

NO. 37237-1

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

IN RE THE PERSONAL RESTRAINT PETITION OF:

DARNELL KEENO CRAWFORD

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 02-1-06037-6

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**STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION**

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A. ISSUES PERTAINING TO PETITIONER'S PERSONAL RESTRAINT PETITION:

1. Has petitioner failed to show deficient performance of his trial or appellate counsel for failing to challenge the comparability of his out of state conviction in light of the controlling case law at the time of his sentencing and when the appellant's brief was filed?
2. Should the court dismiss petitioner's claim for failure to provide evidence that his conviction is, in fact, not comparable to a strike offense in Washington, which is necessary to show that existence of actual prejudice in a collateral attack?
3. Has petitioner failed to show that the outcome of his trial was unreliable, which is the benchmark for an ineffective assistance of counsel claim?
4. Has petitioner failed to show that the possible loss of a "windfall" resolution is the type of "prejudice" recognized under *Strickland*?
5. Is there no evidence to support petitioner's claim that the State's offer included consideration of his out of state convictions?
6. Has petitioner failed to provide any legal theory that would entitle him to demand specific performance of the plea offer he rejected?

B. STATEMENT OF THE CASE.

Petitioner, Darnell Crawford, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 02-1-06037-6.

Appendix A. He was sentenced as a persistent offender on one count of robbery in the first degree and one count of assault in the second degree.

*Id.* Petitioner appealed from entry of this judgment and sentence. His convictions were reversed by Division II of the Court of Appeals in a published opinion. *State v. Crawford*, 128 Wn. App. 376, 115 P.3d 387 (2005). The Supreme Court granted review and reversed the court of appeals and affirmed petitioner's judgment and sentence. *State v.*

*Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006). The mandate issued on January 2, 2007. Appendix B.

On December 21, 2007, petitioner filed a timely personal restraint petition alleging that his convictions or sentence should be vacated because he received ineffective assistance of counsel. He alleged that he received ineffective assistance at the trial level because his attorney failed to: 1) investigate his criminal history; 2) realize that he had two prior strike offenses; 3) try to negotiate a plea resolution to a non strike offense; and 4) fail to contest the comparability determination of his out of state strike offense in the trial court. He also asserts that his appellate attorney was ineffective for failing to contest the comparability determination of his out of state conviction on appeal.

The facts surrounding petitioner's case are as follows: Petitioner has a criminal history with at least eight prior felony convictions in two states, including a 1993 conviction for "sex abuse" in Kentucky, and a 1998 conviction for robbery in the second degree in Washington. Appendix A. On December 26, 2002, petitioner entered a store in Tacoma and tried to steal a MP3 player; when he was confronted by store employees, he pulled a gun and pointed it at the employees and a bystander to effectuate his escape. He was caught after fleeing from the scene and charged with robbery in the first degree and assault in the second degree.

In pretrial negotiations, the State offered to recommend a low-end standard range sentence if defendant pleaded guilty as charged. *See* Appendix C, State's Response to Motion to Vacate and Dismiss with attached exhibits, particularly exhibits 1 and 2. At the time of this offer, the prosecutor was aware only of petitioner's Washington convictions. *Id.* Petitioner rejected this offer. Appendix D, Verbatim report of proceedings of hearing on motion to dismiss and sentencing, RP 275-276. Prior to trial, the prosecutor learned petitioner had felony convictions in Kentucky, including the one for sex abuse, and disclosed their existence to defense counsel. Appendix C.

The case proceeded to trial; the jury found petitioner guilty as charged. While preparing for sentencing, the prosecutor examined the elements of the Kentucky “sex abuse” conviction and concluded that it was comparable to the Washington offense of child molestation in the first degree. Appendix C. As petitioner’s criminal history also included a Washington conviction for robbery in the second degree, petitioner qualified as a persistent offender. *Id.* The prosecutor prepared a sentencing memorandum, including the material to support the comparability determination, and concluded that petitioner should be sentenced as a persistent offender. Appendix G.

After receipt of the State’s sentencing memorandum, petitioner’s trial counsel withdrew and new counsel was assigned; petitioner’s new counsel filed a motion to dismiss, or in the alternative, a motion for new trial. The court denied these motions. Appendix D, RP 331-332. In the course of the testimony at this hearing, petitioner acknowledged that he had a prior conviction for “digitally raping [his] 7 year old niece.” Appendix D at RP 279. He indicated that he had pleaded guilty to that crime. *Id.* The case proceeded to sentencing immediately. Appendix D. Defense counsel indicated that she had “looked at the convictions and looked at the case law on comparable out-of state convictions” and that she believed that the Kentucky sex abuse conviction was comparable to a

most serious offense and that petitioner qualified as a persistent offender. Appendix D, RP 335. The court found that the Kentucky conviction for sexual abuse was comparable to a most serious offense and that with the prior conviction for robbery, defendant was a persistent offender; the court sentenced him to life without the possibility of parole. Appendices A and D at RP 340.

Petitioner appealed, but raised no assignments of error regarding the trial proceedings, the comparability determination made by the trial court, or to his classification as a persistent offender. On appeal, petitioner asserted that he could not be sentenced as a persistent offender because he had not been served with notice of that possibility prior to trial. He also claimed he received ineffective assistance of counsel because his attorney did not realize that his Kentucky conviction was comparable to a most serious offense and attempt to negotiate with the prosecutor.

Petitioner does not claim to be indigent.

C. ARGUMENT.

1. THE PETITION SHOULD BE DISMISSED BECAUSE PETITIONER HAS NOT SHOWN PREJUDICIAL CONSTITUTIONAL ERROR OR A FUNDAMENTAL DEFECT RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE NECESSARY TO OBTAIN RELIEF BY PERSONAL RESTRAINT PETITION.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. *Id.*

In this collateral action, the petitioner has the duty of showing constitutional error and that such error was actually prejudicial. The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. *In re Mercer*, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987);

*Hagler*, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it.

*Hagler*, 97 Wn.2d at 825-26. To obtain collateral relief from an alleged nonconstitutional error, a petitioner must show “a fundamental defect which inherently results in a complete miscarriage of justice.” *In re Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. *Id.* at 810.

Reviewing courts have three options in evaluating personal restraint petitions:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the personal restraint petition without remanding the cause for further hearing.

*In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In a personal restraint petition, “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (citing *In re Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8<sup>th</sup> Cir. 1970)). That phrase means “more is required than that the petitioner merely claim in broad general terms that the prior convictions were unconstitutional.” *Williams*, 111 Wn.2d at 364. The petition must also include the facts and “the evidence reasonably available to support the factual allegations.” *Id.*

The evidence that is presented to an appellate court to support a claim in a personal restraint petition must also be in proper form. On this subject, the Washington Supreme Court has stated:

It is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will, in future cases, accept no less.

*In re Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). The petition must include a statement of the facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); *In re Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). Personal restraint petition claims must be supported by affidavits stating particular facts, certified documents, certified transcripts, and the like. *Williams*, 111 Wn.2d at 364. If the petitioner fails to

provide sufficient evidence to support his challenge, the petition must be dismissed. *Williams* at 364. The purpose of a reference hearing “is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations.” *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). It is not enough for a petitioner to give a statement about evidence that he believes will prove his factual allegations. *Id.* The court has been specific on how petition must support his claims:

If the petitioner’s allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner’s evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

*In re Rice*, 118 Wn.2d at 886. Generally, a motion or petition that is supported by unsworn statements or hearsay affidavits, rather than proper testimonial affidavits, should be dismissed. *See State v. Crumpton*, 90 Wn. App. 297, 952 P.2d 1100 (1998).

As will be more fully set forth below, petitioner has failed to meet his burden of showing that he is entitled to relief.

2. PETITIONER HAS FAILED TO SHOW THAT TRIAL COUNSEL OR APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE COMPARABILITY OF PETITIONER'S KENTUCKY CONVICTION FOR SEX ABUSE.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she

was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.” *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489. When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the outcome of the proceeding would have

been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

Courts have consistently held that an attorney's assistance is not rendered ineffective for failing to anticipate a change in the law. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998). See also *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995). A lack of awareness of the relevant law, standing alone, is insufficient to establish ineffective assistance of counsel. *Bullock v. Carver*, 297 F.3d 1036, 1048 (10th Cir. 2002).

If a petitioner raises ineffective assistance of appellate counsel on collateral review, he must first show that the legal issue that appellate counsel failed to raise had merit and, secondly, must show that he was actually prejudiced by appellate counsel's failure to raise the issue. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 777-778, 100 P.3d 279 (2004).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Petitioner seeks to show ineffective assistance of his trial and appellate counsel for failing to challenge the comparability of his

Kentucky conviction for sex abuse as a strike offense in the trial court of an appeal. As articulated in the State's sentencing memorandum below, the elements of Kentucky's sex abuse statute and Washington's child molestation in the first degree are the same with regard to 1) sexual contact, and 2) a victim less than twelve years old. Appendix G. Washington's statute at the relevant time, however, also required proof that the victim was not married to the perpetrator and that there was an age difference between the victim and perpetrator of at least thirty six months. *Id.* Petitioner argues that the prosecutor used improper means of showing that his conduct fell within these additional elements. In his petition, petitioner relies on many recent cases such as *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007), *In re Pers. Restraint of Lavery*, 154 Wn. 2d 249, 11 P.3d 837 (2005), *State v. Farnsworth*, 133 Wn. App. 1, 130 P.3d 389 (2006), and *State v. Oretaga*, 120 Wn. App. 165, 84 P.3d 935 (2004)(filed February 17, 2004) for the proposition that in making a 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." Petition at p. 17. But none of these cases, which reflect the impact of *Apprendi v. New Jersey*<sup>1</sup> on comparability determinations, existed at the time of his sentencing in 2003 or when his appellate counsel filed his appellate brief on February 5, 2004. Appendix

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<sup>1</sup> 530 U.S. 466, 490, 120 S. Ct 2348, 147 L. Ed. 2d 435 (2000)

H. At the time of petitioner's sentencing and direct review, the law governing comparability of out of state convictions that were broader than Washington crimes was set forth in *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). While *Morley* indicated that the elements of the two crimes must always be the cornerstone of comparability, a trial court could go beyond the elements and delve into the facts of the defendant's conduct:

If the elements of a foreign crime are broader than a comparable Washington crime, this court can rely *on other court documents* underlying the foreign conviction to determine whether the defendant's conduct would have violated a Washington statute.

134 Wn.2d at 610-611 (1998)(emphasis added). The law regarding what a sentencing court could consider to determine whether an out of state conviction was comparable was less restrictive at the time of petitioner's sentencing and direct appeal than it is today. In claiming ineffective assistance of counsel of trial and appellate counsel, petitioner must show deficient performance "on the facts of the particular case, viewed as of the time of counsel's conduct" and not with the benefit of hindsight and a change in the law. *Strickland*, 466 U.S. at 689.

Here, the prosecutor at sentencing laid out the relevant analysis and law to the trial court in its sentencing memorandum and used court documents pertaining to the Kentucky conviction to show that, where the Kentucky elements were broader, petitioner's conduct fell within that

proscribed in Washington. Appendix G. Petitioner does not articulate what was wrong with the State's analysis at the time or articulate how his counsel was deficient in responding to this law and analysis. The elements at issue were not ones subject to much dispute: the age difference between the victim and petitioner and his non-marriage to her. The elements of the Kentucky crime required the victim to be under twelve, just like Washington's crime. It is unclear how petitioner's trial counsel could present any evidence to show that petitioner was less than 36 months older than the victim or that he was married to her. The court had competent evidence of petitioner's birth date as well as the date of his Kentucky crime. The court could do the math to see that petitioner would have been twenty five years old at the time and more than 36 months older than his victim who was under twelve years old. The indictment listed the victim as "LaKeshia James" and a court document setting forth the facts of the case indicate the victim was the petitioner's seven year old niece. Additionally, the petitioner had acknowledged under oath the existence that he had digitally penetrated his seven year old niece. Appendix D at RP 279. Petitioner fails to articulate what argument his counsel should have raised at the time in light of the then existing law and the record before the court. He fails to show how, under the law at the time, the analysis employed by the court was incorrect or that if trial counsel had raised an objection to the use of the conviction that the court would have sustained it. The same is true regarding petitioner's appellate counsel.

Finally, petitioner has to show that there is merit to the issue that his out of state conviction is not comparable. The use of this conviction is only erroneous if his out of state crime is not factually or legally comparable. Petitioner admitted under oath that he pleaded guilty to digitally penetrating his seven year old niece in December 1991. Appendix D at RP 279. If he had done that within the boundaries of Washington in 1991, he would have been guilty of child molestation in the first degree. Apparently, petitioner's argument is that it does not matter what he admits or acknowledges today, the only relevant information is what he acknowledged at the time of his plea. Petitioner provides no authority that his own sworn testimony in a Washington court as to what he pleaded guilty to in Kentucky in 1991 is an insufficient basis on which to make a comparability determination when the out of state crime is broader than Washington's crime. Petitioner provides no testimonial evidence that facts exist to show that what he did in Kentucky would not be a crime in Washington. He does not state in his declaration that there was less than 36 months between their ages or that he was married to his seven year old niece at the time. He has failed to provide evidence required by *Williams* to support his claim that use of his out of state conviction was improper or that actual error occurred. His claim of ineffective assistance of counsel regarding the failure to challenge the comparability determination should be dismissed.

3. PETITIONER HAS FAILED TO SHOW THAT THE OUTCOME OF HIS TRIAL WAS UNRELIABLE, WHICH IS THE BENCHMARK OF AN INEFFECTIVE ASSISTANCE CLAIM OR THAT THE LOSS OF A “WINDFALL” IS THE TYPE OF PREJUDICE RECOGNIZED UNDER **STRICKLAND**.

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Id.* at 691-692. In *Strickland*, the Supreme Court laid the foundation for analyzing claims of ineffective assistance of counsel; a two-prong test requiring a showing of both deficient performance and resulting prejudice.

Proof of prejudice is an essential prerequisite to relief under *Strickland*. Proof of prejudice normally and logically focuses on the proceeding that resulted in the determination of the defendant’s guilt or sentence. The prejudice test adopted in *Strickland* reflects that focus: “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. In most cases, the court is examining the effect of deficient performance in a trial or sentencing hearing.

The courts have applied *Strickland* to a plea hearing context when the defendant seeks to withdraw his plea on the basis of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). When a defendant is represented by counsel and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice “was within the range of competence demanded of attorneys in criminal cases.” *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct 1441, 25 L. Ed. 2d 763 (1970). A defendant who pleads guilty upon the advice of counsel “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.” *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct 1602, 36 L. Ed. 2d 235 (1973). To prove the “prejudice” prong of *Strickland* in the plea process “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. at 59. The decisions of the United State Supreme Court dealing with effective assistance during the plea process stem from cases where the defendant entered a plea. *Wright v. Van Patten*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); *Hill v. Lockhart*, *supra*. The State could find no Supreme Court decision which examined the effectiveness of counsel during plea negotiations once the case had proceeded to trial and conviction.

The Court in *Strickland* emphasized that the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged” and instructed courts to be concerned with whether the “result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Strickland*, 466 U.S. at 696. Once a case has gone to trial and the determination of the defendant’s guilt has been rendered by a fact finder, the question under *Strickland* is whether that determination of guilt is reliable. When guilt has been determined by trial, the *Strickland* test focuses on how deficient performance affected the outcome of the trial and not the plea negotiations.

Additionally, *Strickland’s* concept of constitutional prejudice requires something more than simply a probability of a “different result.” *Strickland* specifically indicated that certain types of “different results” would not qualify as a basis for relief:

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

*Strickland*, 466 U.S. at 695. The court went on to state that while “idiosyncracies of the particular decisionmaker” might affect trial counsel’s tactics and be relevant to the performance prong assessment, such factors were irrelevant to the prejudice prong and that “evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge’s sentencing practices, should not be considered in the prejudice determination.” *Id.*

In *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), the Court gave another example of a “different result” that would not raise a constitutional concern under the Sixth Amendment. In that case, trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance and denial of his right to present a defense by his attorney’s refusal to allow him to testify falsely. The Supreme Court dismissed this claim stating that constitutional right to testify does not extend to testifying falsely and the “the right to counsel includes no right to have a lawyer who will cooperate with planned perjury.” *Nix*, 475 U.S. at 173. The Court held that as a matter of law, defense counsel’s conduct could not establish the prejudice required for relief under the second strand of the *Strickland* inquiry as there was no possibility that Nix’s truthful testimony negatively affected the fairness of the trial; it reiterated that it is the lack of fairness in an

adversary proceeding which is the “benchmark” of an ineffective assistance of counsel claim. *Id.* at 175. Thus, even if the court were to assume Nix’s defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel’s behavior still would not have been prejudicial because the reliability of the judgment was untouched. As Justice Blackmun stated in a concurring opinion for four Justices: “Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.” 475 U.S. at 186-187.

In *Lockhart v. Fretwell*, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the Court reemphasized that the Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. The *Lockhart* Court reiterated that “prejudice” incorporates more than outcome determination; the reviewing court must determine whether the result of the proceeding was fundamentally unfair or unreliable. 506 U.S. at 368. Fretwell was convicted of capital felony murder and sentenced to death. He sought habeas relief from his sentence arguing that his attorney had been ineffective in failing to object to the use of an aggravating factor based on a decision by the Eighth Circuit in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985). *Collins* was good law at the time of Fretwell’s trial, direct appeal, and state habeas proceedings, but had been overruled by the time he sought habeas relief in the federal courts. Nevertheless, he obtained

relief from the federal district court and his case went before the Eighth Circuit for review. A divided court affirmed the grant of relief finding that the Arkansas court would have been bound by *Collins* at the time of trial and any objection to use of the aggravator would have been sustained if it had been made, thereby precluding the jury from using that aggravating factor to support a death verdict. Under this scenario Fretwell had shown prejudice under *Strickland* as he has shown the probability of a different result at the time the error was committed. The Supreme Court took review and reversed. The Supreme Court noted that the Eighth Circuit had overruled *Collins* in light of the Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), therefore the Arkansas sentencing hearing had been conducted under the correct standard of the law, in retrospect, although at the time, the proceeding was contrary to the Eighth Circuit's decision in *Collins*. In view of the change in the law, the failure to comply with *Collins* did not render the sentencing proceeding unreliable or fundamentally unfair. Had an objection been made and sustained at Fretwell's sentencing hearing, he would have received a benefit to which he was not entitled under the law.

To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

*Lockhart v. Fretwell*, 506 U.S. at 369-370. The Court held that "[u]nreliability or unfairness does not result *if* the ineffectiveness of

counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.” 506 U.S. at 372(emphasis added). It concluded that Fretwell suffered no prejudice from his counsel’s deficient performance.

This limitation on the type of prejudice that will support an ineffective assistance of counsel claim was explored by Justice Powell in his concurring opinion in *Kimmelman v. Morrison*, 477 U.S. 365, 392, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bedsheet. While the Court held that *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), did not bar this ineffective assistance claim, Justice Powell wrote separately to clarify that the Court was not resolving a *Strickland* prejudice issue as it had not been argued:

The admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. . . . Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in *Strickland* strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment. . . . It would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall.

*Kimmelman*, 477 U.S. at 396-397. *Strickland*, *Nix*, *Lockhart*, and *Kimmelman* illustrate that when a defendant, who has been convicted

following a trial, claims a denial of his Sixth Amendment right to counsel, the reviewing court must focus on whether the claimed error affected the fundamental fairness of the trial such that there has not been a fair and reliable determination of the defendant's guilt. If the court concludes the determination of defendant's guilt is unreliable, then defendant has succeeded in showing prejudice under the *Strickland* test. If the claimed error does not affect the reliability and fairness of the trial proceeding, then the error will not serve as a basis for a Sixth Amendment claim.

Recently, the Supreme Court prepared to address whether a defendant can obtain relief for deficient performance in plea negotiations once there had been a conviction following a fair trial. In November, 2007, the United States Supreme Court granted certiorari of the Ninth Circuit decision in *Hoffman v. Arave*, 455 F.3d 926 (9<sup>th</sup> Cir. 2006), and directed the parties to brief and argue the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" *Arave v. Hoffman*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 532, 169 L. Ed. 2d 371 (2007). Hoffman sought federal habeas relief from his conviction of murder and the imposition of a death sentence on the grounds that his counsel had been ineffective during both pretrial plea bargaining and the sentencing phase of his trial. The federal district court found that Hoffman had received ineffective assistance of counsel during sentencing but not during plea bargaining; it granted Hoffman's

federal habeas petition in part and ordered the State of Idaho to resentence him. On review, the Ninth Circuit Court of Appeals affirmed the lower court's decision regarding ineffective assistance of counsel during sentencing, but reversed with respect to the ineffective assistance claim during plea negotiations, and ordered the District Court to direct the State either to release Hoffman or to "offer [him] a plea agreement with the 'same material terms' offered in the original plea agreement." 455 F.3<sup>rd</sup> at 943. After the Supreme Court granted the State's petition for certiorari, Hoffman abandoned his claim that his counsel was ineffective during plea bargaining and moved to vacate the Ninth Circuit's opinion and dismiss the appeal as moot. *Arave v. Hoffman*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 749, 169 L. Ed. 2d 580 (2008). The court granted the motion and directed the Ninth Circuit to vacate the portion of its judgment that pertained to the claim of ineffective assistance of counsel during pretrial plea bargaining and to direct the district court to dismiss the claim with prejudice. *Id.*; *see also Hoffman v. Arave*, 518 F.3d 656 (9<sup>th</sup> Cir. 2008). Thus, the Supreme Court's direct resolution of this issue has been left for another day.

