED GUILTY AND COULD HAVE RELIED ON THE DOCTRINE OF SPECIFIC PERFORMANCE TO ENFORCE THE PROMISE THAT THE CONVICTION WAS NOT A STRIKE.

Introduction

Trial counsel was ineffective because she did not conduct a competent investigation into Crawford's prior convictions and consequently failed to advise Crawford of: (1) the risk of a persistent offender finding; and (2) the tremendous benefit that accompanied the State's standard range sentence plea offer. Competent counsel would have accurately explained the law to Crawford, who would have pled guilty if he had known that he was facing a potential life sentence, instead of 75 months as counsel erroneously told him. *See* Appendix H, I. More importantly, given that the State's plea offer treated Crawford's Kentucky conviction as a non-strike, Crawford could have relied on the doctrine of specific performance to preclude any attempt to later characterize that conviction as a strike.

Trial, new trial, and appellate counsel all missed this issue. New trial counsel proceeded on an erroneous assumption; namely that Crawford would have been sentenced to life in prison if he accepted the State's pre-

trial plea offer. Because trial counsel's deficient performance resulted in Crawford's missed opportunity to accept a plea offer with a standard range sentence, he should be returned to that position by this Court.

Facts

Prior to trial, the State offered Crawford an opportunity to plead guilty to a recommended 57 months in prison based on an offender score of "5." This offer did not change even after the State provided defense counsel with a summary of Crawford's criminal history which included his Kentucky sex abuse conviction, a conviction listed in the criminal history section of Crawford's 1998 Pierce County robbery conviction. In other words, the State made Crawford a plea offer which treated the sex abuse conviction as an ordinary felony, *i.e.*, not comparable to a most serious offense.

Trial counsel conveyed this offer to Crawford. However, because the State did not provide any notice and because she did not conduct any investigation into either the facts or law surrounding the Kentucky conviction, she did not advise Crawford that there was a risk that the sex abuse offense could be viewed as comparable to a most serious offense and that he faced the risk of a life sentence. Instead, trial counsel told Crawford that the maximum sentence that could be imposed if convicted at trial was 75 months.

Likewise, counsel did not explain to Crawford that that if he accepted the State's offer after he pled guilty he could rely on the doctrine of specific performance to prevent a life sentence.

Trial counsel's failure to explain the risk of a life sentence falls below the standard of care normally employed by a reasonably competent attorney. *See* Appendix H. If Crawford had received competent advice, he would have accepted the State's offer and entered a guilty plea. Appendix I. Thus, Crawford was denied his constitutional guarantee to effective assistance of counsel.

Ineffectiveness in the Context of Plea Bargaining

To establish ineffective assistance of counsel, the defendant must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is clear that the *Strickland* analysis applies to claims of ineffective assistance of counsel involving counsel's advice offered during the plea bargain process. *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

A defense attorney has an obligation not only to communicate any plea offers to a client (*See State v. James*, 48 Wash.App. 353, 362, 739 P.2d 1161 (1987)), but also to provide him with sufficient information to make an informed decision on whether or not to plead guilty. *In re Restraint of*

McCready, 100 Wn.App. 259, 263- 64, 996 P.2d 658 (2000); *State v. Holm*, 91 Wash.App. 429, 435, 957 P.2d 1278 (1998).

Both this Court and the Supreme Court previously concluded that trial counsel's failure to conduct a minimal investigation into the relevant facts and law relating to Crawford's criminal history constituted deficient performance. *Crawford*, 159 Wn.2d at 99 ("A reasonable attorney who knew of her client's extensive criminal record and out-of-state conviction would have investigated prior to recommending trial as the best option. Because there was no tactical reason for such behavior, we find that counsel's failure to investigate Crawford's criminal history amounted to unreasonable performance."); 128 Wn. App. at 392 ("Crawford's counsel failed to advise him of a mandatory minimum term of life without parole. This failure constituted deficient performance..."). That conclusion applies with equal force to this claim.

A California case, decided by the 9th Circuit in a habeas proceeding, provides further support for the conclusion that counsel's failure to provide her client with accurate sentencing advice constitutes deficient performance. In *Riggs v. Fairman*, 399 F.3d 1179 (9th Cir. 2005), a "three strikes" case where neither the State nor defense counsel were aware of Riggs' recidivist status during unsuccessful plea negotiations, the Ninth Circuit held that defense counsel's investigatory failures constituted

deficient performance. 399 F.3d at 1183. “The investigatory omissions made by Riggs’ attorney were numerous. Among the most egregious omissions were counsel’s failure to investigate Riggs’ prior robbery convictions, failure to obtain Riggs’ rap sheet, and failure to seek sufficient information from Riggs about his prior robbery convictions.” *Id.*