In petitioner's case, he has never shown that the fundamental fairness of his trial was affected by his attorney's deficient performance during plea negotiations. At the evidentiary hearing on petitioner's post-trial alternative motion for dismissal or new trial, petitioner's trial counsel was asked what she would have done differently in terms of preparation for trial had she realized that defendant was facing his third strike. RP

311-313. Counsel indicated that she would have hired an investigator, but acknowledged that she had no evidence that she would have been able to uncover anything that would have changed the outcome of the trial. *Id.* Counsel further testified that knowing that it was a three strikes case would not have affected: 1) how she would have tried the case; 2) who was called as a witness; or, 3) how she conducted her cross-examinations.

RP 313. When petitioner's case was on direct review, his appellate attorney did not raise any assignments of error pertaining to the trial process. *State v. Crawford*, 128 Wn. App. 376, 378, 115 P.3d 387 (2005), *reversed*, 159 Wn.2d 86, 147 P.3d 1288(2006). There has never been any challenge to petitioner's trial that calls into to doubt its reliability in determining the petitioner's guilt. Thus, *Strickland's* "benchmark" of an ineffective assistance of counsel claim, an unreliable trial result, is not present in petitioner's case. His claim of ineffective assistance of counsel must fail.

Additionally, petitioner seeks to show a type of prejudice that is not recognized by the Supreme Court as providing a basis for relief on an ineffective assistance of counsel claim. He asserts that there is a reasonable probability that the State would have offered a plea agreement to a non-strike offense. The State disputes that claim and submits that it was a "possibility," without conceding that there was a "reasonable probability" that an agreed resolution would have been reached. *See* Appendices E and F, Affidavit of Ed Murphy and chart regarding two and

three strikes resolutions in Pierce County. More important however, is the nature of petitioner's claim of prejudice. Petitioner essential assertion is that there was the *possibility* of leniency on part of the prosecutor which *might* have induced the petitioner to plead guilty, thereby resulting in a "different outcome" of his case. This type of claim falls into the category of relying upon the "idiosyncracies of the particular decisionmaker," to show prejudice. His claim enters the realm of speculation as to what the prosecutor and the petitioner might have agreed to, if defense counsel has sought to mitigate his case. *Strickland* holds this type of claim irrelevant to the assessment of prejudice. Under *Strickland*, since petitioner was found guilty at trial, he needs to show that his attorney was deficient in her performance at trial so as to create a reasonable probability that that the outcome of his trial would have been different in order to show prejudice. He has not shown this type of prejudice.

Petitioner's claim of prejudice also runs afoul of *Lockhart* and Justice Powell's view that the scope of the Sixth Amendment does not include protecting criminal defendants against errors that merely deny those defendants "a windfall." There is no question that the jury found petitioner guilty of robbery in the first degree – a strike offense- or that petitioner had a prior Washington conviction for a strike offense (robbery) and a Kentucky conviction for sex abuse, which the trial court found was comparable to a strike offense. Under the POAA, petitioner should be sentenced as a persistent offender to life without the possibility of parole.

It is the sentence that the people of Washington have determined is the appropriate sentence for a person in petitioner's position. If the petitioner had been able to convince the State to offer him the opportunity to plead to something, resulting in a sentence of less than life without the possibility of parole (and had petitioner been willing to take advantage of the opportunity), he would have received "a windfall." He has, however, no constitutionally based argument that he is entitled to a sentence of something less than life without the possibility of parole.

A criminal defendant does not have a constitutional right to plea bargain. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981); *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). A prosecutor has broad discretion over whether to enter into plea bargaining and may revoke an offer at any time before defendant enters his guilty plea or otherwise detrimentally relies on the agreement. *Mabry v. Johnson*, 467 U.S. 504, 507-508, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984); *Wheeler*, 95 Wn.2d at 803-805; *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003). The Sixth Amendment offers a criminal defendant many protections pertaining to trial, but none pertaining to the "right" to plea bargaining. The effectiveness of petitioner's counsel during trial proceedings has never been questioned; the fairness of the trial and the reliability of the jury's verdict is unchallenged. The Sixth Amendment has been satisfied. To paraphrase Justice Black - since petitioner was deprived of neither a fair trial nor any of the specific constitutional rights designed

to guarantee a fair trial, he has suffered no prejudice. *See Nix*, 475 U.S. at 186-187. Under *Lockhart*, as petitioner was not deprived of any substantive or procedural right to which the law entitles him, he cannot show unreliability or unfairness in the outcome of his proceeding and cannot demonstrate “prejudice.” He cannot claim the “loss” of a windfall as constituting prejudice.

Petitioner relies on the Ninth Circuit’s decision in *Riggs v. Fairman*, 399 F.3d 1179 (9<sup>th</sup> Cir. 2005) to support his ineffective assistance argument that deficient performance during plea negotiations can provide a basis for vacating a constitutionally obtained jury verdict. The Ninth Circuit voted to rehear this case and entered an order vacating the decision relied upon by petitioner indicating that it should not be cited as precedent by or to the court. *Riggs v. Fairman*, 430 F.3d 1222 (9<sup>th</sup> Cir. 2005). If the Ninth Circuit does not recognize its own opinion as precedent, neither should this court. The Second Circuit has found ineffective assistance of counsel in a situation analogous to petitioner’s. *See Mask v. McGinnis*, 28 F. Supp. 2d 122 (S.D.N.Y. 1998); affirmed 233 F.3d 132 (2<sup>nd</sup> Cir. 2000), cert. denied *McGinnis v. Mask*, 534 U.S. 943, 122 S. Ct. 322, 151 L. Ed. 2d 240 (2001). The only Supreme Court authority these decisions cite to support the contention that failed or unsuccessful plea negotiations are subject to the *Strickland* standard is *Hill v. Lockhart. Mask*, 233 F.3d at 138-139 citing the lower court opinion at F.Supp 2d at 124-125. As discussed above, *Hill v. Lockhart*

pertained to ineffective assistance by an attorney in the plea process where the defendant accepted the offer and entered a plea. It does not stand for the proposition that ineffective assistance claims regarding deficient performance in the plea negotiation phase will survive a trial that is untainted by deficient performance.

For the above reasons, the court should reject petitioner's claim of ineffective assistance of counsel as the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of the outcome of his trial, which is the "benchmark" of a Sixth Amendment violation.

4. THE STATE DISPUTES THAT ITS PLEA OFFER INCLUDED CONSIDERATION OF PETITIONER'S OUT OF STATE CONVICTIONS OR THAT HE WOULD BE ENTITLED TO ANY SPECIFIC PERFORMANCE OF THAT PLEA OFFER.

Petitioner asserts that the State offered him a plea agreement where the State would agree to recommend a sentence of 57 months based upon an offender score that included his Kentucky convictions. The State disputes that this occurred; the offer, which petitioner rejected, was based only upon his Washington convictions. Moreover the State did not proffer a new offer after the State received confirmation of petitioner's out of state convictions. There is considerable evidence to support the State's version of what occurred below. Much of this evidence was developed in

conjunction with petitioner's alternative motion for dismissal or new trial, which was brought post-verdict and pre-sentencing. The State filed a response to the motion that had an affidavit attached from the trial prosecutor, Lisa Wagner, and from Julie Jackson, the staff person responsible for gathering petitioner's criminal history. *See* Appendix C, State's Response to Motion to Vacate and Dismiss Convictions, with attachments. Additionally, the court heard evidence regarding this motion, including testimony from petitioner's trial counsel, Anne Stenberg. *See* Appendix D, Verbatim report of proceedings of hearing/sentencing.

According to the prosecutor, she proffered an offer to defendant on January 15, 2003, that if he would plead guilty as charged, she would recommend the low end of the standard range, 57 months on the robbery; however, she indicated that this offer was based solely upon petitioner's Washington criminal history. Appendix C. The criminal history specialist corroborates this by indicating in her affidavit that the first criminal history compilation she prepared regarding petitioner did not include the Kentucky convictions as these had not been confirmed. *Id.* She indicated that she did not prepare the second criminal history compilation containing five additional felony convictions from Kentucky until sometime after February 24, 2003. *Id.* These declarations are consistent with the Order on omnibus hearing entered on February 10, 2003, which lists only petitioner's Washington convictions as his known criminal history. Appendix I. Petitioner's trial counsel, Ms. Stenberg testified that she

received two criminal history compilations from the State and the second one included new information about Kentucky convictions. Appendix D, RP 296-297, 301, 306. She further testified that her recollection was that it was sometime in March that she received the information about the Kentucky convictions. *Id.* at RP 301.

The State's offer calculated petitioner's offender score at five, which is consistent<sup>2</sup> with it including only the Washington State convictions in the calculation. Appendix C, *see* offer sheet attached as Exhibit 1. When the five felony convictions from Kentucky were included in the offender score, petitioner's offender score became a "9+." Appendix A.

Thus, the evidence is beyond dispute that the offer extended on January 15, 2003, did not include consideration of petitioner's Kentucky convictions. It is also clear that petitioner rejected this offer and, according to his trial counsel, was "never willing to negotiate" but wanted always to go forward with trial. *See* Appendix D, RP 303-304, 306. There is no evidence to support petitioner's contention that the offer in January took into consideration his Kentucky convictions.

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<sup>2</sup> It is not clear how the trial prosecutor calculated this offender score. When scoring the robbery offense, petitioner should have received one point each for his 1997 firearms conviction and his 1998 possession of stolen property conviction and two points for his 1998 robbery conviction for a total of four points for his criminal history; he would have received two points on the other current offense of assault in the second degree for a total offender score of six points.

To the extent that petitioner is contending that the State re-extended the same plea offer to petitioner after learning of the Kentucky convictions, this contention is also unsupported by the record. Petitioner's trial counsel testified that she could not recall ever receiving another written offer from the State after the second criminal history compilation was distributed. She also agreed that there were no conversations with the prosecutor after the additional criminal history was found where the prosecutor averred that petitioner still had an offender score of five. Appendix D, at RP 307-308. So while petitioner's trial counsel indicated that she believed the offer remained the same after the discovery of additional criminal history, she could offer no explanation as to why she believed petitioner's offender score remained at five despite learning that he had five additional out of state felony convictions. Appendix D, RP 301, 306, 307-308. Counsel admitted that it was her "assumption" that petitioner remained a "five," despite finding additional felony criminal history. RP 308.

Petitioner's argument in his brief is premised on the assumption the second criminal history compilation accompanied the State's offer in January of 2003. Petitioner has provided a recent declaration from his trial counsel, Ms Stenberg, which states:

At the time that I received Mr. Crawford's criminal history, the State's plea offer treated the Kentucky "sex abuse" case as an ordinary felony conviction. The State's plea offer

indicated that Mr. Crawford's standard range was 57-75 months. The State's recommendation was 57 months.

*See* Petitioner's Appendix F, Declaration of Anne Stenberg. This statement implies that the Kentucky convictions were known at the time the State extended its plea offer in January of 2003. This declaration contradicts Ms. Stenberg's sworn testimony at the post-trial hearing that the Kentucky convictions were discovered *after* the State's offer had been made and rejected. As discussed above, petitioner's assumption that the State was considering the Kentucky criminal history when it made its offer is disproved by the evidence in the record.

When this erroneous assumption is removed from petitioner's argument, his conclusion that he would be able to rely on the doctrine of specific performance is clearly incorrect. Had petitioner accepted the State's original offer, the prosecution's statement of his criminal history would have listed only his Washington convictions. The State would not be obligated to abide by its offer upon the discovery of the additional criminal history whether this discovery occurred before or after the entry of the plea.

If the discovery had occurred before entry of the plea, the State would be free to revoke its offer. As stated in *State v. Yates*, 161 Wn.2d 714, 741, 168 P.3d 359(2007) and *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981), absent a guilty plea or some other form of detrimental reliance, the prosecution may revoke any plea proposal. In a

situation where the prosecution revokes a proposal before a plea has been entered, a defendant must establish that he relied on the plea offer in a manner that makes a fair trial impossible in order to get specific performance of his plea. *State v. Budge*, 125 Wn. App. 341, 345, 104 P.3d 714 (2005); *State v. Bogart*, 57 Wn. App. 353, 357, 788 P.2d 14 (1990). It is the defendant's burden to establish detrimental reliance. *Budge*, 125 Wn. App. at 345; *Bogart*, 57 Wn. App. at 357.

If the discovery of additional criminal history had occurred after entry of the plea, the situation is governed by the terms of paragraph 6(d) of the standard Statement of Defendant upon Plea of Guilty; it provides:

If I am convicted of any new crimes before sentencing, or if **any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase.** Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.

CrR 4.2(g), paragraph 6(d); *see also In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). There is no case authority which holds that a criminal defendant who knowingly fails to disclose his full criminal history at the time he enters a guilty plea is entitled to specific performance of a plea agreement premised on an incomplete criminal history. *See State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996).

The record supports the State's contention that the plea offer extended to petitioner in January 2003 did not include consideration of his five out-of- state convictions and that the State never extended another offer after this initial offer had been rejected. Consequently, petitioner has failed to show any factual basis to support his argument that he would somehow be entitled to specific performance of the January 2003 offer.

As for petitioner's claim that he has shown a reasonable probability that the State would have agreed to a resolution of less than life without the possibility of parole and that petitioner would have agreed to such a resolution as well, the State disputes these claims. The State does not contend that such an offer was impossible- it is unknown what, if any, resolution might have been reached at the time. But any plea agreement would have to be agreed to by both sides. If the State's offer had been for petitioner to agree to a sentence of 30 years or more he might have thought, prior to trial, that this offer did not provide enough incentive to enter a guilty plea because he might do better at trial. Any claim that petitioner made post trial that he would have accepted such an offer must be subject to a credibility determination because he is making that statement knowing the outcome of the trial. Such credibility determinations cannot be made on the basis of an affidavit or written declaration. So whether there was a reasonable probability that a plea agreement would have been a reasonable possibility would have to be determined at a reference hearing.

Petitioner asks that if the case is remanded that a special prosecutor to be assigned, because some prosecutors might be called as witnesses at the reference hearing. He fails to articulate why this office would need to be removed from the case under the circumstances. Under RPC 3.7(b) a “lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.” Petitioner has not shown that either RPC 1.7 or 1.9 would be violated by a deputy prosecutor handling a reference hearing and calling another prosecutor to testify at the hearing. The reference hearing is not a criminal trial and would not be before a jury. Generally, the appearance of fairness doctrine does not apply to prosecutors. *See State v. Finch*, 137 Wn.2d 792, 808-09, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999). The Court should deny this request to have this office removed from handling any future hearings in this case as petitioner has not shown any legal justification for this request.

The State also disputes, for lack of sufficient information at this time, the existence of the mitigation evidence presented in petitioner’s affidavit.

D. CONCLUSION.

For the foregoing reasons, the Court should dismiss this petition as petitioner has failed to show that he has suffered actual prejudice from

error of constitutional magnitude. Petitioner was convicted following a constitutional trial that was untainted by any deficient performance by his attorney. While his attorney was deficient in during plea negotiations, the deficient performance did not impact the truth finding function of the trial- it did not render the trial unfair or the outcome unreliable. Petitioner has failed to demonstrate that this “benchmark” of an ineffective assistance claim is present in his case.

DATED: MAY 16, 2008

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
Date \_\_\_\_\_ Signature \_\_\_\_\_

FILED  
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STATE OF WASHINGTON  
BY  DEPUTY

# **APPENDIX “A”**

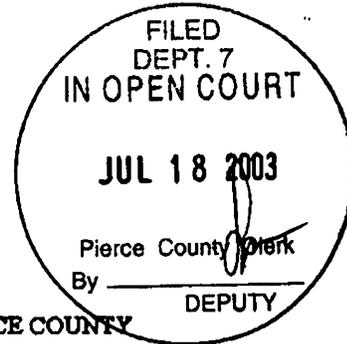
*Judgment and Sentence*



02-1-06037-6 19323546 JDSWCD 07-21-03

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JUL 18 2003



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 02-1-06037-6

vs

DARNELL KEENO CRAWFORD,

Defendant.

WARRANT OF COMMITMENT

- 1)  County Jail
- 2)  Dept. of Corrections
- 3)  Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 7-18-03

By direction of the Honorable  
*[Signature]*  
JUDGE  
KEVIN STOCK

CLERK  
By: *[Signature]*  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date JUL 18 2003 By Hollie Kinne Deputy



STATE OF WASHINGTON

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_.

KEVIN STOCK, Clerk  
By: \_\_\_\_\_ Deputy

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JUL 21 2003

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 02-1-06037-6

vs

JUDGMENT AND SENTENCE (JS)

DARNELL KEENO CRAWFORD

Defendant.

- Prison
- Jail One Year or Less
- First-Time Offender
- SOSA
- DOSA
- Breaking The Cycle (BTC)

SID: WA18408518  
DOB: 1/13/1966

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 4/16/2003 by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME	INCIDENT NO.
I	Robbery in the First Degree (AAA3)	9A.56.190/ 9A.56.200(1)(a)(I)	12/26/2002	023600827
II	Assault in the Second Degree (E28)	9A.36.021(1)(c)	12/26/2002	02360082

as charged in the Original Information

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

03-9-08740-9

02-1-06037-6

## 2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	Fraud Use of CC	7/27/1993	Jefferson Co., KY	9/7/92	A	NV
2	Fraud Use of CC	7/27/93	Jefferson Co., KY	10/19/92	A	NV
3	Sexual Abuse I	9/23/93	Jefferson Co., KY	12/16/91	A	V
4	Bail Jump	9/23/93	Jefferson Co., KY	1/28/93	A	NV
5	Fraud Use of CC	7/27/93	Jefferson Co., KY	3/8/93	A	NV
6	UPOF 2	11/11/93	Pierce Co., WA	2/8/97	A	NV
7	Robbery 2	3/24/98	Pierce Co., WA	9/16/97	A	V
8	PSP 2	3/24/98	Pierce Co., WA	10/5/97	A	NV

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

*Δ preserves right to offender score*

## 2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancement)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	9+	IX	Life		Life	Life
II	9+	IV	Life		Life	Life

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence  above  below the standard range for Count(s) \_\_\_\_\_. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney  did  did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are  attached  as follows: Life w/o possibility of release, \$110 cc, \$500 cvpa, DNA testing, \$100 for DNA testing, no contact with victims

## III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2  The court DISMISSES Counts \_\_\_\_\_  The defendant is found NOT GUILTY of Counts \_\_\_\_\_

02-1-06037-6

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN \$ Restitution to: (Name and Address--address may be withheld and provided confidentially to Clerk's Office)

PCV \$ 500.00 Victim assessment RCW 7.68.035

BLD \$ 100.00 Biological Sample Fee

CRC \$ Court costs, including RCW 9.94A.030, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 110.00 FRC

Witness costs \$ WFR

Sheriff service fees \$ SFR/SFS/SFW/WRF

Jury demand fee \$ JFR

Other \$

PUB \$ Fees for court appointed Attorney RCW 9.94A.030

\$ Other costs for : \$ 710 TOTAL RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

[ ] is scheduled for

[ ] RESTITUTION. Order Attached

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ per month commencing . RCW 9.94A.760.

[ ] In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760.

[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the

02-1-06037-6

county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with \_\_\_\_\_ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for \_\_\_\_\_ years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER:


4.4(a) BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR: PERSISTENT OFFENDER. The defendant was found to be a Persistent Offender.

The court finds Count Rabbery 1°  
Assault 2° is a most serious offense and that the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

[ ] The court finds Count \_\_\_\_\_ is a crime listed in RCW 9.94A.030(31)(b)(i) (e.g., rape in the first degree, rape of a child in the first degree (when the offender was sixteen years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was eighteen years of age or older when the offender committed the offense) or indecent liberties by forcible compulsion; or any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree, or an attempt to commit any crime listed in RCW 9.94A.030(31)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(31)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(31)(b)(i).

Those prior convictions are included in the offender score as listed in Section 2.2 of this Judgment and Sentence. RCW 9.94A.030, RCW 9.94A.

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

Life without the possibility of early release on Counts I and II  
\_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_

02-1-06037-6

Actual number of months of total confinement ordered is: Life without the possibility of early release.

(b) **CONSECUTIVE/CONCURRENT SENTENCES.** RCW9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here. [ ] The sentence herein shall run consecutively to the felony sentence in cause number(s) \_\_\_\_\_

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: \_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

4.6 **OTHER:** \_\_\_\_\_

**V. NOTICES AND SIGNATURES**

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 **RESTITUTION HEARING.**  
[ ] Defendant waives any right to be present at any restitution hearing (defendants initials): \_\_\_\_\_

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall

02-1-06037-6

forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. N/A

5.8 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 7-18-03

JUDGE

Print name

*Linda King*

LG  
Deputy Prosecuting Attorney

Print name: LISA WAGNER

WSB # 16718

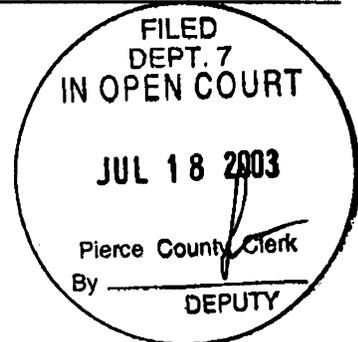
Linda King  
Attorney for Defendant

Print name: LINDA KING

WSB # 16160

Darnell Crawford  
Defendant

Print name: Darnell Crawford



02-1-06037-6

**CERTIFICATE OF CLERK**

CAUSE NUMBER of this case: 02-1-06037-6

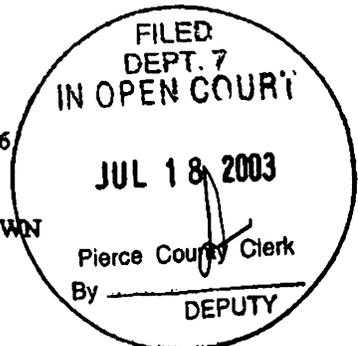
I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_.

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

02-1-06037-6

IDENTIFICATION OF DEFENDANT



SID No. WA18408518  
(If no SID take fingerprint card for State Patrol)

Date of Birth 1/13/1966

FBI No. UNKNOWN

Local ID No. UNKNOWN

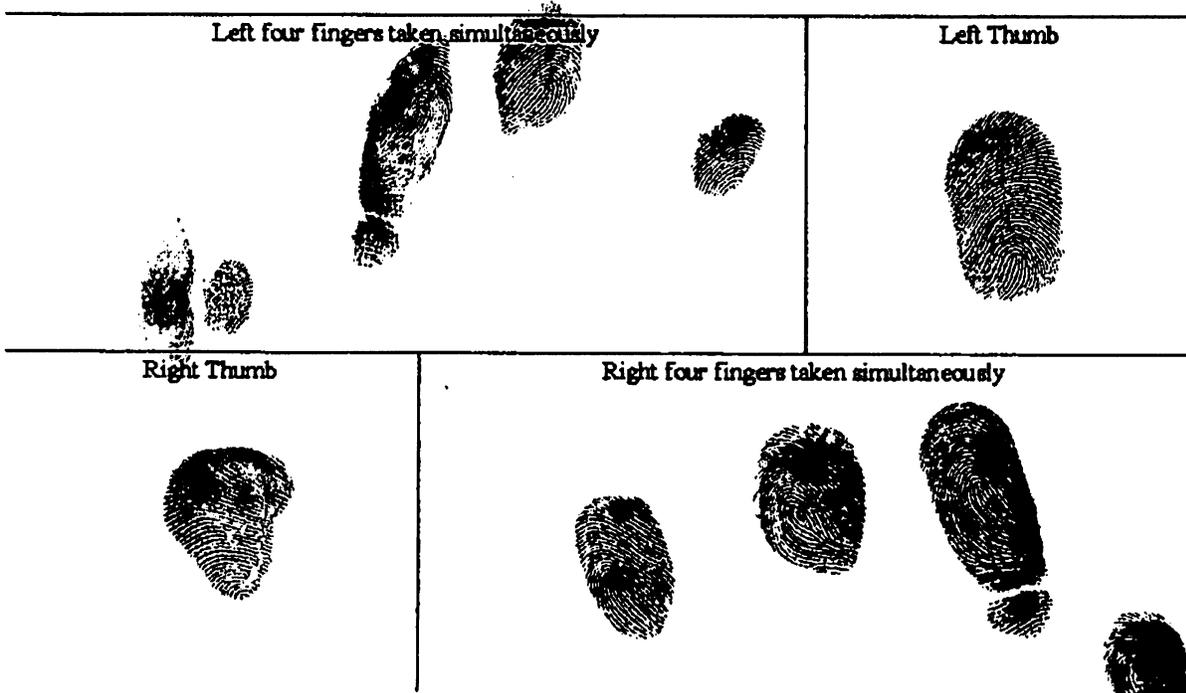
PCN No. UNKNOWN

Other

Alias name, SSN, DOB: \_\_\_\_\_

<b>Race:</b>		<b>Ethnicity:</b>		<b>Sex:</b>	
<input type="checkbox"/> Asian/Pacific Islander	<input checked="" type="checkbox"/> Black/African-American	<input type="checkbox"/> Caucasian	<input type="checkbox"/> Hispanic	<input checked="" type="checkbox"/> Male	
<input type="checkbox"/> Native American	<input type="checkbox"/> Other: :	<input checked="" type="checkbox"/> Non-Hispanic	<input type="checkbox"/>	<input type="checkbox"/> Female	

FINGERPRINTS



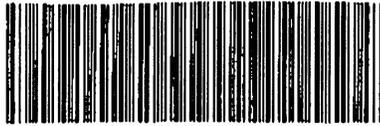
I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, Jenny Martin Dated: 7/18/03

DEFENDANT'S SIGNATURE: Daniel K. [Signature]

DEFENDANT'S ADDRESS: \_\_\_\_\_

# **APPENDIX “B”**

*Mandate and Opinion*



02-1-06037-6 26745009 MND 01-03-07

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SUPREME COURT  
STATE OF WASHINGTON

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BY C.J. MERRITT

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A.M. JAN - 3 2007 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
DEPUTY

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DARNELL KEENO CRAWFORD,

Respondent.

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MANDATE

NO. 77532-0

C/A No. 30650-6-II

Pierce County  
No. 02-1-06037-6

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington  
in and for Pierce County.

The opinion of the Supreme Court of the State of Washington filed on December 7, 2006, became final in the above entitled cause on December 27, 2006. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Costs in the amount of \$25.75 are awarded to Respondent, Pierce County Prosecutor's Office to be paid by Petitioner, Darnell Keeno Crawford.

12/6/78



I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 2nd day of January, 2007.

A handwritten signature in black ink, appearing to read "Ronald R. Carpenter". The signature is written in a cursive style and is positioned above a horizontal line.

RONALD R. CARPENTER  
Clerk of the Supreme Court  
State of Washington

cc: Hon. Frederick Fleming, Judge  
Honorable Kevin Stock, Clerk  
Pierce County Superior Court  
Hon. David Ponzoha, Clerk  
Court of Appeals Division II  
Kathleen Proctor  
Leslie Orville Stomsvik  
Reporter of Decisions

**FILE**

IN CLERKS OFFICE  
SUPREME COURT, STATE OF WASHINGTON

DATE **DEC 07 2006**

*Alexander C.J.*  
CHIEF JUSTICE

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	No. 77532-0
	)	
v.	)	
	)	EN BANC
DARNELL KEENO CRAWFORD,	)	
	)	
Respondent.	)	Filed <u>DEC 07 2006</u>
_____	)	

FAIRHURST, J. – Respondent Darnell Keeno Crawford was convicted of first degree robbery<sup>1</sup> and second degree assault<sup>2</sup> after stealing an MPEG<sup>3</sup>-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. Taking into account Crawford’s prior criminal convictions, the Pierce County Superior Court sentenced him to a life sentence without the possibility of parole under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570.

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<sup>1</sup> RCW 9A.56.190, .200(1)(a)(i).  
<sup>2</sup> RCW 9A.36.021(1)(c).  
<sup>3</sup> Moving picture experts group.

*State v. Crawford*, No. 77532-0

Before the Court of Appeals, Crawford raised two issues related to pretrial notice. First, Crawford contended that due process requires the State to provide pretrial notice that the defendant faces a mandatory life sentence. Second, Crawford alleged that his attorney provided ineffective assistance of counsel by failing to examine his prior out-of-state conviction and advise him that, if convicted, he faced a life sentence.

In a published opinion, Division Two of the Court of Appeals vacated the judgment of the trial court, holding that Crawford was denied procedural due process and the effective assistance of counsel. *State v. Crawford*, 128 Wn. App. 376, 115 P.3d 387 (2005). We find that Crawford was not denied due process or effective assistance of counsel and reverse the Court of Appeals.

## I. FACTS

Initiative 593, the POAA, commonly known as the “three strikes law” was adopted by voters in 1993. *State v. Manussier*, 129 Wn.2d 652, 659, 921 P.2d 473 (1996) (citing *State of Washington Voters Pamphlet, General Election 4* (Nov. 2, 1993)). Under the POAA, trial courts are required to sentence “persistent offenders” to life in prison without possibility of parole. RCW 9.94A.570.<sup>4</sup> A “persistent offender” is an offender who has been convicted of any felony

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<sup>4</sup>“Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death.” RCW 9.94A.570.

*State v. Crawford*, No. 77532-0

considered a “most serious offense” under former RCW 9.94A.030(28) (2002) and who has twice previously been convicted of such offenses or equivalent offenses in other states. Former RCW 9.94A.030(32)(a)(i), (ii) (2002).

On December 26, 2002, a Best Buy employee noticed an MP3 box missing from a display and saw what appeared to be an outline of the box in Crawford’s jacket.<sup>5</sup> The employee relayed his suspicions to a store manager, who approached Crawford and asked him to stop as he walked toward the exit. Crawford continued walking and, as he exited the store, an electronic sensor activated an alarm. The manager and another employee pursued Crawford into the parking lot, repeatedly asking him to drop the merchandise. Crawford continued walking. At one point he pulled out a gun and showed it to the individuals who were following him. Crawford then got into a waiting car and left the scene. He was later apprehended by Tacoma police. The State charged Crawford with first degree robbery and second degree assault.

Crawford has an extensive criminal history, including a 1998 Washington conviction for second degree robbery<sup>6</sup> in Pierce County, and a 1993 Kentucky conviction for first degree sex abuse.<sup>7</sup> While the prosecutor and the defense were aware of Crawford’s prior Pierce County convictions and realized that the second

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<sup>5</sup> The parties do not dispute the facts underlying Crawford’s conviction.

<sup>6</sup> RCW 9A.56.190, .210.

<sup>7</sup> Ky. Rev. Stat. Ann. § 510.110.

*State v. Crawford*, No. 77532-0

degree robbery conviction qualified as a strike offense, neither was aware of the Kentucky conviction.

The State calculated Crawford's offender score as a five for each count and, at a January 2003 pretrial conference, provided the defense with a criminal history compilation reflecting only Crawford's Pierce County convictions. At that time the State offered to recommend a sentence at the low end of the standard range, 57 to 75 months, in exchange for Crawford's guilty plea.<sup>8</sup> By February 2003, the State learned of Crawford's Kentucky criminal history and provided the defense with a new criminal history compilation.

Even after learning of Crawford's Kentucky history, neither party investigated the conviction. The parties did not engage in further plea negotiations. Thus Crawford continued to believe his standard range to be 57 to 75 months. Under this assumption, Crawford and his attorney decided to proceed to trial. Following a jury trial, Crawford was found guilty of first degree robbery and second degree assault.

By May 15, 2003, several weeks after trial, the prosecutor thoroughly reviewed Crawford's Kentucky sex abuse conviction and determined it to be a strike offense, the equivalent to the Washington crime of child molestation in the

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<sup>8</sup> The "Offer and Sentencing Worksheet" notes that count I, first degree robbery, carries a standard range of 57 to 75 months, and that count II, second degree assault, carries a standard range of 22 to 29 months. Under the State's original offer, Crawford's sentences would have run concurrently. Clerk's Papers (CP) at 81.

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first degree.<sup>9</sup> The prosecutor notified Crawford's attorney that, including the Kentucky conviction, Crawford in fact had two prior strikes against him, making him subject to a mandatory minimum sentence under the POAA.

Crawford retained new counsel and filed a posttrial motion for dismissal or alternately for a new trial. At the posttrial hearing on the motion to dismiss, Crawford testified that had he known before trial that he faced a potential life sentence, he would have accepted the prosecutor's offer.<sup>10</sup> Verbatim Report of Proceedings (July 18, 2003) (VRP) at 277. Crawford's trial attorney testified that she had not investigated Crawford's Kentucky conviction because she assumed it had been a misdemeanor. *Id.* at 302. She made this assumption because, in her experience, prosecutors in Pierce County typically provided "persistent offender notices" prior to trial in three strikes cases, an action which had not been taken here. *Id.* at 299.

Finally, while no mitigation evidence had been presented by the defense either before or at trial, at the posttrial hearing the defense called a mitigation specialist who testified that she would have put together a mitigation package for Crawford had she been notified that he faced a third strike. *Id.* at 294-95. She

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<sup>9</sup> RCW 9A.44.083.

<sup>10</sup> In a sworn statement filed after trial, the deputy prosecutor stated that even if Crawford had accepted her original offer, she had never offered to allow him to plead guilty to anything but a strike offense. CP at 85.

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further stated that she had put together 12 mitigation packages in cases involving a potential third strike, all of which had been accepted by the prosecutor. *Id.* at 291.

The trial court denied Crawford's motion to dismiss and imposed a mandatory minimum sentence of life in prison without possibility of parole. In a published opinion, the Court of Appeals vacated the judgment of the trial court, finding that Crawford was denied procedural due process and denied the effective assistance of counsel. *Crawford*, 128 Wn. App. at 385. Judge J. Robin Hunt partially dissented, arguing that Crawford's conviction should be reversed solely on the ineffective assistance of counsel claim. *Id.* (Hunt, J., dissenting in part). The State appealed to this court, contending that due process does not require pretrial notice of the possibility of a life sentence under the POAA and that Crawford was not denied effective assistance of counsel.

## II. ISSUES

- A. Whether procedural due process requires that a criminal defendant receive pretrial notice of a possible life sentence under the POAA.
- B. Whether Crawford was denied effective assistance of counsel when his attorney failed to examine his prior out-of-state conviction and advise him that, if convicted, he faced a life sentence.

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### III. ANALYSIS

A. Procedural due process does not require that a criminal defendant receive pretrial notice of a possible life sentence under the POAA.

The right to procedural due process is guaranteed under the Washington Constitution article I, section 3<sup>11</sup> and the United States Constitution amendments V<sup>12</sup> and XIV, section 1.<sup>13</sup> The Washington Constitution provides the same scope of protection as the United States Constitution. *Manussier*, 129 Wn.2d at 679.

We have found that the POAA is “a *sentencing* statute and not a statute defining the elements of a crime.” *State v. Thorne*, 129 Wn.2d 736, 779, 921 P.2d 514 (1996) (emphasis added). As a sentencing statute, the POAA allows, but does not mandate, notification to offenders who have been convicted of a “most serious offense.” *Id.* at 779 (citing former RCW 9.94A.393 (1994), *recodified as* RCW 9.94A.561<sup>14</sup> (LAWS OF 2001, ch. 10, § 6)). The legislature has the authority to set such sentencing procedures. *Id.* at 778 (citing *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986)). We will not mandate greater procedural protections than those required by statute unless those requirements violate a

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<sup>11</sup>“No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. art. I, § 3.

<sup>12</sup>“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. V.

<sup>13</sup>“No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV, § 1.

<sup>14</sup>“A sentencing judge, law enforcement agency, or state or local correctional facility *may, but is not required to,* give offenders who have been convicted of an offense that is a most serious offense as defined in RCW 9.94A.030 either written or oral notice, or both, of the sanctions imposed upon persistent offenders.” RCW 9.94A.561 (emphasis added).

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constitutional guaranty. *Thorne*, 129 Wn.2d at 778. Thus, we will not require pretrial notice of possible sentencing under the POAA unless the lack of notice allowed under the statute violates the defendant's right to procedural due process.

The State argues that the Court of Appeals decision below conflicts with United States Supreme Court precedent and our previous decisions regarding the POAA. In concluding that *Crawford* was denied due process, the Court of Appeals relied on *Thorne* where we found due process did not require that a formal charge be filed in order to sentence a defendant as a persistent offender. 129 Wn.2d at 779. But because there was actual notice given to the defendant in *Thorne*, we left open the possibility of "cases in which the failure to give notice would have constitutional implications." *Id.* at 781. Relying on our dicta in *Thorne*, the Court of Appeals found *Crawford* to be such a case, noting that "[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. The person needs to know that such a sentence is possible when deciding . . . whether trial or plea is the better alternative." *Crawford*, 128 Wn. App. at 383. In reaching its holding, the Court of Appeals cited "many times" in which Washington courts have held that "due process requires the State to formally allege a mandatory minimum term in its information." *Id.* at 381 n.10. But these cases simply illustrate the rule that prosecutors must set forth their intent to seek enhanced penalties for the *underlying*

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crime in the information and are not applicable where, as here, a defendant faces potential sentencing consequences because of convictions for *prior* crimes.<sup>15</sup>

Contrary to the Court of Appeals decision below, the United States Supreme Court and this court have repeatedly rejected the argument that pretrial notice of enhanced penalties for recidivism is constitutionally required. In *Olyer v. Boles*, the United States Supreme Court held that due process does not require the State to give criminal defendants notice that they may be subject to an habitual offender sentence prior to trial on the substantive offense. 368 U.S. 448, 452, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). The Court also found, however, that where a determination of whether a defendant is an habitual offender is separate from the criminal charges, due process does require that a defendant receive reasonable notice and an opportunity to be heard relative to the recidivist charge. *Id.*

Similarly, we have recognized that while due process requires that the defendant receive formal notice of criminal charges, “we do not extend such constitutional notice to the *penalty* exacted for conviction of the crime.” *State v.*

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<sup>15</sup> See, e.g., *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 553, 627 P.2d 953 (1981) (noting that deadly weapon allegations must be included in the information where defendant is charged with robbery while armed with a deadly weapon); *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980) (remanding for resentencing where jury found by special interrogatory that defendant was armed with deadly weapon upon commission of the crime but prosecutor had neglected to file notice advising defendant that the State intended to seek an enhanced penalty); *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972) (“Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue . . . must be presented to the jury . . . before the court can impose the harsher penalty.” (citing *State v. Nass*, 76 Wn.2d 368, 456 P.2d 347 (1969))).

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*Clark*, 129 Wn.2d 805, 811, 920 P.2d 187 (1996) (citing *State v. Lei*, 59 Wn.2d 1, 3, 365 P.2d 609 (1961)). We have previously applied this reasoning in *Lei*, where we upheld a defendant's sentence as an habitual offender under RCW 9.92.090.<sup>16</sup> 59 Wn.2d at 2. There the petitioner was found guilty of robbery and, before being sentenced, the State filed supplemental information alleging prior out-of-state convictions. *Id.* We found that formal notice was not required because the habitual offender statute did not establish a substantive offense, but instead established that a mandatory penalty be imposed upon a third felony conviction. *Id.* at 3.

Finally, in specifically addressing the POAA, we have noted that because essential elements of a crime must be stated in a charging document, the POAA would violate a defendant's due process rights *only* if it created a separate offense that was not set forth in the charging document. *Thorne*, 129 Wn.2d at 779 (citing *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991)). But since the POAA does not define the elements of a crime, we have held that prior convictions resulting in

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<sup>16</sup> RCW 9.92.090 states:

Every person convicted in this state of any crimes of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been twice convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in a state correctional facility for not less than ten years.

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a life sentence under the POAA need not be pleaded in the information, submitted to a jury, or proved beyond a reasonable doubt. *State v. Wheeler*, 145 Wn.2d 116, 117, 34 P.3d 799 (2001).

Because the POAA is a sentencing statute, Crawford had no constitutional right to pretrial notice that he faced the possibility of being sentenced as a persistent offender. As required under *Olyer*, 368 U.S. at 452, Crawford was, in fact, given notice and the opportunity to be heard before being sentenced. VRP (July 18, 2003) at 335.

We clarify today that pretrial notice of a possible sentence under the POAA is not constitutionally mandated. In so doing, we acknowledge that a rule requiring such notice in all circumstances would “place a difficult burden on the imposition of a recidivist penalty” since the fact of such prior convictions is often not known to prosecutors before trial. *Olyer*, 368 U.S. at 452 n.6. We emphasize, however, that where a possible life sentence is at stake, providing notice is the best practice. *Thorne*, 129 Wn.2d at 780-81. While the constitution does not guarantee a right to plea bargain, we recognize that notice provides a criminal defendant with the important opportunity to weigh his or her options and to intelligently decide between accepting a plea bargain and proceeding to trial. *Manussier*, 129 Wn.2d at 681 n.118 (citing *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)); *Crawford*, 128 Wn. App. at 383.

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B. Crawford was not denied effective assistance of counsel when his attorney failed to examine his prior out-of-state conviction and advise him that, if convicted, he faced a life sentence.