The *Riggs* court continued:

Informed only by her limited knowledge of his criminal record, Riggs’ counsel advised him that his maximum exposure under California law was only nine years and that he should therefore reject the state’s offer of a five-year prison term. However, Riggs’ actual exposure under California’s three strikes law was 25-years-to-life. Defense counsel’s advice to Riggs was not only erroneous, but egregious, considering the discrepancy between the two punishments. *See Iaea v. Surn*, 800 F.2d 861, 865 (9th Cir.1986) (“Though a mere inaccurate prediction, standing alone, would not constitute ineffective assistance, the gross mischaracterization of the likely outcome presented in this case, combined with the erroneous advice on the possible effects of going to trial, falls below the level of competence required of defense attorneys.”) (citations omitted).

Simply stated, Riggs’ counsel had a duty to investigate whether California’s three strikes law would be applicable to Riggs. Riggs’ counsel unjustifiably failed to discover such information in this case. Her omission fell below an objective standard of reasonableness. *See Iaea*, 800 F.2d at 865.

Id. *See also Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002)

(“More importantly, he offered this flawed advice without conducting reasonable research into the legal landscape.”).

In this case, much like *Riggs*, trial counsel conveyed the State’s plea offer, but inaccurately characterized the possible risks and benefits that

accompanied that offer. Counsel's failure was the result of an incompetent investigation. It is overwhelmingly clear that counsel's performance was deficient.

Having satisfied the first prong, Crawford must next show a "reasonable probability" that, but for his counsel's ineffectiveness, the result of his proceedings would have differed. *Strickland*, 466 U.S. at 694. This burden represents a fairly low threshold. *See Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir.1994) (stating that a "reasonable probability" is actually a lower standard than preponderance of the evidence). Crawford can easily satisfy this standard—at least to entitle him to an evidentiary hearing, if not definitively. *See Mask v. McGinnis*, 233 F.3d 132, 142 (2d Cir.2000) (holding that the prejudice requirement was satisfied when defendant stated his willingness to accept a reasonable plea bargain and a great disparity existed between the sentence exposure at trial and in the plea bargain).

In this context, Crawford must show that he would have pled guilty. If Crawford had been told that he could "lock in" to a standard range of 57-75 months and avoid the possibility of a life sentence, he clearly would have done so. *See Appendix I; RP 277*. This fact seems obvious from both the extra-record evidence that accompanies this petitions, as well as Crawford's testimony at the new trial motion.

Instead, the only real question here is whether Crawford could have bound the State to its plea offer that treated his Kentucky offense as a non-strike. In order to understand why the answer to this question is “yes,” Crawford must explore the law on guilty pleas and specific performance.

It is now well-established that “where the terms of a plea agreement conflict with the law or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea.” *State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988). “[W]hen a mutual mistake occurs regarding a standard sentence range, a defendant may choose to either specifically enforce the plea agreement, or to withdraw the plea.” *State v. Moon*, 108 Wn.App. 59, 63, 29 P.3d 734 (2001). “[T]he integrity of the plea bargaining process requires that *once the court has accepted the plea, it cannot ignore the terms of the bargain*, unless the defendant ... chooses to withdraw the plea.” 110 Wn.2d at 536 (emphasis added); *see also State v. Harrison*, 148 Wn.2d 550, 556-57, 61 P.3d 1104 (2003) (observing that, because plea agreements are contracts that “concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to *the terms of the agreement*. ” (emphasis added)).

A defendant is entitled to specific performance of the plea agreement, even “where the terms of a plea agreement conflict with the

law.” *Miller*, 110 Wn.2d at 536; *see, e.g., Isadore*, 151 Wn.2d 294, 302-03, 88 P.3d 390 (2004) (permitting defendant to request specific performance of a plea agreement that erringly failed to include a mandatory term of community placement); *State v. Cosner*, 85 Wn.2d 45, 51-52, 530 P.2d 317 (1975) (allowing reduction in defendants' mandatory minimum terms “in accordance with their understanding of the length thereof at the time of their pleas”).