A criminal defendant has the right to assistance of counsel under the sixth amendment to the United States Constitution. We consider this right to be “the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

To show that counsel provided ineffective assistance, a defendant must show:

(1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Reversal of a lower court decision is required where the defendant demonstrates *both* deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. We address performance and prejudice in turn. Because we find Crawford has not demonstrated actual prejudice, we also conclude that he was not denied effective assistance of counsel.

The State argues that the Court of Appeals erred in finding deficient performance because “[t]he court gave no weight to the fact that trial counsel had

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inquired of [Crawford] as to the nature of his prior convictions and that his representations led her to believe that the out of state convictions were not serious.” Suppl. Br. of Pet’r at 14. We disagree with the State and conclude that the Court of Appeals correctly found counsel’s performance deficient. Even if counsel gave weight to Crawford’s wishes in proceeding to trial, it was unreasonable under the circumstances to neglect to investigate Crawford’s prior convictions.

In evaluating a claim for ineffective assistance of counsel, “the performance inquiry must be whether counsel’s assistance was *reasonable* considering all the circumstances.” *Strickland*, 466 U.S. at 688 (emphasis added). In engaging this inquiry, we are highly deferential to the performance of counsel. *Id.* at 689. A defendant can overcome the presumption of effective representation by demonstrating “that counsel failed to conduct appropriate investigations.” *Thomas*, 109 Wn.2d at 230 (citing *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). The defendant may also meet this burden by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336; *see also State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

The State contends that the Court of Appeals erred in finding deficient performance under our decisions in *In re Personal Restraint of Jeffries*, 110 Wn.2d

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326, 752 P.2d 1338 (1988) and *State v. Benn*, 120 Wn.2d 631, 663-65, 845 P.2d 289 (1993). The State's comparison is misplaced. In *Jeffries*, we denied an ineffective assistance of counsel claim where defense counsel neglected to call witnesses whose testimony would have provided mitigation evidence. We found counsel's actions reasonable because the defendant had specifically stated his wishes that the witnesses not testify and, furthermore, because calling the witnesses likely would have resulted in the defendant's extensive criminal record being put before the jury in rebuttal. *Jeffries*, 110 Wn.2d at 331-33. In *Benn*, we denied an ineffective assistance of counsel claim where the defendant claimed defense counsel had failed to adequately investigate mitigating factors to present prior to the filing of a special sentencing notice. We found that counsel made a tactical decision to offer limited mitigation evidence after conferring with the defendant, since other mitigation evidence would have been inconsistent with defense strategy. *Benn*, 120 Wn.2d at 663-65.

Like *Jeffries* and *Benn*, here, defense counsel did comply with Crawford's wishes in rejecting the State's plea offer. VRP at 310. But unlike *Benn* and *Jeffries*, there was no tactical basis for counsel's performance. The State alerted defense counsel a month prior to trial of the Kentucky conviction. *Id.* at 301. Defense counsel did not investigate the conviction even though the information given to her by the State indicated that the Kentucky conviction qualified as an

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“adult felony” conviction. *Id.* at 309. 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.

The State next contends that the Court of Appeals erred in finding defense counsel’s performance prejudicial to Crawford. Crawford alternately argues that the Court of Appeals reached the correct conclusion because, had Crawford “been informed of the severity of [the] potential penalty he faced, mitigating evidence could have been prepared and presented on his behalf and plea negotiations . . . could have been undertaken.” Resp’t’s Reply to Pet. for Review at 5-6. We agree with the State and find that Crawford has not demonstrated prejudice.

Even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. A defendant must *affirmatively prove prejudice*, not simply show that “the errors had some conceivable effect on the outcome.” *Id.* at 693. In doing so, “[t]he defendant must show that there is a reasonable probability that, *but for* counsel’s unprofessional errors, the result of the proceeding would

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have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>17</sup> *Id.* at 694 (emphasis added).

Even though Crawford testified that he would have pleaded guilty to a lengthy sentence rather than proceed to trial had he known that he faced a possible third strike, he does not establish a “reasonable probability that, but for” his counsel’s deficient performance, he would have avoided a life sentence. *Id.*

First, there is no indication that the prosecutor was willing to offer Crawford the option of pleading guilty to a nonstrike offense. While the original “Offer and Sentencing Worksheet” presented to Crawford does illustrate that the prosecutor was willing to offer a sentence at the low end of the standard range for his charges, it does not indicate that the State intended to charge Crawford with anything but a strike offense. Furthermore, Crawford presents no evidence that the prosecutor would have offered to allow him to plead guilty to a lesser offense had the parties understood the Kentucky conviction to be a strike offense.

Second, it is highly speculative to conclude that the prosecutor would seek to charge a defendant with a nonstrike offense in such a case. As we have previously noted, the POAA reduces a prosecutor’s flexibility in plea bargaining because the

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<sup>17</sup> We do not require the defendant to “*guarantee*” the outcome would have been different as the dissent asserts. Dissent at 6. The test requires the defendant to show there is a *reasonable* probability that the outcome would have been different absent counsel’s ineffective performance. The dissent’s attempt to minimize the test requirements by calling it a “mere reasonable probability” verges on reducing it to a nullity.

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list of “most serious offenses” is comprehensive and includes crimes with high standard range sentences. *Manussier*, 129 Wn.2d at 681 n.118. 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.” *Id.* 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.

Third, the POAA grants no discretion to judges or prosecutors in the sentencing of persistent offenders.<sup>18</sup> *Thorne*, 129 Wn.2d at 768. The statutory language is unambiguous: every persistent offender must be sentenced to life in prison without possibility of parole. *Id.* at 765. Thus, Crawford would necessarily have been sentenced as a persistent offender *unless* the prosecutor had allowed him to plead guilty to a nonstrike offense prior to sentencing.<sup>19</sup>

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<sup>18</sup> The dissent challenges the relevance of our discussion of the State’s lack of discretion to consider a plea bargain during the sentencing phase because Crawford was denied his constitutional right to effective assistance of counsel pretrial. Dissent at 6 n.2. We discuss the State’s lack of discretion *at sentencing* to underscore the fact that the defendant must show the State would have considered a plea bargain *pretrial* in order to establish a reasonable probability that, but for his counsel’s deficient performance, he would have avoided a life sentence.

<sup>19</sup> The State cites the following steps as necessary in resolving a three strikes case with a plea to a nonstrike offense: (1) there is mitigating information to submit to the prosecutor; (2) the mitigating information is of such a sufficiently compelling nature that the prosecutor is willing to offer a plea agreement to a nonstrike offense; (3) the prosecutor and defense counsel are able to formulate a plea agreement that allows the defendant to plead guilty to a nonstrike offense but still provides a sentence long enough to remove a recidivist offender from the

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Finally, Crawford presents no mitigation evidence. We have previously denied an ineffective assistance of counsel claim where the petitioner failed to demonstrate additional mitigation evidence that counsel could have offered. *Benn*, 120 Wn.2d at 665-66. Here, defense counsel testified that she would have “take[n] a very serious posture towards the case” had she been notified of a potential third strike before trial and would have hired a mitigation specialist to prepare a mitigation package to present to the prosecution on Crawford’s behalf. VRP at 299-300. But the mitigation specialist who testified posttrial for the defense *did not* examine Crawford’s criminal or personal history, and presented *no* mitigation evidence on his behalf. VRP at 294.

Even if a mitigation specialist had presented a mitigation package on Crawford’s behalf, a reduction in charges would not automatically result. The State had no obligation to accept a mitigation package or even to engage in plea negotiations. RCW 9.94A.421 (“The prosecutor and the attorney for the defendant, or the defendant when acting *pro se*, *may* engage in discussions with a view toward reaching [a plea] agreement . . . .” (emphasis added)). And even if the State had agreed to less serious charges in exchange for Crawford’s guilty plea, the

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community for a sufficient period; (4) the defendant agrees to plead guilty to a lengthy sentence; (5) the trial court, after hearing the plea agreement disclosure and any input from victims, approves the agreement. Pet. for Review at 16.

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trial judge would have retained discretion over whether to accept or reject a plea agreement. RCW 9.94A.431(2).

In light of Crawford's extensive criminal history and the lack of mitigation evidence in the record, Crawford has not demonstrated a reasonable probability that, *but for* his counsel's error, he would have succeeded in avoiding sentencing under the POAA. The dissent concludes a series of events occurred that, but for the ineffective representation by Crawford's counsel, might have changed the outcome of Crawford's case. Dissent at 8. However, we reiterate that the test requires more than the existence of events that *might* have changed the outcome. It requires the defendant to *affirmatively prove prejudice*. See *supra* p. 15. Because Crawford has not demonstrated prejudice, his claim for ineffective assistance of counsel fails.

Accordingly, the judgment of the Court of Appeals is reversed, and the judgment of the trial court reinstated.

#### IV. CONCLUSION

We hold that procedural due process does not require that a criminal defendant receive pretrial notice of a possible life sentence under the POAA. We further hold that Crawford was not denied effective assistance of counsel. While Crawford has demonstrated that counsel acted unreasonably in not investigating

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his prior convictions, he has not met his burden of showing prejudice. We reverse the Court of Appeals and reinstate the judgment of the trial court.

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Fairhurst, J.

WE CONCUR:

Alexander, C.J.

Bridges, J.

Madsen, J.

J.M. Johnson

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Majority by Fairhurst, J.

Dissent by C. Johnson, J.

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C. JOHNSON, J. (dissenting)—At the critical time Darnell Crawford needed effective assistance of counsel to advise him on how to proceed with his defense, he was denied that constitutional right. As a result of his counsel's deficient performance, he chose to proceed to trial completely unaware that if found guilty, he would be sentenced to life in prison without any possibility of parole. The majority correctly recognizes, as did the Court of Appeals, Crawford's counsel's performance was deficient, yet erroneously concludes that Crawford has not established he was prejudiced by the deficient performance.

Applying the correct standard of review, Crawford has amply shown prejudice. Crawford established that the deficient performance of counsel denied him any opportunity to attempt to negotiate a plea bargain. The State concedes this opportunity exists. In practice, the State endorses pleas to non-strike offenses in some cases. Furthermore, Crawford has established through testimony that had he known it was a third strike offense, a mitigation package would have been prepared. A "mitigation specialist" from the office of assigned counsel testified

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she had been successful in all 12 third strike cases in which she had any involvement. Clerk's Papers (CP) at 291. The specialist testified there are "always" mitigating circumstances. CP at 291. The reasonable probability that the result would have been different has been established. The conviction should be vacated and the case remanded to the trial court to the pretrial stage to begin again.

The facts supporting the charge in this case establish that Crawford shoplifted an MP3<sup>1</sup> player from a Tacoma Best Buy store, the crime being elevated to first degree robbery and assault when Crawford displayed a firearm to the individuals who chased him into the parking lot. This happened on December 26, 2002, and Crawford was arrested and charged at that time. The State presented its offer sheet on January 15, 2003. The State concedes the offer sheet did not indicate Crawford had two prior "strikes." The State admits it became aware of the extent of Crawford's criminal record on February 24, 2003, did no comparability analysis, and did not revise its offer sheet. Nor did defense counsel do a comparability analysis. It was not until a month *after trial* that the State determined and defense counsel realized the conviction was a third strike. Based

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<sup>1</sup> MPEG (moving picture experts group) -1 Audio Layer 3

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on these events, the Court of Appeals and the majority correctly conclude that defense counsel's performance was deficient for failing to fully investigate Crawford's criminal history. *State v. Crawford*, 128 Wn. App. 376, 384, 115 P.3d 387 (2005); majority at 13. The only issue centers on whether Crawford suffered prejudice.

The test for prejudice requires the defendant show "there is a *reasonable probability* that, but for counsel's . . . errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (emphasis added). The majority misapplies this standard in concluding Crawford has not established prejudice. We need not be certain the errors of counsel determined the outcome. In fact, "[t]he result of a proceeding can be rendered unreliable . . . even if the errors of counsel cannot be shown by a *preponderance* of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. (emphasis added). Instead, a mere reasonable probability of a different outcome is all that is required.

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The reasonable probability standard was purposefully constructed to stress the defendant's constitutional right to counsel and should not be confused with tests that present a higher standard of proof and protect finality of the proceedings. The reasonable probability standard is not as stringent as, for example, the standard for newly discovered evidence claims. For those claims, the court can presume the proceeding was otherwise accurate and fair.<sup>2</sup> When presented with an ineffective assistance claim, no such presumption exists.

A more lenient standard is appropriate here because "one of the crucial assurances" of a reliable result is missing entirely. *Strickland*, 466 U.S. at 694. Missing a crucial assurance of a reliable result, "finality concerns are somewhat weaker," *id.*, and the defendant's constitutional right to effective assistance of counsel is more prominent. Hence, applying the proper standard is crucial to upholding a defendant's constitutional right to effective representation.

A false assumption about plea bargains causes the majority to presume this standard cannot be met. Reasoning from the abstract, the majority concludes it is "highly speculative" the prosecutor would charge Crawford with a non-strike

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<sup>2</sup> A newly discovered evidence claim "presupposes that all the essential elements of a

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offense. Majority at 17 (citing *State v. Manussier*, 129 Wn.2d 652, 681 n.118, 921 P.2d 473 (1996)). *Manussier*, in commenting on the effect of POAA (Persistent Offender Accountability Act, RCW 9.94A.570) on plea bargains, noted that prosecutors have less flexibility under POAA and further suggested the prosecutor loses the ability to plea bargain. *Manussier*, 129 Wn.2d at 681 n.118. However, *Manussier* does not hold nor does it support the majority's conclusion that the State has no discretion to plea bargain.

Empirically, we know prosecutors have discretion to offer pleas in third-strike cases. We have reviewed cases where the State has entered a plea bargain to a non-strike offense in exchange for a lengthy prison sentence. *See In re Pers. Restraint of West*, 154 Wn.2d 204, 206, 110 P.3d 1122 (2005) (first degree theft in place of first degree robbery).

This discretion is also recognized by the State in its concession that it has adopted five criteria for "resolving a three strikes case with a plea to a non-strike offense . . . ." Pet. for Rev. at 16. The State considers whether there is mitigating information, whether the information is "sufficiently compelling," and whether the

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presumptively accurate and fair proceeding were present . . . ." *Strickland*, 466 U.S. at 694.

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resulting agreement removes a recidivist for a sufficient period. The defendant must agree to plead guilty to a lengthy sentence. Finally, the trial court needs to approve the agreement.<sup>3</sup> Majority at 16. The State has substantially more discretion than was outlined by the *Manussier* comment, and the majority errs by suggesting otherwise.

The majority ignores the prejudice to Crawford because Crawford cannot *guarantee* the State would have plea bargained to a non-strike offense. The appropriate analysis emphasizes the probability of success, not the odds of failure. We intentionally do not require defendants to prove that the deficient performance “more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693–94. The bar is much more forgiving. Prejudice exists if “there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a *probability sufficient to undermine confidence in the outcome.*” *Strickland*, 466 U.S. at 694 (emphasis added).

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<sup>3</sup> While the majority correctly recognizes the POAA grants no discretion at the *sentencing* phase, that is irrelevant. In this case, Crawford was denied his constitutional right to effective assistance of counsel at the pretrial stage of the proceedings. At that stage, the State has discretion to reduce the charge to a non-strike offense.

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Here, a different outcome was shown to be reasonably probable. Crawford has presented the testimony of a mitigation specialist who had mitigated 12 third-strike cases. In every case in which she had any involvement, she had been successful.<sup>4</sup> She testified a mitigation package would have been prepared for Crawford if anyone had called on her to do so. At the very least, Crawford should have a chance to present a mitigation package.

We know Crawford was not informed of the sentencing consequences and premised his decision to go to trial on erroneous information. We also know Crawford's counsel, acting on this erroneous assumption, did not present a mitigation package and would have prepared one. We know she would have pursued her case more aggressively.<sup>5</sup> We know the prosecutor did not know the

---

<sup>4</sup> The Pierce County "mitigation specialist" testified that a mitigation package is a collection of information that seeks to explain the defendant's behavior. CP at 290. To compile a package involves collecting records, interviewing family members, reviewing past crimes, and compiling a social history. CP at 290, 294. The specialist testified that among the many possible mitigating issues, family trauma is "often" a factor. CP at 290. Furthermore, the defendant's poverty is often a factor in explaining crimes that occur during the holidays. CP at 292. As noted earlier, Crawford's act of shoplifting occurred the day after Christmas. The package also includes recommendations for avoiding future offenses. CP at 290. The specialist had been employed by Department of Assigned Counsel since 1990.

<sup>5</sup> Crawford's original counsel gave several examples of things she would have done differently if she had known it was a third strike case. She would have hired an investigator. CP at 299. She would have sought a longer amount of time to prepare the case. CP at 300. She also would have worked hard to negotiate a non-strike offense with the prosecutor's office. CP at 300. If the

Cause No. 77532 0

nature of the Kentucky offense. We know the State has standards to apply in exercising its discretion and did not in this case because the State was unaware of the third strike. We know the mitigation specialist had successfully presented mitigation packages in every third strike case in which she was involved; 12 in all. But for his counsel's ineffective representation, a series of events did not occur each of which might have changed the outcome of Crawford's case.

The remedy for counsel's ineffective assistance can be only to put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred. In this case the conviction should be vacated and the case remanded to the trial court to the pretrial stage.

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prosecutor was not inclined to accept the non-strike offense, she testified she would "seek [out] the elected official . . . ." CP at 300.

Cause No. 77532 0

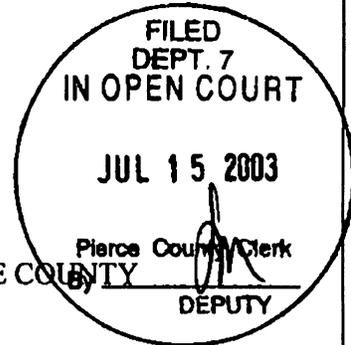
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Dwyer  
Landis  
Chamber

## **APPENDIX “C”**

*State’s Response to Motion to Vacate and Dismiss*



CERTIFIED COPY



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 02-1-06037-6

vs.

DARNELL KEENO CRAWFORD,

STATE'S RESPONSE TO MOTION TO VACATE AND DISMISS CONVICTIONS

Defendant.

**A. PROCEDURAL HISTORY**

Defendant was arraigned on December 31, 2002 on one count of robbery in the first degree and one count of assault in the second degree. A pre-trial hearing was initially scheduled for January 9, 2003, but was re-scheduled to January 15, 2003. On January 15, 2003, the State provided to defense counsel an offer sheet that memorialized the State's plea offer in this case. The State's offer was to have the defendant plead guilty to the original information and the State would recommend the low end of the standard sentencing range on both counts.<sup>1</sup> Further negotiations occurred between the parties when the State learned that the defendant was a suspect in another robbery, however, at no time during the course of this case did the State offer

**ORIGINAL**

<sup>1</sup> A copy of the Offer and Sentencing Worksheet that was given to defense counsel on January 15, 2003 is attached hereto as Exhibit 1.

1 to allow the defendant to plead to anything other than a "strike" offense.<sup>2</sup> Defendant rejected all  
2 of the State's offers and demanded that the case proceed to trial.

3 At the time that the State made the initial plea offer, the only convictions that it had  
4 knowledge of were the Pierce County convictions for unlawful possession of a firearm in the  
5 second degree (UPOF 2), robbery in the second degree and possessing stolen property in the  
6 second degree (PSP 2). That fact is evidenced by the offender score listed in the Offer and  
7 Sentencing Worksheet (Exhibit "1" attached hereto). The State calculated the defendant's  
8 offender score as "5" for each count, which clearly shows that the Kentucky criminal history was  
9 not taken into account when the offer was made. A Criminal History Compilation, which  
10 reflected only the Pierce County convictions, was provided to defense counsel at the time of the  
11 pre-trial conference. Julie Jackson of the Pierce County Prosecutor's Office prepared this  
12 compilation.<sup>3</sup>

13  
14 At the end of February, 2003, the State learned that the defendant had additional criminal  
15 history out of Kentucky. The State obtained certified copies of the Kentucky convictions on  
16 February 24, 2003. At that time, a new Criminal History Compilation was prepared which  
17 reflected the defendant's criminal convictions from Kentucky<sup>4</sup>. A copy of this new compilation  
18 was then provided to defense counsel. This same Criminal History Compilation was attached as  
19 Exhibit "A" to Defendant's Motion and Declaration for Continuance and for Withdrawal of  
20 Counsel. Defendant acknowledges that he was in possession of this document prior to  
21 proceeding to trial.

22  
23 <sup>2</sup> See Declaration of Lisa Wagner, attached hereto as Exhibit "2"

24 <sup>3</sup> The State no longer possesses a copy of the original Criminal History Compilation prepared by Ms. Jackson. The  
25 original Criminal History Compilation that was provided to defense would have reflected only the Pierce County  
Convictions. See the Declaration of Julie Jackson, attached hereto as Exhibit "3".

1 After the defendant rejected all offers presented by the State, the case proceeded to trial  
 2 on April 14, 2003. The jury returned a verdict on April 16, 2003, finding the defendant guilty  
 3 as charged. Following the defendant's convictions on the robbery and assault charges, the State  
 4 began preparing the paperwork for defendant's sentencing, which was continued to May 16,  
 5 2003. It was during this time that the State discovered that the Defendant's prior Kentucky  
 6 conviction for "sex abuse" was comparable to a conviction in Washington for child molestation  
 7 in the first degree, which is considered a "strike" offense (See Declaration of Lisa Wagner,  
 8 Exhibit "2). Defendant's attorney, Ann Stenberg, was given oral notice of this fact and later was  
 9 provided with a sentencing memorandum on this issue.

## 10 **B. LAW AND ARGUMENT**

### 11 1) The State complied with its obligations under CrR 4.7.

12 Defendant argues that his convictions should be vacated and dismissed with prejudice  
 13 pursuant to CrR 8.3(b) and CrR 4.7, based upon "prosecutorial mismanagement and misconduct"  
 14 for failing to provide timely notice that the defendant's 1993 Kentucky conviction for "sex  
 15 abuse" is comparable in Washington to child molestation in the first degree. At the heart of the  
 16 defendant's argument is the suggestion that the State must not only disclose prior criminal  
 17 history to a defendant, but must also interpret that history for the defendant. This is an argument  
 18 completely without merit and wholly unsupported by any authority.

19 The State's obligations as it relates to a defendant's criminal history are set forth in CrR  
 20 4.7. Specifically, CrR 4.7(a)(1)(vi) requires the State to disclose to the defendant:  
 21

22 Any record or prior criminal convictions known to the prosecuting attorney of the  
 23 defendant and of persons whom the prosecuting attorney intends to call as witnesses at  
 24 the hearing or trial.

25 <sup>4</sup> This second Criminal History Compilation was prepared some time after February 24, 2003 (see Exhibit 3, Declaration of Julie Jackson).

1 The purpose of CrR 4.7 is to prevent a defendant from being prejudiced by surprise,  
2 misconduct, or arbitrary action by the government. State v. Cannon, 130 Wn.2d 313, 328, 922  
3 P.2d 1293 (1996). When arbitrary action or governmental misconduct, which may include  
4 discovery violations, prejudices the rights of a defendant, a court may dismiss the prosecution in  
5 the furtherance of justice. Cannon at 328; CrR 8.3(b). Dismissal of a case for discovery  
6 violations is an extraordinary remedy that generally is only available if the defendant was  
7 prejudiced by the State's actions. Cannon at 328.

8 There was no arbitrary action on the part of the State, nor was there any governmental  
9 misconduct in this case. The State complied with its obligations under CrR 4.7 and provided to  
10 defendant two different compilations that documented the criminal convictions known to the  
11 State at the time each was prepared.<sup>5</sup> Defendant was provided with the first criminal history  
12 compilation at the January 15, 2003 pre-trial conference. He was later provided with an  
13 amended compilation, which included the Kentucky convictions, after those convictions were  
14 discovered and confirmed. Defendant had possession of this second compilation prior to the  
15 time that trial began in April, 2003. Both compilations identified: 1) each crime of which the  
16 State had knowledge; 2) the date each crime occurred; 3) the sentencing date for each crime;  
17 and 4) the jurisdiction in which each crime was committed.

18  
19 Despite being provided with this information, defendant argues that the State violated  
20 CrR 4.7 because it did not "provide adequate notice that Crawford's 1993 Kentucky conviction  
21 for 'sex abuse' is comparable to any strike offense." Defendant further argues that this case  
22 should be dismissed pursuant to CrR 8.3(b) due to this alleged discovery violation. Defendant  
23

24  
25 <sup>5</sup> The State provides a compilation of a defendant's criminal history rather than the actual printouts of the criminal histories from the various criminal justice agencies because such printouts contain both conviction and non-conviction data and the State is prohibited by statute from disseminating such non conviction data. See, e.g. RCW 10.97.050.

1 cites to no authority to support this position. Instead, defendant cites to several cases where  
2 courts found sufficient governmental misconduct to justify dismissal, however none of the cases  
3 cited address the issue before this court.

4 Defendant cannot in fact cite to any authority to support his argument that the State must  
5 not only provide notice of the criminal convictions, but must also interpret the information  
6 provided. Defendant's argument fails to take into account an important fact, which is that *this*  
7 *information was already within the defendant's personal knowledge*. It can hardly be argued that  
8 he did not know the details of the "sex abuse" conviction given that he pled guilty to the crime.  
9 Defendant was certainly on notice after receiving the State's Criminal History Compilation that  
10 the "sex abuse" conviction would be considered in his offender score.

11 The State complied with its discovery obligations under CrR 4.7. The State provided  
12 defendant with two different Criminal History Compilations, both of which documented the  
13 prior criminal convictions that the State was aware of at the time they were prepared. CrR  
14 4.7(a)(1)(vi) does not impose upon the State the additional requirement of interpreting the  
15 criminal convictions for the defendant. Defense counsel had every opportunity to review the  
16 criminal history compilations with the defendant and to ask defendant about the "sex abuse"  
17 conviction. It is his conviction after all, and he had every opportunity to discuss the details of the  
18 conviction with his attorney, which would have alerted defense counsel to the nature of the  
19 crime.  
20

21 Defendant argues that he was denied his "constitutional due process rights to a fair trial  
22 through informed preparation and defense against the charges, with full knowledge of their  
23 consequences." In support of this argument, defendant contends that testimony that will be  
24 presented at a later date will support the fact that it is a common practice in Pierce County to  
25

1 give notice that a filed charge subjects the defendant to a third strike and that the prosecutors  
 2 routinely request a mitigation package to attempt to negotiate plea agreement. Unfortunately,  
 3 defendant has failed to file any declaration or affidavit supporting these allegations, rather he has  
 4 asked to court to rely on testimony that will be presented at a later date. The State cannot  
 5 respond to these arguments since they are mere conjecture at this time. Without such supporting  
 6 affidavits/declarations, this court should decline to consider defendant's motion.

7 Defendant has failed to establish that the State violated CrR 4.7. There is no basis for  
 8 this court to dismiss these charges and the court should deny defendant's motion to vacate and  
 9 dismiss.

10 2. Defendant is not entitled to a new trial pursuant to CrR 7.5(a).<sup>6</sup>

11 CrR 7.5(a) provides as follows:

12 The court on motion of a defendant may grant a new trial for any one of the following  
 13 causes, when it affirmatively appears that a substantial right of the defendant was  
 14 materially affected:

- 15 (1) Receipt by the jury of any evidence, paper, document or book not allowed by  
the court;
- 16 (2) Misconduct of the prosecution or jury;
- 17 (3) Newly discovered evidence, material for the defendant, which the defendant  
could not have discovered with reasonable diligence and produced at the trial;
- 18 (4) Accident or surprise;
- 19 (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of  
court, or abuse of discretion, by which the defendant was prevented from  
having a fair trial;
- 20 (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done

21 Here, defendant argues that he should be granted a new trial based upon CrR 7.5(a)(2)  
 22 (misconduct); 7.5(a)(3) (newly discovered evidence); 7.5(a)(4) (unfair surprise), 7.5(a)(5)  
 23 (irregularity in the proceedings); 7.5(a)(7) (verdict is contrary to law); and 7.5(a)(8) (substantial  
 24

25 \_\_\_\_\_  
<sup>6</sup> Defendant mistakenly cites to CrR 7.6 as the basis for his motion for a new trial.

1 justice has not been done). Defendant has failed to show how his alleged lack of knowledge  
2 about the prior strike conviction in any way affected the trial itself. It is clear that the provisions  
3 of CrR 7.5 relate to situations that could have impacted the defendant's trial or right to a fair  
4 trial. Defendant had his "day in court"; he had the opportunity to confront witnesses, to present  
5 witnesses in his defense, to testify if he so chose, and to hold the State to its burden of proof. In  
6 other words, he had the opportunity to present a complete defense to this case, despite the  
7 sentencing issue. Defendant has failed to document in any manner how any of his rights, as they  
8 relate to a fair trial, were affected by his alleged lack of knowledge about the details of his own  
9 criminal history. Again, *defendant did in fact have notice of his criminal history*. He was  
10 apprised of the name, date and jurisdiction for each conviction. He has failed to cite to any  
11 authority supporting his argument that he is owed more than that from the State. Accordingly,  
12 this court should exercise its discretion and deny defendant's motion for a new trial.  
13

14 3. The State disclosed defendant's criminal history in a timely manner.

15 Defendant relies on State v. Copeland, 89 Wn.App 492, 949 P.2d 458 (1998) in support  
16 of his argument that he should be granted a new trial pursuant to CrR 7.5 Copeland, supra can  
17 be readily distinguished from the facts in this case. In Copeland the defendant was convicted of  
18 second degree rape. The State's case relied principally on the credibility of the complaining  
19 witness. The State failed to disclose to defendant the fact that the complaining witness had a  
20 prior felony conviction for theft. Theft is a crime of dishonesty, therefore such a conviction  
21 would have been admissible against the complaining witness to attack her credibility. Because  
22 the defendant had not been given any notice of this conviction, he was prevented from  
23 impeaching the victim on cross-examination. The issue presented to the court was whether the  
24 State had violated the provisions of CrR 4.7 for failing to disclose this prior felony conviction to  
25

1 defendant. The court found that that the State did in fact commit misconduct by failing to  
2 disclose this conviction. Copeland at 498. Having found such misconduct, the court next had to  
3 decide whether the misconduct required a new trial. The court found that because the State's case  
4 essentially relied upon the credibility of the complaining witness, there was a substantial  
5 likelihood that the misconduct affected the jury's verdict. Id. Accordingly, the court reversed  
6 and remanded the case for a new trial. The issue regarding the State's decision to seek a  
7 persistent offender sentence after initially stating that it would not seek such a sentence was  
8 never addressed by the court and did not play a role in the court's decision to reverse and  
9 remand.

10 Defendant's reliance on Copeland is wholly misplaced. The State in this case did in fact  
11 provide notice to defendant of his own criminal history. Defendant has not provided this court  
12 with any evidence showing that his trial strategy or tactics would have changed had he known  
13 that the Kentucky conviction would be considered a "strike" offense in Washington.  
14 Defendant's due process right to a fair trial was not violated. A defendant is entitled to a new  
15 trial if his due process right to a fair trial was violated. State v. Lord, 117 Wn.2d 829, 887, 822  
16 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 121 L. Ed. 2d 112, 113 S. Ct. 164 (1992). Criminal  
17 defendants have a right to a fair trial, measured by reasonable standards. State v. Willis, 67  
18 Wn.2d 681, 689, 409 P.2d 669 (1966). Under the due process clause of the Fourteenth  
19 Amendment and Washington Constitution article I, section 3, prevailing notions of fundamental  
20 fairness also require that a defendant have a meaningful opportunity to present a complete  
21 defense. Lord, 117 Wn.2d at 867. Errors that deny the defendant a fair trial are per se  
22 prejudicial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Defendant had his  
23 opportunity to present a complete defense at trial and has not provided any evidence to suggest  
24  
25

1 otherwise. He simply has failed to show how his right to a fair trial was impacted by his alleged  
2 lack of knowledge about the nature of his criminal history. This court should deny defendant's  
3 motion for a new trial pursuant to CrR 7.5.

4 4. There is no requirement that the State must notify the defendant that he faces a  
5 persistent offender sentence

6 Defendant concedes that the persistent offender statute, RCW 9.94A.030(32), does not  
7 require formal, written notice that a defendant faces a persistent offender sentence. There is also  
8 no case law that requires the State to provide defendant with such written notice. Defendant  
9 correctly points out that our Supreme Court has approved of such notice, however *it has not held*  
10 *that a trial court cannot impose a persistent offender sentence if such notice is not given.* State  
11 v. Thorne, 129 Wn.2d, 736, 78-81, 921 P.2d 514 (1996). There is simply no authority for this  
12 court to find that the State was required to provide such notice to defendant. Defendant was  
13 apprised of his criminal history, including the conviction for "sex abuse." Defendant apparently  
14 knew that his robbery conviction was a "strike" offense. There is every reason to believe that the  
15 defendant would also recognize that his conviction for the rape of a 7 year old child would  
16 qualify as a "strike" offense.

17  
18 Defendant argues on page 16 of his memorandum that, had he known that he faced a  
19 persistent offender sentence upon conviction of the present offenses, he likely would not have  
20 chosen to proceed to trial. This pre-supposes that the defendant would have been given the  
21 opportunity to plead to a "non-strike" offense. There is nothing before this court to support that  
22 suggestion. As evidenced by the attached declaration of Lisa Wagner, the only offers made to  
23 defendant were offers to plead to "strike" offenses. There is no evidence before this court to  
24  
25

1 indicate that the defendant would have been allowed to plead to anything other than a "strike"  
2 offense.

3 More surprisingly, defendant argues that, had his attorney known that he was a potential  
4 three strikes candidate, *a more vigorous defense would have been undertaken on his behalf.*

5 This is a remarkable argument. Defendant was charged with robbery in the first degree, a class  
6 A felony, which has a maximum possible maximum term of life in prison, and assault in the  
7 second degree, a class B felony with a possible maximum term of 10 years. It is difficult to  
8 imagine that an experienced trial attorney would defend a class A felony less vigorously than a  
9 potential three strikes case. The defendant's liberty is at stake in both situations, the  
10 consequences of a conviction are severe in both situations and the defendant is entitled to  
11 competent, vigorous representation in both situations. Defendant does not indicate what steps  
12 would have been undertaken on his behalf to in support of this more "vigorous defense." This is  
13 a spurious argument unsupported by any factual evidence and should not be considered by this  
14 court.  
15

16 Defendant analogizes this situation to one where a defendant is allowed to withdraw his  
17 guilty plea because a mistake had been made which rendered the plea involuntary. Obviously,  
18 this is a completely different situation. Defendant did not give up any of his constitutional rights  
19 and enter a plea, instead he exercised his constitutional rights and demanded a trial by jury,  
20 which was provided to him. Defendant was represented by counsel and had every opportunity to  
21 present a complete defense to the charges. He certainly suffered no prejudice by exercising his  
22 right to a jury trial and he was not denied his right to a fair trial  
23

24 If defendants were allowed seek new trials every time additional criminal history was  
25 discovered between the time of conviction and the time of sentencing, then the courts would be

1 over-flowing with re-trials. It is a common occurrence that additional criminal history is  
2 discovered following a plea or conviction. In fact, the Statement of Defendant on Plea of Guilty,  
3 which is set forth in CrR 4.2, takes into account the possibility that additional criminal history  
4 could be discovered prior to sentencing. The plea form specifically advises a defendant that if  
5 any additional criminal history is discovered following entry of the plea, then there might be an  
6 increase in the standard sentencing range.

7 The State was under no obligation to provide the defendant with formal, written notice  
8 that he faced a persistent offender sentence. The defendant was apprised of his criminal history  
9 and chose to exercise his constitutional right to a jury trial. He received a fair trial and was not  
10 prejudiced by his exercise of this constitutional right. The court should deny defendant's motion.

11 5. Defendant has failed to establish that he received ineffective assistance of counsel.

12 The two-part test for establishing ineffective assistance of counsel is set forth in  
13 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

14 First, the defendant must show that counsel's performance was deficient. This requires  
15 showing that counsel made errors so serious that counsel was not functioning as the  
16 "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant  
17 must show that the deficient performance prejudiced the defense. This requires  
18 showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a  
19 trial whose result is reliable. Unless a defendant makes both showings, it cannot be said  
20 that the conviction .... resulted from a breakdown in the adversary process that renders  
21 the result unreliable.

22 The burden is on the defendant to show that the result of the proceeding would have been  
23 different but for counsel's errors. State v. McFarland, 127 Wash. 2d 322, 337, 899 P.2d 1251  
24 (1995). Defendant has not shown that the outcome of the trial would have been any different had  
25 counsel investigated the "sex abuse" conviction and determined that it was a "strike" offense.

There has been no showing that the defendant received ineffective assistance of counsel.

**C. CONCLUSION**

Based upon the foregoing, the court should deny the relief requested by defendant.

RESPECTFULLY SUBMITTED this 15 day of July, 2003.

GERALD A. HORNE  
Prosecuting Attorney

By: LKW  
LISA K. WAGNER  
Deputy Prosecuting Attorney  
WSB # 16718

lkw

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# EXHIBIT "1"

OFFER AND SENTENCING WORKSHEET

DATE: 1/15/03 DPA Wagner Defense Atty Ann Stenberg

I. DEFENDANT INFORMATION

Defendant: Demarell Crawford Race: \_\_\_\_\_  
D.O.B. \_\_\_\_\_ S.I.D. \_\_\_\_\_  
Sex: \_\_\_\_\_ Cause # 02-1-06037-6

II. PLEA AGREEMENT:

Original Information Y Amend Information to: \_\_\_\_\_  
Other Agreements: \_\_\_\_\_

III. D.P.A RECOMMENDATION:

Court I: 57 mo, LTS 24-48 mo comm c-50  
Court II: 29 mo c/c 110/500/100 out  
Good driver Nic situation strip to comm 6x

IV. CRIMINAL HISTORY: (Known as of this date) Both parties stipulate to the criminal history attached hereto and incorporated herein by reference. Attached

V. OFFENDER SCORE:

	Score	Seriousness Level	Range	Max Term	Max Fine
Ct I:	<u>5</u>	<u>IX</u>	<u>57-75</u>	<u>Life</u>	
Ct II:	<u>3</u>	<u>IV</u>	<u>22-29</u>	<u>10</u>	
Ct III:					
Ct IV:					

VI. JUDGMENT AND SENTENCE PAPERWORK:

Plea \_\_\_\_\_; Conviction: Jury \_\_\_\_\_ Judge \_\_\_\_\_  
Date of Crime 12/2/02 Special Finding \_\_\_\_\_  
Incident # 02360827 Appendices \_\_\_\_\_  
Crime Codes: Ct I \_\_\_\_\_ Ct II \_\_\_\_\_ Ct III \_\_\_\_\_ Ct IV \_\_\_\_\_  
Plea Date \_\_\_\_\_ Sentence at same time? \_\_\_\_\_

VII. ACKNOWLEDGEMENT: The State is relieved of its obligations under this agreement in the event the defendant subsequently re-offends, fails to appear for a court hearing or otherwise violates the conditions of release.

D.P.A. Approval \_\_\_\_\_ Defense Attorney Approval \_\_\_\_\_

EXHIBIT "2"

1  
2  
3  
4  
5  
6 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

7 STATE OF WASHINGTON,

8 Plaintiff,

CAUSE NO. 02-1-06037-6

9 vs.

10 DARNELL KEENO CRAWFORD,

Defendant.

DECLARATION OF LISA K. WAGNER

11 LISA K. WAGNER, being first duly sworn on oath, declares as follows:

12 1. That I am the deputy prosecuting attorney assigned to this case.

13 2. This case was assigned to me shortly after the defendant's arraignment on December  
14 31, 2002.

15 3. At the time that I prepared an offer for the January 15, 2003 pre-trial conference, I only  
16 had knowledge of the defendant's Pierce County criminal convictions. The Criminal History  
17 Compilation that had been prepared by Julie Jackson prior to January 15, 2003 did not reflect  
18 any criminal history from Kentucky. I prepared the pre-trial offer based upon the defendant's  
19 Pierce County criminal history.  
20

21 4. Some time after the January 15, 2003 pre-trial conference, I learned that the defendant  
22 had criminal history out of Kentucky. These Kentucky convictions were not confirmed until  
23 February 24, 2003, which is when my office received certified copies of the Kentucky criminal  
24 convictions.  
25

1           5. Following receipt of these certified copies, Julie Jackson prepared a second Criminal  
2 History Compilation, which reflected the Kentucky convictions as well as the Pierce County  
3 criminal convictions. I provided a copy of this second Criminal History Compilation to  
4 defendant's attorney, Ann Stenberg.

5           6. Although I reviewed the second Criminal History Compilation, I did not realize at that  
6 time that the Kentucky "sex abuse" conviction was an offense that was comparable to the  
7 Washington crime of child molestation in the first degree.

8           7. The first time that I realized that the Kentucky sex abuse conviction was comparable to  
9 the crime of child molestation in the first degree was after the defendant's trial when I began  
10 preparing the sentencing paperwork. At that time I reviewed the Kentucky statutes for all of the  
11 defendant's Kentucky convictions and thoroughly reviewed the certified copy of the judgment  
12 and sentence for the "sex abuse" conviction. The judgement and sentence paperwork for the sex  
13 abuse conviction also contained the defendant's guilty plea wherein he pled guilty to digitally  
14 penetrating the vagina of his seven-year-old niece.  
15

16           8. After going through the comparability analysis, I realized that the Kentucky conviction  
17 was in fact comparable in Washington to the crime of child molestation in the first degree. I then  
18 realized that because the defendant also had a conviction for robbery in the second degree, his  
19 current convictions would be considered his "third strike."

20           9. I advised Ms. Stenberg of the situation by phone, and later provided her with a  
21 sentencing memorandum which outlined the comparability analysis.