An agreement by the parties on the issue of comparability (or, lack of comparability) binds the sentencing court and can be enforced through the doctrine of specific performance. *See State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). In *Ross*, one of the defendants (Hunter) argued that the sentencing and appellate courts had a duty to critically review the State’s proof of comparability, despite his earlier admission of comparability. The Supreme Court rejected this argument, holding that under the SRA, a defendant's *acknowledgement* of the existence and comparability of his or her prior out-of-state convictions allows the judge to rely on unchallenged *facts and information* introduced for the purposes of sentencing. The court held that a defendant's *affirmative acknowledgment* of the existence and comparability of out-of-state convictions renders further proof unnecessary. “Accordingly, since Hunter affirmatively acknowledged at sentencing that his prior out-of-state convictions were properly included in his offender score, we hold the sentencing court did not violate the SRA nor deny him

due process.” *Id.* at 233. *See also In re Murillo*, 134 Wn. App. 521, 533, 142 P.3d 615 (2006) (“The fact that the terms of the plea agreement are contrary to the explicit terms of a sentencing statute does not preclude enforcement of the agreement, “where fundamental principles of due process so dictate.”).

Remedy

When ineffective assistance of counsel has deprived a defendant of a plea bargain, a court may choose to vacate the conviction and return the parties to the plea bargaining stage. *See United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir.1998). Once again, *Riggs* is instructive.

Although the habeas court did not find a “perfect” remedy, it explained why returning *Riggs* to plea bargaining stage was the best available choice: If the prosecution were ordered to reinstate its original plea offer to *Riggs*, the government would be forced to repeat the same mistake it made years ago. On the other hand, returning the parties to the negotiation stage does not restore the lost plea opportunity. Weighing both of these considerations, the district court held that “[t]he least inappropriate remedy, therefore, would appear to be the vacation of the conviction and the return of the parties to the pre-error stage.” *Id.* at 1154. The district court aptly noted that as a matter of policy, requiring the government to re-offer *Riggs* the five-year deal is troubling in light of the fact that under California law, plea bargains are not binding on the parties until “a

defendant pleads guilty or otherwise detrimentally relies on that bargain.” *People v. Rhoden*, 75 Cal.App.4th 1346, 1354, 89 Cal.Rptr.2d 819 (1999). Therefore, even if Riggs had accepted the five-year plea offer, the government may have realized its mistake prior to the court's acceptance of the plea agreement. Upon realizing its mistake, the government would have had the right to unilaterally invalidate the plea agreement. Because the district court properly considered the effect of California law and weighed the competing considerations raised by the parties, we cannot say that the district court abused its discretion in returning the parties to the plea bargain stage of the proceedings. *Riggs* at 1184.

Crawford seeks the same remedy. Crawford’s conviction and sentence should be vacated. Next, the State should be compelled to re-extend its pretrial offer which treated his Kentucky conviction as a non-strike.

Conclusion

This Court previously stated “(i)t is fundamentally unfair for the State not to notify a person before trial that he may be subject to a mandatory sentence of life without parole.” 128 Wn. App. at 383. While the Supreme Court disagreed and reversed this Court’s decision, it is clear that the rule set forth by this Court, even if not required as a matter of due process, provides protections to both the State and potential three strike

defendant. Where the State has not made a final determination whether an out-of-state conviction constitutes a strike, giving pretrial notice of the possibility of a persistent offender finding prevents a defendant from pleading guilty and asserting specific performance.

However, where, as here, the State gives no such notice, but instead extends a plea agreement which includes the questioned out-of-state prior and recommends a standard range sentence, a defendant who pleads guilty can rely on that doctrine to preclude a life sentence.

If the State does not dispute any of the facts set forth by Crawford in this section, then this Court should apply the law and remand this case so that Crawford can plead guilty to a standard range sentence that treats his Kentucky conviction as a non-strike. If, on the other hand, the State contests any of Crawford's facts with their own facts, this Court should remand this case for an evidentiary hearing.

3. IN THE ALTERNATIVE, CRAWFORD WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HAD TRIAL COUNSEL COMPETENTLY RECOGNIZED THE RISK OF A PERSISTENT OFFENDER FINDING THERE IS A REASONABLE PROBABILITY THAT THE STATE WOULD HAVE OFFERED A PLEA BARGAIN TO A NON-STRIKE.

Introduction

If this Court rejects Crawford's previous arguments, then Crawford alternatively claims that his conviction and sentence should be vacated because there is a reasonable probability that the State would have extended

a plea offer to a non-strike, if counsel had competently prepared a “mitigation package.” This claim is based on extensive extra-record--evidence that new trial counsel failed to investigate and present at the post-trial motion. *See* Appendices I-O.

Crawford’s new evidence demonstrates that a high percentage of potential three strike cases are plea bargained, including cases similar to or more serious than Crawford’s case. Crawford’s new evidence also shows that his life history includes the type of mitigating evidence that commonly results in the State’s agreement to reduce a charge to a non-strike. In short, because Crawford has presented a *prima facie* case of deficient performance *and* prejudice, this Court should remand this issue to the trial court either for a determination on the merits or for an evidentiary hearing.