22           10. At no time did I attempt to hide the defendant's criminal history from Ms. Stenberg,  
23 and I am assuming that Ms. Stenberg had every opportunity to discuss the criminal convictions  
24 with her client to determine the nature of each conviction.  
25

1           11. On January 15, 2003, I provided Ms. Stenberg with a written copy of my pre-trial  
2 offer in this case. The offer indicated that I would recommend the low end of the sentencing  
3 range for each count in exchange for the defendant' plea to both the robbery and assault charges.

4           12. Ms. Stenberg and I engaged in further pre-trial negotiations after I learned that the  
5 defendant was possibly a suspect in another robbery. However, I never offered to allow the  
6 defendant to plead guilty to anything other than a "strike" offense.

7 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
8 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

9 DATED: July 15, 2003  
10 PLACE: TACOMA, WA

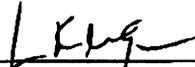
11   
12 \_\_\_\_\_  
13 LISA K. WAGNER, WSB #16718  
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 02-1-06037-6

vs.

DARNELL KEENO CRAWFORD,

Defendant.

DECLARATION OF JULIE JACKSON

JULIE JACKSON, being first duly sworn on oath, declares as follows:

1. I am currently employed at the Pierce County Prosecuting Attorney's Office and have been since 1991.

2. My job responsibilities include the compilation of criminal histories for defendants facing criminal prosecution by the State.

3. I compiled the criminal history summary for defendant Darnell Keeno Crawford.

4. The first compilation I prepared was completed on January 2, 2003. At that time I did not have confirmation that the defendant had criminal convictions from Kentucky and those criminal convictions were not included on the first Criminal History Compilation that I provided to Deputy Prosecuting Attorney Lisa Wagner.

5. According to my notes, I discovered that the defendant had at least one open case in Jefferson County, Kentucky for Fraud, Unlawful Use of a Credit Card and UPCS.

6. I made several phone calls to agencies in Jefferson County, Kentucky to obtain additional information about these charges.

1 7. During the course of these contacts I learned that the defendant had actually been  
2 convicted in Jefferson County, Kentucky on several counts.

3 8. I requested certified copies of the Judgment and Sentence paperwork for all of the  
4 convictions. These certified copies were received on February 24, 2003.

5 9. Following receipt of the certified conviction paperwork, I prepared an updated  
6 Criminal History Compilation, which included the Kentucky convictions and provided that  
7 compilation to Lisa Wagner.

8 10. The "Notes" field on the bottom of the Criminal History Compilation still shows that  
9 the compilation was prepared on January 2, 2003, which is incorrect. I did not update the "date  
10 compiled" when I prepared the second compilation. This date should read February 24, 2003.

11 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
12 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

13 DATED: July 15, 2003  
14 PLACE: TACOMA, WA

15   
16 JULIE JACKSON

## **APPENDIX “D”**

*Verbatim Report of Proceedings,  
Motion to Vacate and Dismiss*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No: 02-1-06037-6  
 ) COA No: 30650-6-II  
 DARNELL K. CRAWFORD, )  
 )  
 Defendant. )

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VERBATIM REPORT OF PROCEEDINGS  
VOLUME 4 of 4

---

BE IT REMEMBERED THAT ON THE 18th day of July, 2003, the following proceedings were held before the Honorable FREDERICK W. FLEMING, Judge of the Superior Court of the State of Washington, in and for the County of Pierce, sitting in Department 7.

The Plaintiff was represented by Deputy Prosecuting Attorney, LISA WAGNER;

The defendant was represented by his attorney, LINDA KING;

WHEREUPON, the following proceedings were had, to wit:

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DARNELL CRAWFORD

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PAMELA ROGERS

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ANN STENBERG

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1 PROCEEDINGS

2 -July 18, 2003-

3 THE COURT: Let's do Darnell Keno  
4 Crawford. Is that your true name?

5 THE DEFENDANT: Yes.

6 THE COURT: Birthdate?

7 THE DEFENDANT: 1/13/66.

8 THE COURT: This is 02-1-06037-6. State  
9 ready to proceed?

10 MS. WAGNER: Yes, Your Honor.

11 THE COURT: Defense ready to proceed?

12 MS. KING: I am if I can find a seat.

13 For the record, I'm Linda King and we're here today  
14 for a sentencing and a motion hearing on my client,  
15 Darnell Crawford, and that's cause 02-1-06037-6.

16 As the Court is well aware, we were set to  
17 have sentencing some time ago and then we set it  
18 over.

19 THE COURT: And you waived your right to  
20 speedy sentencing and now you're now here to have  
21 the matter-- what do you want done?

22 MS. KING: We're asking for an  
23 evidentiary hearing, Your Honor, and the Court  
24 granted us that at the last.

25 THE COURT: I understand that. What do

1           you want now?

2                       MS. KING: We want the Court to allow us  
3 to hold an evidentiary hearing and then argue the  
4 motion to vacate and dismiss, or for a new trial.

5                       THE COURT: I want the record to be clear  
6 what the posture is. So we'll take the motion  
7 first, obviously, and it's a motion to either  
8 dismiss or for a new trial, because he wasn't  
9 advised and didn't know that this would be a third  
10 strike and he faced life in prison with no  
11 discretion with the court.

12                      MS. KING: Correct. But before Your  
13 Honor hearing the argument on that, I think we  
14 really need to take the testimony. I have three  
15 witnesses scheduled, one is Mr. Crawford himself,  
16 with one is Pam Rogers, who's a mitigation  
17 specialist with the Department of Assigned Counsel  
18 for three strikes cases, and the third one is Ann  
19 Stenberg, his former attorney. I think we need to  
20 put them on the stand, just briefly, to have the  
21 evidentiary hearing before the Court hears the  
22 argument.

23                      THE COURT: What are you saying,  
24 Ms. Wagner?

25                      MS. WAGNER: Your Honor, you had

1           previously indicated that you would allow this, so  
2           I'll leave it at the Court's discretion.

3           THE COURT: Briefly.

4           MS. KING: Briefly, we'll try, Your  
5           Honor. I would call Mr. Crawford first.

6           THE COURT: Please come forward.

7           DARNELL CRAWFORD,           Having been duly sworn  
8   under oath, testified as  
9   follows:

10                                   DIRECT EXAMINATION

11                                   BY MS. KING

12       Q     Will you please state your name for the record?

13       A     Darnell Crawford.

14       Q     Will you spell your last name, please?

15       A     C-r-a-w-f-o-r-d.

16       Q     And where are you presently located?

17       A     Pierce County jail.

18       Q     And before we begin questioning you, are you  
19           willing to waive the attorney/client privilege that  
20           exists between you and your former attorney, Ann  
21           Stenberg, in order to answer these questions?

22       A     For the purposes of the hearing, yes.

23       Q     Thank you. And are you also willing to waive any  
24           possible or apparent conflict with the Department  
25           of Assigned Counsel to allow Pam Rogers to testify

1 in that an attorney at DAC testified as a witness  
2 at your trial?

3 A Yes.

4 Q For the purposes of this hearing?

5 A Yes.

6 Q Thank you. Mr. Crawford, what is your knowledge of  
7 your prior convictions?

8 A I know that they exist. I know what my prior  
9 convictions are.

10 Q Let me ask you this a different way. Did you have  
11 an opportunity to review with your attorney,  
12 Ms. King, a criminal history compilation that the  
13 State provided?

14 A No.

15 Q You never reviewed that?

16 A No. I did, yes, on June 6 when it was presented in  
17 a motion, was the first time that I reviewed my  
18 whole compilation, was on June 6.

19 Q Do you agree that the criminal history compilation  
20 is correct as far as you know or as far as your  
21 prior convictions?

22 A Yes.

23 Q And as far as this prior Kentucky sex abuse  
24 conviction, are you aware that this is the real  
25 important conviction that we're concerned about?

1 A Yes.

2 Q Did you have counsel when you were charged with  
3 that crime in the state of Kentucky?

4 A No.

5 Q You didn't have an attorney?

6 A Yes, I had an attorney. Yes. I didn't understand.

7 Q And did you ever discuss the elements of that  
8 crime, if you know, with that attorney?

9 A No.

10 Q Do you still have paperwork from that conviction?

11 A No.

12 Q And just for the record, do you remember the date  
13 that you were convicted in Kentucky for the crime  
14 of sex abuse?

15 A I remember it being in the early '90s, maybe '92 or  
16 something.

17 Q Okay, that's good. And did you have any  
18 discussions at all with your attorney about this  
19 current or these current charges being possibly  
20 three strikes?

21 A No.

22 Q Were you aware of that before you went to trial?

23 A No.

24 Q Do you know what a strike is under Washington law?

25 A Today I know, yes.

1 Q Did you know before trial?

2 A No.

3 Q Do you know, now that you've been convicted, that

4 potentially you face a three strike sentence?

5 A Yes.

6 Q And what, to your knowledge, is that?

7 A Life in prison.

8 Q With the possibility or without the possibility of

9 parole?

10 A Life without.

11 Q Okay. Thank you. Just to give some background in

12 this charge, do you remember the date of this

13 incident?

14 MS. WAGNER: Can you clarify which

15 incident?

16 MS. KING: The charge, current charges,

17 I'm sorry.

18 Q (By Ms. King) Do you remember the date the current

19 charges of robbery one and assault two happened?

20 A Yes.

21 Q When was that?

22 A December 26th is when the incident happened.

23 Q Can you tell us what you took?

24 A I took MP3 Sound Blaster, that's what it was, MP3

25 Sound Blaster.

1 Q Can you tell us what that is exactly, for those of  
2 us who don't really know?

3 A It's a device that's used to plug into the TV or to  
4 your computer to give different effects.

5 Q And Mr. Crawford, why did you take that?

6 A As a Christmas gift.

7 MS. WAGNER: I'm going to object to this.

8 THE COURT: That's not relevant. What is  
9 relevant is he took something with a firearm,  
10 that's what the problem is.

11 MS. KING: Your Honor, it's relevant to  
12 the mitigation testimony that we'll have from  
13 Ms. Rogers regarding the information.

14 THE COURT: I'm going to sustain the  
15 objection.

16 Q (By Ms. King) Before trial did you enter into any  
17 plea negotiations with the assistance of your  
18 attorney?

19 A Yes.

20 Q And what, to your recollection, was the plea offer  
21 prior to trial?

22 A 57 months.

23 Q And do you remember what the standard range, as far  
24 as you knew, was before trial?

25 A I believe it was 57 to 75 months.

1 Q Okay. And why did you not take the plea offer?

2 A Because I felt like my attorney advised me that if  
3 we go to trial we could get the same amount of  
4 time.

5 Q Okay. And as far as you know, if you know, was  
6 that based on the criminal history compilation that  
7 the State provided?

8 A As far as I know.

9 Q What was the first time that you found out that  
10 this current offense or these current offenses  
11 constituted a third strike?

12 A First time I found out was on May 15th.

13 THE COURT: 2003?

14 THE WITNESS: 2003, yes.

15 Q (By Ms. King) And just to clarify, was that after  
16 your conviction?

17 A Yes.

18 Q After jury trial?

19 A Yes.

20 Q If you had known that you were facing a third  
21 strike, would that have affected your decision to  
22 go to trial?

23 A Yes.

24 Q And how?

25 A Because I would have took the advice from my

1 counselor and--

2 Q Let me ask you a slightly different way. If your  
3 attorney had been able to negotiate a plea that  
4 would have been less than a three strike, would you  
5 have done that instead of go to trial?

6 A Yes.

7 MS. KING: I don't have any other  
8 questions for Mr. Crawford. There may be  
9 cross-examination.

10 THE COURT: Ms. Wagner, do you have any  
11 questions?

12 CROSS-EXAMINATION

13 BY MS. WAGNER

14 Q If your attorney had come to you and said you can  
15 plead to something other than a strike, but you're  
16 going to have to serve 30 years, would you have  
17 accepted that?

18 A Excuse me?

19 Q If your attorney had told you you were facing three  
20 strikes but the prosecutor is willing to offer you  
21 something but you have to serve 30 years, would you  
22 have accepted that?

23 A Yes, under circumstances.

24 Q So you wouldn't accept 57 months, but you would  
25 accept 30 years, is that your testimony?

1 A Yes.

2 Q Is it your testimony that your attorney never went  
3 through your criminal history with you?

4 A Yes.

5 Q She never showed you a criminal history  
6 compilation?

7 A The first time I seen my criminal history  
8 compilation was on June 6 when I was going to  
9 sentencing.

10 Q So when she told you what your sentencing range is,  
11 you didn't question that and say how did you get to  
12 that range?

13 A No, it was just we had a brief conversation about  
14 it when I was going to omnibus hearing or pretrial  
15 or something, and I remember she had my file and  
16 she was telling me what my charges was and said  
17 that the prosecutor offered me 57 months.

18 Q And she never told you how that range was obtained?

19 A Not to my knowledge.

20 Q You knew then what your criminal history was,  
21 didn't you?

22 A Yes.

23 Q You knew that Washington had a three strikes law,  
24 didn't you?

25 A No.

1 Q You did not know that?

2 A No.

3 Q You knew that your prior robbery conviction was a  
4 strike, didn't you?

5 A No, I didn't.

6 Q They didn't tell you that when you were convicted?

7 A No, ma'am.

8 Q You knew that you had the prior conviction out of  
9 Kentucky for digitally raping your 7 year old  
10 niece, didn't you?

11 A Yes.

12 Q And you plead guilty to that, didn't you?

13 A Yes.

14 Q And you still had a recall of that, didn't you?

15 A Yes.

16 Q And you knew in fact you had an extensive criminal  
17 history in Kentucky, didn't you?

18 A Yes.

19 Q You knew that you had several criminal felony  
20 convictions in Washington, didn't you?

21 A Yes.

22 Q And you never questioned your attorney about the  
23 sentencing range, despite that extensive criminal  
24 history?

25 A Well, my criminal history, it was in '93 in

1 Kentucky and there was like four charges that I had  
2 and those charges were-- it was like I was-- they  
3 was all put together. It was like a crime spree or  
4 something and I was sentenced under-- I was  
5 sentenced for all those crimes in one court  
6 procedure. And then in Washington I was-- I've  
7 only-- I was only convicted of a robbery or I plead  
8 to a robbery two.

9 Q You plead to a robbery two in 1998?

10 A Yes.

11 Q And they didn't tell you at that time that that was  
12 a strike?

13 MS. KING: Your Honor, asked and  
14 answered.

15 THE COURT: Overruled.

16 Q (By Ms. Wagner) Is that your testimony?

17 A Yes.

18 Q You plead in April of '97 to unlawful possession of  
19 a firearm, didn't you?

20 A Yes.

21 Q In Washington?

22 A Yes.

23 Q And that was based upon prior felony history from  
24 Kentucky, wasn't it?

25 A I'm not sure. I don't know.

1 Q And you also plead in March of '98 to possessing  
2 stolen property in the second degree, didn't you?

3 A If it was, yeah, I guess, if it was a part of the  
4 plea agreement, yes.

5 Q And the sex abuse criminal conviction, you also  
6 plead guilty to bail jumping at the same time,  
7 correct?

8 A Yes.

9 Q So you have at least eight prior felony convictions  
10 that you can recall. You knew that, didn't you?

11 A The way that it was put, I mean to me the  
12 convictions that I had in Kentucky was one  
13 conviction because I was sentenced to-- I was  
14 sentenced for all those crimes at one time and I  
15 didn't-- I wasn't really aware of how the judicial  
16 system goes. And when I came to Washington State I  
17 was unaware of how the judicial system is here. I  
18 never knew of any kind of strikes or I never knew  
19 that there was a point system or anything like  
20 that. In the state where I come from they don't  
21 have this kind of--

22 Q So in 1997 when you plead to unlawful possession of  
23 a firearm you didn't know about the point system?

24 A Yes, at that point is when I find out about the  
25 point system.

1 Q And then in '98, when you plead to the robbery  
2 second, you understood about the point system?

3 A No, not really.

4 Q You're still in Washington, aren't you?

5 A Yes.

6 Q Did you think the point system had gone away?

7 A I didn't know how-- I didn't know how it worked. I  
8 just heard a little bit about how it goes, you  
9 know, for prior felonies or something like that, or  
10 somewhere other, I'm not really sure.

11 Q Well, when Ms. King came to you with the offer to  
12 plea as charged, the State's offer to plea as  
13 charged to the robbery and assault, she told you  
14 those would be strikes, didn't she?

15 A No.

16 Q She never said the word strike to you?

17 A No.

18 Q Didn't tell you what the consequences of pleading  
19 guilty would be?

20 A No.

21 MS. WAGNER: That's all I have, Your  
22 Honor.

23 THE COURT: All right.

24 MS. KING: Just a couple questions to  
25 clarify. Your Honor, could we please mark this as

1 an exhibit?

2 REDIRECT EXAMINATION

3 BY MS. KING

4 Q Mr. Crawford, I'm going to show you what's been  
5 marked as Defendant's Exhibit 1. And without  
6 telling us what it, is does this kind of look  
7 familiar to you? Have you seen something like  
8 this?

9 A Yes.

10 Q Did you see something like this in the context of  
11 discussions with your attorney throughout these  
12 proceedings?

13 A No.

14 Q Ever?

15 A No.

16 Q Never saw it?

17 A No.

18 MS. KING: Okay. I'm going to offer,  
19 even though he says it looks familiar, Your Honor,  
20 I'm going to offer at this time. If there is any  
21 objection from the State?

22 THE COURT: What is it?

23 MS. KING: It's a criminal history  
24 compilation, Your Honor, that was attached to the  
25 declaration of Ann Stenberg, but I'd like to offer

1           it as an actual exhibit.

2                   MS. WAGNER:  If he doesn't recognize it,  
3           I know that's been made part of the pleading Your  
4           Honor, counsel submitted it as part of a motion, so  
5           it's part of the record at this point.

6                   MS. KING:  Right, but I prefer to make it  
7           an exhibit just for the record, Your Honor.

8                   THE COURT:  That's all right.  I'll admit  
9           it.

10                   MS. KING:  Thank you, Your Honor.

11   Q           (By Ms. King) Mr. Crawford, when the prosecutor  
12           asked you you were willing to take 30 years but not  
13           57 months before, just to clarify, was that in the  
14           context that now you know you would be facing a  
15           third strike and life in prison without possibility  
16           of parole?

17   A           Absolutely.

18   Q           So if the prosecutor's offer had been 30 years  
19           before you knew this was a third strike, would you  
20           have been willing to take that?

21   A           Could you please ask that?

22   Q           If the prosecutor's offer at the time you did plea  
23           negotiations was 30 years instead of 57 months, but  
24           you didn't know this was a third strike, would you  
25           have accepted it then?

1 A No.

2 Q And as far as discussing your criminal history, did  
3 you pretty much rely upon your attorney giving you  
4 what was your offender score?

5 A Yes.

6 Q And did you understand at the time of pretrial  
7 negotiations that everyone believed your offender  
8 score was a five?

9 A Yes.

10 Q And that your standard range was 57 to 75 months?

11 A Yes.

12 Q And did you understand before trial that the  
13 consequences of going to trial was going to be the  
14 standard range, was that your belief?

15 A Exactly.

16 MS. KING: I don't have any other  
17 questions.

18 MS. WAGNER: Two follow-up.

19 RE CROSS EXAMINATION

20 BY MS. WAGNER

21 Q How did you think your offender score was five when  
22 you knew you had about eight prior felony  
23 convictions?

24 A Like I said, I don't know how the system works as  
25 far as the points or whatever, I don't know how

1           they're added. I didn't know how they was added up  
2           or how they took in effect of one charge and add  
3           them up to two points or whatever. I didn't know  
4           how it goes. I just relied on my attorney to tell  
5           me what it was that I was facing.

6    Q       So in your three prior convictions in Washington  
7           not a single attorney went through with you the  
8           grid system and the point system?

9    A       No.

10   Q       But you knew you had an offender score of five,  
11           that was your testimony?

12   A       Yes.

13   Q       And you didn't question what five meant?

14   A       I didn't, to be honest with you, no. I take that  
15           statement back. No, I didn't know that my offender  
16           score was five. I just knew that I was facing 57  
17           to 75 months.

18                   MS. WAGNER: I have nothing further, Your  
19           Honor.

20                   MS. KING: I have no further questions of  
21           Mr. Crawford.

22                   THE COURT: You may step down.

23                   MS. KING: The next witness that defense  
24           will call is Pamela Rogers from the Department of  
25           Assigned Counsel.

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PAMELA ROGERS,

Having been duly sworn  
under oath, testified as  
follows:

DIRECT EXAMINATION

BY MS. KING

Q Will you please state your name and spell your last name for the record?

A Pamela Rogers, R-o-g-e-r-s.

Q And Ms. Rogers, what is your position?

A I'm the mitigation specialist and investigations administrator at Department of Assigned Counsel.

Q And how long have you been in that position?

A Since September of '99.

Q And what was your experience? Just summarize very quickly before that time.

A During the early 80's I was defense investigator with the public defender's office in Oregon. And in the later 80's I began the career as mitigation specialist and investigator. I investigated background in mainly death penalty cases and prepared for death penalty sentencing hearings.

Q So at DAC, can you explain what kind of mitigation you do there?

A I do almost all of the death penalty capital

1           aggravated murder cases that come in into the  
2           county, and I also put together mitigation packages  
3           on three strikes cases.

4   Q       Okay. And would you say technically that you're  
5           kind of a custodian of the DAC files in the sense  
6           that you have access to them?

7   A       I have access to all the files.

8   Q       Okay.

9                         MS. KING: Your Honor, I would mark at  
10           this time Defense Exhibit 2, and it's actually  
11           three documents. If I can staple them together as  
12           one exhibit it might be easier. Just for the  
13           Court's information, they're sample persistent  
14           offender notices on three strikes cases from other  
15           cases.

16                        THE COURT: Any objection to the  
17           admission?

18                        MS. WAGNER: Not for the purposes of this  
19           hearing, Your Honor.

20                        THE COURT: All right. I'm going to  
21           admit them. They are notices for mitigation  
22           packages from three strikes cases?

23                        MS. KING: Right.

24   Q       (By Ms. King) Ms. Rogers, can you take a look at  
25           this exhibit? Have you seen those documents

1 before?

2 A Yes.

3 Q And can you explain what they are, for the record?

4 A This is the persistent offender notice that we  
5 received from the prosecutor's office giving us the  
6 heads up, if you will, that this will be treated as  
7 a third strike.

8 Q And without saying the names of those defendants or  
9 the cause number on those three samples, what are  
10 the dates that the cases were?

11 A The first is the 23rd of May, 2003, another is 9th  
12 of January, 2001, the third is 15th of December  
13 1998.

14 Q Okay. And in your experience as the mitigation  
15 specialist for three strikes cases at DAC, do they  
16 rely on those notices?

17 A We do rely on these notices.

18 Q And how, in your experience or understanding, does  
19 DAC receive those notices?

20 A My understanding is we either receive them at  
21 arraignment or we receive them later in discovery,  
22 but early on in the case.

23 Q Thank you. And what happens when you receive a  
24 notice like this?

25 A Typically the attorney will put together a request

1 to me, make a copy of the discovery, and pass this  
2 on to me, and say help, I need a three strikes  
3 case. And then I do the background investigation  
4 and investigate-- assign an investigator to the  
5 current case, the facts portion of that case, and  
6 we prepare a mitigation package.

7 Q What kind of information goes into a mitigation  
8 package that would be mitigated against a life  
9 sentence, such as a three strike sentence?

10 A First of all, I would send for records and get as  
11 much background information as I possibly could. I  
12 talk to family members, do an extensive social  
13 history, and do try to offer to the State an  
14 explanation for this behavior, not an excuse, but  
15 some kind of understanding as to how we got to this  
16 point.

17 Oftentimes there might be psychological  
18 records. There could have been trauma in the  
19 family. There could have been a lot of different  
20 mitigating issues, and I try to explain that in a,  
21 you know, a credible concise package to the State.  
22 And oftentimes that will include a plan for if this  
23 person does, you know, X amount of time for a  
24 certain amount of time, is released, here is our  
25 plan to see that they not reoffend, to give them

1 the best possible options for living well after  
2 this incident, you know, short of a life sentence.

3 Q So could you explain for the Court what happens if  
4 a mitigation package is successful or accepted by  
5 the State?

6 A There's usually negotiation.

7 Q Or plea to a less than three strike?

8 A Right, exactly.

9 Q How many mitigation packages, approximately, have  
10 you done at the time you've been at DAC?

11 A I think I've done directly, or been involved in,  
12 about 12, about.

13 Q And of those, how many do you remember that were  
14 successful?

15 A All of my packages have been successful.

16 Q So have any of your defendants that you've done  
17 mitigating packages for ever had a life sentence?

18 A Not that I'm aware of. I believe not.

19 Q Is the date of the incident or the time of the  
20 incident something that would go into a mitigation  
21 package?

22 A It could well. It oftentimes, and I've seen this  
23 in something I learned from death penalty cases, is  
24 that I'll look for-- if the incident happened near  
25 a holiday, major holiday, usually Christmas, or New

1 Year's, that sort of thing, I'll look back through  
2 records for a pattern of acting out during  
3 holidays. Oftentimes it might be an extenuating  
4 family circumstances. There could have been a  
5 trauma early on during a holiday, and it's not  
6 uncommon to see repeated behaviors right during the  
7 holidays. They can be very stressful times.

8 Oftentimes you may have a situation where the  
9 person came from a very, very poor home life and  
10 where the holidays become very stressful, they want  
11 to do things for family members, they can't do  
12 that, or that sort of thing. I try to explain the  
13 crime.

14 Q Now, going to kind of a different area of  
15 information. Let's talk about criminal history a  
16 little bit. You've been an investigator. Do you  
17 sometimes do investigations at DAC?

18 A Yes.

19 Q What direct access to criminal history data do you  
20 have as defense counsel?

21 A We have direct access to LINX, which is the county-  
22 wide system, and AOC, which is the state-wide  
23 system.

24 Q Does just DAC have that or do panel attorneys or  
25 private defense attorneys have access to those?

1 A I can tell you that the panel attorneys for DAC  
2 have access to that through us.

3 Q Okay. Do you have any direct access to out of  
4 state conviction data?

5 A None.

6 MS. KING: And those are all the  
7 questions that I have for Ms. Rogers at this time.

8 THE COURT: Do you have any questions  
9 Ms. Wagner?

10 CROSS-EXAMINATION

11 BY MS. WAGNER

12 Q There's no requirement that the State accept a  
13 mitigation package, is there?

14 A Accept it?

15 Q Yes.

16 A You mean accept it as in agree to negotiate?

17 Q Correct.

18 A Oh, no, not that I'm aware of.

19 Q And you're not aware of any requirement that the  
20 State actually advise the defendant that he faces a  
21 persistent offender sentence, are you?

22 A I'm not a lawyer.

23 Q You're not aware of that though, are you?

24 A No.

25 Q And it's not your testimony that every defendant in

1           Pierce County who has faced persistent offender  
2           sentence has in fact had that sentence mitigated?  
3    A    No, I wouldn't. I wouldn't say that.  
4    Q    And you have no mitigation evidence to present in  
5           this hearing, do you?  
6    A    I have not investigated this case.  
7    Q    So you have no idea if there is anything mitigating  
8           about the circumstance, do you?  
9    A    I would say my rule of thumb is there's always  
10           mitigation.  
11   Q    Always mitigation?  
12   A    Always mitigation.  
13   Q    From a defense perspective?  
14   A    From my-- I mean it's something I've learned in  
15           training a long time ago; if you're not finding the  
16           mitigation, you're the problem. I mean perhaps the  
17           State wouldn't agree it was mitigation.  
18   Q    Perhaps not. So when you talked about the  
19           explanation for the behavior, you're talking about  
20           explanation for the behavior of the current crime,  
21           correct?  
22   A    And previous crimes, certainly. It's a third  
23           strike, so I might address the other crimes, too.  
24   Q    Raping a 7 year old, you might try and figure out  
25           an explanation behind that?

1 A I certainly would try.

2 Q And prior robberies?

3 A Not excuses mind you, but yes, explanations.

4 MS. WAGNER: I have nothing further.

5 THE COURT: You may step down. Do you  
6 have any more witnesses?

7 MS. KING: One more, Your Honor. Ann  
8 Stenberg.

9 THE COURT: Please come forward.

10 ANN STENBERG, Having been duly sworn  
11 under oath, testified as  
12 follows:

13 DIRECT EXAMINATION

14 BY MS. KING

15 Q Could you please state your name and spell your  
16 last name for the record? Actually, spell both  
17 first and last name.

18 A Ann Stenberg, A-n-n S-t-e-n-b-e-r-g.

19 Q How many years have you been in the practice of  
20 law?

21 A Ten.

22 Q And are you on the defense panel, as we call it, in  
23 Pierce County?

24 A Yes.

25 Q And could you just briefly explain that for the

1 record?

2 A That is a situation where attorneys will belong to  
3 a panel, private attorneys with private practices  
4 will belong to a panel and accept cases from the  
5 Department of Assigned Counsel where there is a  
6 conflict, as there was in this case. One of the  
7 witnesses in this case was an employee of the  
8 Department of Assigned Counsel.

9 Q Thank you. And you've heard Mr. Crawford testify  
10 that he's willing to waive the attorney/client  
11 privilege. Are you willing to waive that as well?

12 A Yes, I am.

13 Q And what is your primary area of practice?

14 A Criminal defense.

15 Q What percentage of your practice would be, you say,  
16 is criminal defense?

17 A 90.

18 Q And when were you assigned to this case,  
19 approximately, to the best of your knowledge?

20 A I believe it was late January of 2003 or early  
21 February. But my notice of appearance from the  
22 Department of Assigned Counsel is not dated.

23 Q I'm going to show you what's been marked as  
24 Defendant's Exhibit 1. Does this look familiar to  
25 you? And for the Court's information, this is the

1 compilation history.

2 A Yes, I believe this is the second criminal history  
3 compilation I received from the prosecutor in this  
4 case.

5 Q Thank you. Do you remember if you ever showed  
6 this, physically showed it, to Mr. Crawford?

7 A I believe that I did show it to him because it  
8 included the new information from the State of  
9 Kentucky. I think I may have passed it by him but  
10 retrieved the document. It's nothing I ever left  
11 with him, and something I retained in my file.

12 Q Is this a typical document that you received from  
13 the State for criminal history?

14 A Yes.

15 Q Do you ever get any actual conviction data, like  
16 the judgment and sentence, from like for instance  
17 even a Washington State conviction or out of state  
18 conviction?

19 A The only time that will happen is, generally  
20 speaking, in a third strike case. The prosecutors  
21 are likely to prepare certified copies of judgment  
22 and sentence ahead of time or in a case where they  
23 need to prove up a predicate crime for possession  
24 of a firearm, something like that.

25 Generally speaking, for notification of

1           outstanding criminal history we do not receive  
2           judgment and sentences, nor any information about  
3           the underlying crime.

4    Q       How many strike cases, to the best of your  
5           knowledge, have you had?

6    A       Three, I believe.

7    Q       Do you have access to out of state conviction data?

8    A       No, I do not.

9    Q       So do you rely on the State's production of this  
10           kind of information?

11   A       Yes, I do.

12   Q       Have you ever had an out of state conviction that  
13           was comparable to a Washington conviction?

14   A       Yes.

15   Q       And did the State then produce the certified copies  
16           of the out of state conviction data?

17   A       Well, it depends, I'm not remembering specifically.  
18           I don't think they would necessarily, nor would I  
19           request it, unless we were in a three strikes  
20           posture.  If it, say, was a second strike or a non-  
21           strike felony, I don't think it would be produced  
22           nor requested.

23   Q       Right.  But if you're in a three strikes posture,  
24           do you recall ever getting that kind of  
25           information?

1 A I'm just not certain any of three strike cases  
2 included out of state comparable felonies.

3 Q So you say you've had about three of them. All  
4 three, did you receive the persistent offender  
5 notice? And actually, while I ask you that  
6 question I'll show you what's been marked as  
7 Defendant's Exhibit 2. Have you ever received a  
8 notice like this?

9 A Yes.

10 Q Is that pretty much typical?

11 A Yes, it is.

12 Q Would you say that that's the practice in Pierce  
13 County?

14 A Pierce and Thurston County as well.

15 Q In the three strike cases that you had, did you  
16 receive notices on all three of them?

17 A Yes, I did.

18 Q And what do you do as part of your practice when  
19 you receive a notice like that?

20 A Well, I take a very serious posture towards the  
21 case, understanding the gravity of the potential  
22 sentence. I would be, in every circumstance, hire  
23 at the very least an investigator. I most  
24 certainly would have someone on hand to be a  
25 mitigation specialist, that could be a psychologist

1 or a private investigator or someone like  
2 Ms. Rogers who does mitigation exclusively. I  
3 would prepare a mitigation specialist. I would  
4 seek a longer amount of time to prepare the case so  
5 that I'm dotting all my i's and crossing all my  
6 t's, and I would strive very much to negotiate a  
7 non- strike offense with the prosecutor's office.  
8 I would return time and time again, if that that's  
9 what it took. I would probably seek the elected  
10 official out if I was not making progress with the  
11 deputy. There's many different things I would do  
12 in a third strike case that we did not have the  
13 opportunity to do in this one.

14 Q As far as you're aware, is the Court ever aware of  
15 all these underlying events that are going on for  
16 negotiations for mitigation and whatnot?

17 A No.

18 Q So what the Court sees then is what?

19 A The Court sees the net result of either failed  
20 negotiations, and therefore a trial, or the parties  
21 coming together having resolved the case in some  
22 sort of negotiated style.

23 Q In your opinion, having had three strikes-- three  
24 three strikes cases in ten years of practice, is  
25 part of the success in the negotiations the fact

1           that the State bears some risk of going to trial?

2    A       Yes.

3    Q       Okay. As far as Mr. Crawford's actual case, did  
4           you receive any notice of any kind, oral, written,  
5           anything prior to trial that his Kentucky  
6           conviction was comparable to a Washington strike?

7    A       None whatsoever.

8    Q       When did you receive a notice?

9    A       The notice containing the Kentucky information?

10   Q       Right.

11   A       I believe that was about a month prior to trial and  
12           it was not-- that would be have been, let's see,  
13           March. Sometime in March is my best recollection.  
14           The prosecutor did alert me to the fact that new  
15           history had been found. I believe that's the time  
16           that I brought it back to Mr. Crawford and showed  
17           him the document. We still were in agreement that  
18           he had five felony points with the standard range  
19           of 57 to 75. We were still in a posture where  
20           Mr. Crawford really only risked the high end of the  
21           standard range by proceeding to trial.

22   Q       Was there anything to put you on notice, when you  
23           received that compilation showing the Kentucky  
24           conviction, that that was a possible strike?

25   A       No, there wasn't. The Kentucky conviction said on

1 the compilation sex abuse, without designating a  
2 degree. Furthermore, it was combined, as  
3 Mr. Crawford testified, with the bail jump and  
4 indicated that the sentence had been for a year.  
5 So my appraisal of that situation was that it  
6 likely was a sex misdemeanor of some sort.

7 Q Now, before you testified I showed you the State's  
8 brief that they filed in this case?

9 A Correct.

10 Q And also I believe there was attached to the  
11 State's sentencing memorandum, actually, and I'm  
12 going to show you, because it's part of the  
13 records, I'm not going to make this one an exhibit,  
14 but this is a plea offer out of Kentucky. And  
15 you'll note there, what is that at the bottom of  
16 the page?

17 A At the bottom?

18 MS. WAGNER: Sorry, counsel, what are you  
19 showing her?

20 MS. KING: It's attached to your  
21 sentencing memorandum.

22 MS. WAGNER: I just didn't hear.

23 MS. KING: This is certified copies of  
24 the Kentucky actual plea.

25 MS. WAGNER: Okay.

1 Q (By Ms. King) What is that at the bottom?

2 A At the bottom of this Kentucky document is a brief  
3 synopsis of the facts of the case which indicate  
4 that between December 16 and December 20, 1991, the  
5 defendant digitally penetrated the vagina of his 7  
6 year old niece in Jefferson County, Kentucky.

7 Q Did you ever see this document prior to trial?

8 A No.

9 Q If you had seen this document, would this have put  
10 you on notice that that conviction was a potential  
11 strike as compared to a Washington strike offense?

12 A Without question.

13 Q When did you first get notice that he was facing a  
14 three strikes sentence?

15 A Approximately three weeks after the verdict was  
16 rendered.

17 Q Now, when you were undergoing the plea  
18 negotiations, you just testified that you  
19 understood the standard range was 57 to 75 months.  
20 Did you advise the defendant as to going to trial  
21 versus taking a plea?

22 A Yes. My recollection is that Mr. Crawford was not  
23 interested in taking a plea under the  
24 circumstances, a plea as charged offer, and I had  
25 to agree with him; was not much inducement to plea

1           rather than take a chance at prevailing at trial.

2       Q     But was this with the understanding that the  
3           potential maximum was 75 months?

4       A     Definitely.

5       Q     Okay. Did you ever discuss with Mr. Crawford, you  
6           heard him testify, what a strike is or whether his  
7           prior conviction of a robbery was a strike?

8       A     I don't believe that I did. I think his testimony  
9           was accurate. For one thing, we didn't believe we  
10          were in a strike posture or a three strikes  
11          posture, so there would have been no reason to  
12          discuss strikes on that basis. He was never  
13          interested in pleading guilty, so we didn't sit  
14          down and carefully detail what was a strike, what  
15          wasn't a strike, whether this would be a second or  
16          first strike, nor did we go over plea paperwork  
17          which notifies the defendant of whether this  
18          conviction is a strike.

19      Q     Did you ever discuss his current offenses are  
20          strike offenses?

21      A     I don't believe we did discuss that.

22      Q     So you heard his testimony where he said nobody  
23          discussed it for his prior conviction. Would that,  
24          in your experiences of ten years as defense  
25          counsel, be unreasonable or likely?

1 A Well, as I say, I think he is accurately  
2 representing that he and I never discussed. We  
3 never had a reason to discuss strike offenses. I  
4 knew that he had criminal history. He was somewhat  
5 savvy about his options, and because we were going  
6 to trial we really more focused on witnesses and  
7 discovery issues than the consequences of his-- of  
8 this particular offense. And because he was not in  
9 a third strike situation, I don't think I advised  
10 him that, you know, this is going to be your second  
11 strike if we lose. I don't think I did that.

12 Q If you had known before trial, and if you had  
13 undergone doing the mitigation package and been  
14 offered a plea that was less than a strike, would  
15 you then have advised him to take the plea?

16 A Absolutely.

17 MS. KING: Okay. I don't have any other  
18 questions at this time, Your Honor.

19 THE COURT: Ms. Wagner?

20 CROSS-EXAMINATION

21 BY MS. WAGNER

22 Q Ms. Stenberg, it's your testimony that at no time  
23 you discussed with the defendant what a strike was?

24 A I really don't have any recollection that that ever  
25 happened. There was never a reason to discuss what

1 a strike offense was, whether this was or wasn't.  
2 Mr. Crawford was never willing to negotiate, rather  
3 he wanted to go forward to trial. That was his  
4 posture in the case the whole time. We never  
5 looked at a plea document, in other words.

6 Q You had an initial criminal history or the initial  
7 criminal history compilation that did not include  
8 the Kentucky criminal history, correct?

9 A I did.

10 Q And then later, you said in about March, got the  
11 second one?

12 A Correct.

13 Q And yet you still thought the sentencing range  
14 would be the same even though you saw all those  
15 additional Kentucky convictions?

16 A Well, I think the offer from the State remained the  
17 same, which led me to believe that we were still  
18 probably all on the same page, that maybe even the  
19 State had interpreted those Kentucky convictions as  
20 misdemeanors, because the offer remained  
21 throughout, even before we were notified of  
22 Kentucky convictions, five points, 57 to 75.

23 Q Ms. Stenberg, isn't it true that an offer was made  
24 if he plead guilty to this particular robbery, they  
25 wouldn't charge a second robbery?

1 A Yes, that was additional feature at one point.

2 Q But ranges weren't discussed at that point, were  
3 they?

4 A I don't recall.

5 Q And in no time, despite the possibility of either  
6 conviction or plea, you never talked to the  
7 defendant about what a strike offense was?

8 A As I say, I don't believe there was reason to  
9 discuss a strike offense.

10 Q You discussed his offender score with him though,  
11 right?

12 A Right.

13 Q You didn't take-- undertake any investigation into  
14 the Kentucky criminal history, even though it did  
15 indicate that it was felony criminal history,  
16 correct?

17 A Well, as I say, also from the State's point of  
18 view, the points were not changing, so no, I didn't  
19 view those as a risk to my client in any way.  
20 Because it seemed to me my understanding with the  
21 State of Washington was that he had five points at  
22 the beginning, and after the discovery of the  
23 original criminal history.

24 Q Ms. Stenberg, the State didn't provide you with a  
25 second written offer after the second criminal

1 history compilation came in, did it?

2 A I don't believe so.

3 Q So there were no discussions with the State after  
4 that second criminal history came in that  
5 specifically said he's still a five?

6 A That's correct. That is correct. There was no  
7 notification in writing by plea agreement that this  
8 was-- he was a five or a seven or a eight.

9 Q Was simply your assumption that he was still a  
10 five, despite seeing this additional history?

11 A Yes.

12 Q Did you talk to the defendant about these criminal  
13 convictions from Kentucky?

14 A Yes, I think briefly. I don't recall that he was  
15 much of a historian on them and he certainly  
16 minimized whatever was happening in Kentucky, to  
17 me. Certainly did not tell me that he digitally  
18 penetrated his niece.

19 Q When you say he minimized, what do you mean?

20 A Well, I remember when I showed him the Kentucky  
21 convictions, he, you know, and asked what was going  
22 on here, I did not hear about the fact that it was  
23 a rape situation. He made it seem as though it  
24 were minor, and in my mind that was confirmed by  
25 the fact that his sentence had been a year.