Crawford’s Extra-Record Evidence of Prejudice

The first prong of Crawford’s ineffectiveness claim is deficient performance. This prong, discussed in the prior claim, is easily satisfied and is likely uncontested.

To briefly set forth Crawford’s claim, trial counsel did no pretrial factual or legal investigation into Crawford’s criminal history, despite the fact that Crawford was charged with a most serious offense and had a recent Pierce County conviction for a most serious offense. Trial counsel could have discovered the existence of Crawford’s prior Kentucky offense simply by looking at his most recent judgment filed in the Pierce County

Clerk's Office. *See* Appendix B. *See also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense."). Discovering the elements of the Kentucky sex abuse was also simple, especially given the availability of computer research. From this cursory investigation alone, counsel would have been on notice of the possibility that Crawford might be considered a persistent offender. Counsel's performance was deficient.

Crawford was prejudiced because there is a reasonable probability that, if defense counsel had been aware of the persistent offender possibility and submitted mitigating evidence, the prosecutor would have offered a plea to a non-strike crime which Crawford would have accepted. *See United States v. Thompson*, 27 F.3d 671, 675-76 (D.C.Cir.), *cert. denied*, 513 U.S. 1050, 115 S.Ct. 650, 130 L.Ed.2d 554 (1994); *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir.1996); *United States v. Day*, 969 F.2d 39, 45-46 (3d Cir.1992). *See also* RP 277 (Crawford states he would have accepted a sentence as high as 30 years, if he had been told that he faced a maximum of life, not 75 months). Thus, Crawford focuses his argument on the proposition that there is a reasonable probability that the State would have extended a plea offer.

On direct appeal, the Supreme Court correctly framed the issue, but found the evidence of prejudice in the record lacking, stating "it is highly

speculative to conclude that the prosecutor would seek to charge a defendant with a nonstrike offense in such a case.” 159 Wn.2d at 101.

The Supreme Court’s decision was based on supposition, which Crawford now affirmatively disproves. The Supreme Court stated: “As we have previously noted, the POAA reduces a prosecutor’s flexibility in plea bargaining because the list of ‘most serious offenses’ is comprehensive and includes crimes with high standard range sentences. Thus, a prosecutor considering a plea bargain in a case falling under the POAA would usually be forced to choose between a relatively low standard range sentence and life without parole. This virtually precludes the prosecutor from plea bargaining. Given the limited flexibility prosecutors have in plea bargaining in such cases, we are unwilling to speculate here that the prosecutor would have agreed to charge Crawford with a lesser offense.” *Id.* at 100-01.

To the contrary, most potential persistent offender cases are plea bargained. In the years since the law took effect, prosecutors (both in Pierce County and around the state) have responded by making plea offers in potential three strikes cases to lesser charges, often in exchange for agreed “exceptional sentences.” This regular exercise of discretion appears to take into consideration a defendant’s criminal history (and whether there are legal arguments contesting persistent offender status), as well as his personal history.

In addition, prosecutors regularly exercise in cases that are similar to Crawford's case. While it is certainly possible to find defendants who "struck out" with current offenses and criminal histories similar to Crawford, it is much easier to find "similar" defendants who were offered plea bargains. In addition, it is impossible to determine whether those individuals sentenced to life for similar crimes sought and/or were offered plea agreements which they turned down.

Competent counsel could have easily raised significant questions about the comparability of Crawford's Kentucky conviction. Competent counsel could have also presented a compelling life history, one that includes trauma and mental illness, but also serious attempts to overcome these deficits. Comparing the cases that resulted in less than life sentences with Crawford's case leads to the inescapable conclusion that, but for counsel's incompetence, the prosecutor would have offered a similar plea bargain.

Remedy

If Crawford was denied effective assistance of counsel, then he must be returned to a position which most closely approximates his situation pre-conviction. As mentioned earlier, fashioning a fair and just remedy is not always easy where the ineffectiveness arises in the plea bargaining context.

This is even more true where the ineffectiveness arises from the failure to engage in plea bargaining.

The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel, not the criminal defendant. *Kimmelman*, 477 U.S. at 379. The only remedy which could cure the constitutional error was to return the accused to the point in the criminal proceeding when the ineffective assistance of counsel caused the prejudicial error in violation of constitutional rights. Like many rules, this rule is easy to state, but sometimes hard to apply.

When ineffective assistance of counsel has deprived a defendant of a favorable plea bargain, courts have not been consistent in the remedies afforded. Some courts vacate the conviction and return the parties to the plea bargaining stage, where the parties may negotiate, or decline to negotiate, as they see fit. *See, e.g., United States v. Gordon*, 156 F.3d 376, 381-82 (2nd Cir.1998) (upholding district court's discretion to order retrial); *People v. Curry*, 178 Ill.2d 509, 227 Ill.Dec. 395, 687 N.E.2d 877, 890-91 (1997) (new trial accompanied by resumption of plea bargaining process); *In re Alvernaz*, 2 Cal.4th 924, 942-44, 8 Cal.Rptr.2d 713, 724-26, 830 P.2d 747, 758-59 (1992) (“Most courts, in determining the remedy that should be afforded a defendant who establishes that he or she has been denied effective assistance of counsel with regard to an offered plea bargain, have

vacated the judgment of conviction and remanded the case for a new trial”). Other courts force the prosecution to reinstate the lost plea offer. *See, e.g., Alvernaz v. Ratelle*, 831 F.Supp. 790, 797-99 (S.D.Cal.1993); *Williams v. State*, 326 Md. 367, 382-83, 605 A.2d 103, 110-11 (1992). Still other courts return the parties to the plea bargaining stage, but impose a rebuttable presumption of vindictiveness upon any prosecutorial refusal to reinstate the lost plea offer. *See, e.g., Turner v. Tennessee*, 940 F.2d 1000, 1001-02 (6th Cir.1991), *cert. denied*, 502 U.S. 1050, 112 S.Ct. 915, 116 L.Ed.2d 815 (1992).

Depending upon the circumstances, each of these remedies can be inadequate or unfair. Vacation of the conviction sometimes is unfair to the state. Such a remedy reverses the result of an entirely fair trial, sometimes in situations where the passage of time would make retrial difficult or impossible. *See State v. Donald*, 198 Ariz. 406, 10 P.3d 1193, 1205 n. 7 (Ariz.App.2000), *cert. denied*, 534 U.S. 825, 122 S.Ct. 63, 151 L.Ed.2d 30 (2001). Mere vacation of the conviction also sometimes is unfair to the petitioner. The remedy does not restore the lost plea opportunity of which the petitioner was deprived, although it may, as a practical matter, induce the prosecution to bargain anew.

Where no plea bargain (involving a reduced charge) has ever been extended, it is even more difficult to fashion a remedy that is fair to both

sides. As mentioned earlier, ordering a new trial may provide a windfall to the defense (if the case is now improvable), but could also result in a simple repeat of a trial that was not infected by the constitutional error raised herein. Nevertheless, Crawford believes that if this Court orders both a new trial and directs the appointment of a special prosecutor that both parties will endeavor to work in good faith in achieving a resolution that is fair and just for all.

D. CONCLUSION AND PRAYER FOR RELIEF

Crawford is not a persistent offender. He could have achieved this result previously if former counsel had demonstrated the non-comparability of his prior Kentucky conviction or by simply pleading guilty to the State's standard range offer, which treated that conviction as a non-strike.

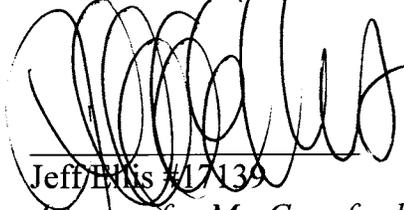
Based on the above, this Court should:

1. Find that Crawford is not a persistent offender; vacate his persistent offender finding and remand this case to the Pierce County Superior Court for imposition of a standard range sentence; or
2. Find that Crawford's rejection of the State's pretrial offer (treating his Kentucky sex abuse offense as a non-strike) was the result of ineffective assistance of counsel; vacate his conviction and sentence and remand this case with instructions that the State reinstate the offer; or
3. Find that, but for trial counsel's ineffectiveness, there is a reasonable probability the State would have offered Crawford a plea bargain to lesser crimes; vacate his conviction and sentence; and remand this case to Pierce County Superior Court with directions to appoint a special prosecutor.

If the State presents competent evidence contesting Crawford's new evidence, this Court should remand this case to the Pierce County Superior Court for an evidentiary hearing on the issue of ineffective assistance of counsel. However, since employees of the Pierce County Prosecutor's Office will be necessary witnesses at such a hearing, this Court should direct the appointment of a special prosecutor.

DATED this 19th day of December, 2007.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Jeff Ellis", written over a horizontal line.

Jeff Ellis #17139

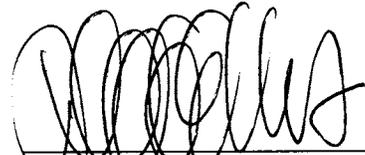
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VERIFICATION OF PETITION

After being first duly sworn, on oath, I depose and say: That I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

12/18/07 Seattle, WA
Date and Place



Jeffrey Ellis #17139