1 Q He made it seem like it was minor, which suggests  
2 to me that you did in fact discuss that conviction  
3 with him?

4 A I think briefly.

5 Q What did he tell you?

6 A I'm not remembering specifically, and the best I  
7 can do is to tell you that he brushed over it.

8 Q Is the reason you discussed it was because you  
9 wanted to determine whether it was misdemeanor or  
10 felony?

11 A Yes.

12 Q Okay. And the State had it listed as a felony,  
13 correct?

14 A I don't believe so. I don't believe that that is  
15 the case. The second compilation has no degree of  
16 the charge. It simply says sex abuse and given the  
17 one year.

18 Q Ms. Stenberg, I'm going to hand you what's been  
19 marked as Plaintiff's Exhibit 1. Is there a  
20 section there marked adult felony convictions?

21 A Yes.

22 Q Where is that sex abuse conviction listed?

23 A In the adult felony convictions.

24 Q It's not listed as a misdemeanor, is it?

25 A No.

1 THE COURT: It's actually Defendant's 1.

2 MS. WAGNER: I apologize, Your Honor.

3 Q (By Ms. Wagner) You say he minimized it. Did you  
4 ask him about the details behind the conviction?

5 A No.

6 Q Didn't ask him what he did to cause him to be  
7 convicted of that?

8 A Well, if I did, I can tell you he didn't tell me  
9 that. I never learned it was a rape situation.

10 Q Did you ever ask the State for additional  
11 information about that conviction?

12 A No. It's been my experience that the State  
13 provides documents in its possession or information  
14 in its possession as it comes upon them.

15 Q Did you ever undertake to look into the Kentucky  
16 statutes?

17 A No, I did not.

18 Q You said that the defendant was, quote, savvy about  
19 his options. What did you mean by that?

20 A What I meant by that was that he was quite  
21 comfortable in rejecting pleas and wanting to go  
22 forwards to trial. He wasn't-- he did not appear  
23 too rattled by having been charged and being in  
24 custody, and he seemed like he was-- he had a  
25 relative level of comfort with his options.

1 Q Did you talk to him about offender scores and how  
2 you reach the offender score of five?

3 A I think originally. I don't have a clear memory of  
4 that, but that's one of the first things I do with  
5 the new client, is sit down and review criminal  
6 history and talk about offender score. I think at  
7 that time I had a written plea offer which  
8 designated five as the State's understanding of his  
9 offender score, so we worked with five from that  
10 point forward.

11 Q So you went over with him the grid system and how  
12 you reach offender score in any given case?

13 A I think he knew all of that.

14 Q Why do you think that?

15 A Because he demonstrated an understanding of what I  
16 was talking about when I talked offender score and  
17 standard ranges.

18 Q Your testimony was that had you known this was a  
19 three strike case, you would have done several  
20 things differently. What would you have done  
21 differently in terms of preparation for the trial?

22 A Well, all this behind the scenes effort, I guess  
23 that doesn't respond to your question. I assuredly  
24 would have had an investigator on hand to help me  
25 with the case, because I did not realize it was a

1           third strike and because the factual pattern, the  
2           fact pattern in this case was relatively simple, it  
3           was a shoplifting turned into a robbery, and I felt  
4           I understood it. I opted not to use an  
5           investigator, but I certainly would have had an  
6           investigator, and I probably would have asked that  
7           person to spend more time with the clients. I  
8           would have at least had an investigator.

9    Q     You knew that this was a Class A felony?

10   A     I did.

11   Q     You knew what the sentencing range was?

12   A     I did.

13   Q     And even though we are both operating under the  
14           mistaken assumption that he was facing a maximum of  
15           75 months, that's still approximately five years,  
16           correct?

17   A     Correct.

18   Q     A substantial amount of time?

19   A     It is.

20   Q     And you zealously represented your client, didn't  
21           you?

22   A     I did.

23   Q     To the best of your ability?

24   A     I did.

25   Q     You have no evidence to present to this Court

1           today, do you, that you would have been able to  
2           uncover anything that would have changed the  
3           outcome of this trial, do you?

4    A       Well, that's just the point; I never had an  
5           opportunity to try. I may have been able to  
6           convince you that he was worth a shot at a non-  
7           strike conviction to resolve this case. I may not,  
8           but we'll never know because I wasn't able to try.

9    Q       And I appreciate what you're saying, Ms. Stenberg.  
10           My question is with regard to this trial do you  
11           have any evidence to provide this Court today that  
12           would suggest the outcome of the trial would have  
13           been different had you known this was a three  
14           strike?

15                       MS. KING: I think she just answered that  
16           question, Your Honor.

17                       THE COURT: I'll allow her to answer.

18    A       The trial itself?

19    Q       (By Ms. Wagner) Correct.

20    A       No. I think he still with would have had the same  
21           witnesses. I probably would have done the same  
22           cross-examination.

23                       MS. WAGNER: That's all I have, Your  
24           Honor.

25                       THE COURT: All right. You may step

1           this conviction in Kentucky meant, would have done  
2           a better job at trial?

3                   MS. KING: I think not only would she  
4           have done a better job by hiring an investigator--

5                   THE COURT: In other words, even though  
6           he was facing five or six years plus, plus wasn't  
7           there a firearm enhancement issue and whatever it  
8           was, she wasn't giving her best shot?

9                   MS. KING: Your Honor, I think the more  
10          critical question is could we have avoided a third  
11          strike conviction by mitigation. And Ms. Rogers  
12          testified that out of the 12 mitigation packages  
13          she's done, and I have to say she's really good,  
14          all of them have been successful.

15                  THE COURT: I heard that testimony and  
16          that was impressive facts. But again, I'm having  
17          trouble with an attorney representing an individual  
18          civilly or criminally. You know, you're sworn from  
19          the very beginning to do the very best you can to  
20          represent your client, and I have to believe that's  
21          what happened here.

22                  MS. KING: Well, Your Honor, but that  
23          begs the question--

24                  THE COURT: And also, you couple that  
25          with what this defendant's criminal history is, I

1 mean aside from it being whether or not we defined  
2 it as a third strike, he has, I guess it's not  
3 disputed, he has eight felony convictions. And  
4 you're trying to tell this Court that even though  
5 they would have reduced this down to a felony, from  
6 a felony to a non-third strike felony, but with his  
7 extensive criminal history we're still going to let  
8 him off the hook; that is what you're trying to  
9 say?

10 MS. KING: Your Honor, with all due  
11 respect, can I make my argument for the record?

12 THE COURT: I'm trying to help you, tell  
13 you what's going through my mind.

14 MS. KING: You're putting the horse in  
15 front of the cart, Your Honor.

16 THE COURT: I think I'm helping you,  
17 telling you what to focus on. Whether you convince  
18 me or the appellate court, that's what the problem  
19 is going to be, I think.

20 MS. KING: Well, the real problem is I  
21 need to make my argument, because it sounds like  
22 you've already made up your mind and I would like  
23 to at least make my argument.

24 THE COURT: I haven't said that. I must  
25 point some things out that are on my mind.

1 MS. KING: Let me go through a couple  
2 points I think are important. I think one of the  
3 most important points I found out in this whole  
4 case is the State's sentencing memorandum that they  
5 filed right when this first came to light. The  
6 prosecutor admitted that they received certified  
7 copies of the Kentucky conviction, not just the  
8 compilation, but certified copies of the judgment  
9 and the plea agreement, and that's attached to the  
10 defendant's sentencing memorandum that would have  
11 put defense counsel on notice before trial that  
12 this was a potential third strike.

13 Now, irrespective of whether the result might  
14 have been different, the State has an obligation  
15 under discovery rule CrR 4.7. We don't guess  
16 whether it's going to be a different result.  
17 That's putting the horse before the cart. What we  
18 know is that that's an obligation on the part of  
19 the State, Your Honor. They can't pick and choose  
20 and say well, this isn't going to be a successful  
21 case so we're not going to turn this over. They  
22 have a mandatory obligation under 4.7 to turn over.  
23 You know, the language of the rule doesn't just say  
24 criminal compilation, that's something that's  
25 prepared by the State. The language of the rule

1 says, and I'm quoting, any record or prior criminal  
2 conviction.

3 And on February 24 of 2003, before trial, they  
4 had the actual certified copies of these documents  
5 in their hands, because Ms. Wagner puts that in her  
6 declaration, and the documents are attached to the  
7 sentencing memorandum in the record. That's the  
8 key point. Can you just say well, it wouldn't have  
9 been a different result so we're going to forgive  
10 that? No, Your Honor, you can't say that. The  
11 courts say that that is mismanagement.

12 And I've cited a number of cases to the court.  
13 One of them is State vs Sherman, one is State vs  
14 Daily, and that is the obligation to turn over  
15 criminal records.

16 Now, as you know, under 8.3 we have to show  
17 prosecutorial mismanagement, and that doesn't have  
18 to be evil. We're not saying it was purposeful.

19 THE COURT: And this rises to the level  
20 of, one, it needs to be dismissed, and/or you would  
21 get a new trial.

22 MS. KING: Correct. Like I say, this  
23 interlocks because this interlocks with the  
24 constitutional right to due process. State vs  
25 Thorne is the seminal case on this. It's an older

1 case. And the supreme court considered an argument  
2 that the statute was unconstitutional because there  
3 is no requirement that written notice be given.  
4 And in Thorne there were three other companion  
5 cases that were decided, along with that the  
6 Supreme Court cited those three other companion  
7 cases, and it said it doesn't really matter,  
8 because in these cases they all got notice. And  
9 I'm quoting the court now. Although formal  
10 charging is not constitutionally mandated because  
11 the act involves sentencing and not filing of a  
12 criminal charge, we nonetheless find early notice  
13 of the potential sentence to be appropriate. There  
14 may be cases in which the failure to give any  
15 notice would have constitutional implications. The  
16 defendant has a constitutional right to due  
17 process, which is notice, not only of the charge  
18 against him but also of the sentencing  
19 consequences. And in my brief I cited--

20 THE COURT: Who better knows his criminal  
21 history than him?

22 MS. KING: But Your Honor, the defendant  
23 does not know, necessarily, that he's facing a  
24 third strike. And if you are going to presume  
25 that, that is placing the burden on him when the

1 State-- you're ignoring the State's burden. If you  
2 adopt the Court's rational, the State doesn't have  
3 to turn over anything because the defendant can  
4 figure it out.

5 THE COURT: No, that's not what I'm  
6 saying.

7 MS. KING: That's not the way the ruling  
8 case--

9 THE COURT: I'm not saying that. I'm  
10 saying who better knows his criminal history than  
11 him, aside from what the duties and  
12 responsibilities of the State might be.

13 MS. KING: I think we've provided an  
14 adequate record, number one, that there was  
15 mismanagement in this case, not evil, but  
16 mismanagement, because they had the documents and  
17 they were in their physical possession and they  
18 didn't turn them over. Defense counsel doesn't  
19 have to make a request; they have a duty to turn it  
20 over. They didn't do it.

21 The question is was there prejudice. And I  
22 think we've prepared and presented an adequate  
23 record to this Court that there was sufficient  
24 prejudice. And let me tell you why, Your Honor,  
25 and why the Court should dismiss instead of just

1           granting a new trial, and that is because when  
2           you're facing trial and you're undergoing plea  
3           negotiations, as every defense counsel knows and  
4           probably the Court, you used to practice criminal  
5           defense, one of the bargaining chips--

6                   THE COURT: I used to prosecute also.

7                   MS. KING: Pardon me?

8                   THE COURT: I used to prosecute, so to be  
9           fair, I did both sides.

10                   MS. KING: But this is more apropos to  
11           you then because one of bargaining chips, probably  
12           the biggest bargaining chip defense counsel has, is  
13           the State might lose if you go to trial. So if you  
14           are facing a three strikes case, the State's  
15           weighing the mitigating factor, is there some  
16           reason we don't want the guy to go to prison in  
17           this case? Shoplift, basically against the risk of  
18           trial, but in this case we no longer have that  
19           bargaining chip because the State has already a  
20           conviction. So even if you were to grant a new  
21           trial he has significantly less bargaining power.

22                   So it's not really whether she should have  
23           done a better job, it's whether-- what could she  
24           have worked as a successful plead negotiation  
25           knowing that the State has a risk of not prevailing

1 at trial and now the bargaining chip is gone, and  
2 is that through any fault of his?

3 THE COURT: Are you saying because one  
4 jury found him guilty another one--

5 MS. KING: Absolutely. I tell you, I  
6 have done trials where its gone back after appeal  
7 three times, and by the third time they got it  
8 right. They fix their mistakes in a second trial.  
9 Every appellate attorney and defense attorney knows  
10 if you have to go through a trial the second time,  
11 the chances of winning are far less because they  
12 are able to fix their-- they know they've got a  
13 conviction, so there is no longer that bargaining  
14 chip.

15 THE COURT: They've got altogether a  
16 different jury. They've got a conviction. This  
17 time it's a different jury.

18 MS. KING: I will tell you, defense  
19 counsel, and I think prosecutors also, know that  
20 that is true, Your Honor. So what we've done is  
21 we've moved to dismiss, vacate and dismiss under  
22 CrR 8.3 and 4.7 for discovery violations, and we've  
23 also moved for a new trial under CrR 7.6 for all of  
24 the (a) (2), (a) (3), (a) (4), (a) (5), (a) (7) and  
25 (a) (8) misconduct, newly discovered evidence,

1 contrary to law, not substantially justice, and we  
2 have cited Copeland to you. That's a case out of  
3 Division II and that was failure to turn over  
4 discovery. And the State says well, we don't have  
5 any authority for this. Your Honor, that's  
6 because--

7 THE COURT: Failure to turn over  
8 discovery, that's a different horse.

9 MS. KING: Well, criminal history,  
10 discovery, criminal conviction stuff, and State vs  
11 Copeland, Your Honor, the reason we don't have a  
12 case, a case the court should do this or this, is  
13 because there is no case on this. It's a case of  
14 first impression and it involves important  
15 constitutional rights that the court referenced  
16 saying there may be a case out there and that case  
17 they had notice, so they're not going to speculate.

18 This is the case, and I'm not saying that  
19 every single three strikes case that they don't  
20 give a notice would be warranted there, but in this  
21 case it was out of state conviction, there was  
22 nothing to put her on notice that it was a strike  
23 offense. Most importantly, they had the  
24 information that would have put her on notice.

25 And so we're saying that whether you vacate

1 under 8.3 or grant a new trial under 7.6, one more  
2 point, and that is that if he had plead guilty and  
3 then we had found out afterwards that there was a  
4 mutual mistake to the parties after the guilty  
5 plea, he would be entitled to withdraw his plea.

6 Here, he should be at least accorded the same  
7 fundamental fairness here. So I think that the  
8 Court has to do that. But like I said, I think  
9 that 8.3 is only--

10 THE COURT: What do you say to that  
11 Ms. Wagner, that if he had plead guilty and the  
12 criminal history came out as it did, he would have  
13 been allowed to withdraw his plea of guilty?

14 MS. WAGNER: I agree a hundred percent,  
15 Your Honor.

16 THE COURT: You what?

17 MS. WAGNER: I'm sorry, I agree a hundred  
18 percent. When a defendant pleads guilty the court  
19 has to establish that it was knowing and voluntary  
20 plea and that he understands what he's doing and  
21 then he understands he's giving up several of his  
22 constitutional rights.

23 The difference, Your Honor, in this particular  
24 case he did not waive any constitutional rights.  
25 He exercised his constitutional right to a jury

1 trial. He understood what was going to happen if  
2 he goes to a jury trial. Sentencing isn't part of  
3 an issue. The issue is did he have a right to a  
4 fair trial.

5 THE COURT: So you distinguish the fact  
6 the sentencing is not the issue then?

7 MS. WAGNER: I do that in, I think it's  
8 Thorne, Your Honor, when they talk about why the  
9 notice isn't mandatory. It is a completely  
10 separate issue. The defendant hasn't given up  
11 anything. He hasn't waived anything.

12 THE COURT: He got his trial that he  
13 wanted. What do you say to that, Ms. King?

14 MS. KING: Your Honor, he didn't exercise  
15 his full constitutional rights because he didn't  
16 get his full constitutional rights to notice. In  
17 Mancebo, which is a California case, they said that  
18 notice it was a one strike case, they have even  
19 more strict laws down there, should be inferred  
20 under the statute, which our Thorne court didn't do  
21 yet, but they said it's absolute under the  
22 constitution and that's the difference.

23 There has to be some notice, and I'm not  
24 saying it has to be all written notice, but there  
25 has to be some notice, that's implicit in our

1 constitutional right to due process, it is one of  
2 the most fundamental things of our constitution.  
3 So no, he didn't exercise his fundamental  
4 constitutional right because he didn't know what  
5 his sentencing consequences were when he decided to  
6 go to trial.

7 And one more point and I will be done for now,  
8 and that is if in fact Ms. Stenberg was somehow  
9 ineffective for not researching that and then  
10 following up, if it was possible, we've heard  
11 testimony that it might not have been, but we would  
12 ask for discussing with him that it was a strike.  
13 She admitted she didn't discuss with him it was a  
14 strike.

15 We would ask the Court find her representation  
16 was below the standard, it was not tactical, and he  
17 was prejudiced by it and ask for the same result,  
18 and that would be a new trial.

19 THE COURT: Ms. Wagner, what do you want  
20 to say?

21 MS. WAGNER: Your Honor, I'd like to  
22 respond to one of the points Ms. King just said  
23 with sentencing.

24 The Court is well aware of the sentencing  
25 statute and it specifically sets out the court

1 shall hold a sentencing hearing and get a  
2 presentence investigation if necessary and  
3 determine what the defendant's criminal history is.

4 I think this Court has been on the bench long  
5 enough to recognize the number of cases its  
6 probably had before it where what the criminal--  
7 what everyone thought the criminal history was when  
8 the conviction occurred versus the time of  
9 sentencing, that often varies. There's no case law  
10 that would suggest that finding out that the  
11 defendant has additional criminal history would  
12 warrant a new trial or that he was somehow denied  
13 his constitutional rights.

14 In this particular case, Your Honor, the issue  
15 is did the State violate 4.7? No. The State did  
16 in fact provide a record of the defendant's  
17 criminal history. And I'm not going to rehash the  
18 issue. I think the Court understands why the  
19 Kentucky criminal history wasn't there initially,  
20 and when we did submit it to the defense it was  
21 still long before trial. The defense did have that  
22 record and had every opportunity to either ask the  
23 State for more information on that, to talk to the  
24 client, whatever, but there was notice provided,  
25 and we did comply with our discovery obligations.

1           This is not a case like Copeland where we  
2 simply didn't turn over any records. In Copeland  
3 the State failed to advise the defense that a key  
4 witness, the complaining victim, had a prior felony  
5 theft conviction. Obviously that's a conviction  
6 that can be used for impeachment. Witness'  
7 credibility was at issue. The defense didn't have  
8 that opportunity to cross-examine her, and the  
9 court found that the outcome of the trial might  
10 have been different with that. That's a key  
11 difference between that case and this case.

12           In this case the defense did in fact have the  
13 notice. What the defense is asking us to do is not  
14 only give notice but interpret notice, and I don't  
15 think that's required.

16           What CrR 8.3(b) requires, Your Honor, is  
17 arbitrary action for misconduct. It's not just  
18 mismanagement, but it specifically states the  
19 court, in furtherance of justice, after notice and  
20 hearing, may dismiss any criminal prosecution due  
21 to arbitrary action or governmental misconduct.  
22 And that's a deliberate intentional act on behalf  
23 of the State, to withhold information. And I don't  
24 think there's, at least if I'm listening to  
25 Ms. King correctly, there is no allegation of that.

1 She's alleging mismanagement. I don't believe that  
2 rises to the level of 8.3. So there's been no  
3 violation. There's certainly no basis for this  
4 Court to dismiss pursuant to 8.3.

5 As for rule 7.5, the new trial, if the Court  
6 looks at those factors, all of those factors relate  
7 to something that prevented the defendant from  
8 having a fair trial in the first place.

9 Ms. Stenberg was very straight with this Court.  
10 She told you she wouldn't have done anything  
11 differently after trial even if she had known that  
12 it was a three strikes case. She talked about an  
13 investigator and things like that, but she told you  
14 she would cross-examine the witnesses the same,  
15 question the witnesses, put on whatever witnesses.  
16 They made a conscious decision not to have the  
17 defendant testify.

18 But the defendant had a complete opportunity  
19 to present a complete defense, and that's what this  
20 Court needs to look at in determining whether the  
21 defendant was denied a fair trial. There's been no  
22 evidence provided to this Court to suggest that he  
23 has.

24 All of the evidence that was presented was to  
25 the effect of well, we didn't get a chance to

1 present a mitigation package. There is nothing  
2 statutory. There's nothing in the case law that  
3 says that the State has to consider a mitigation  
4 package, or for that matter, there's nothing  
5 requiring the State to give the notice.

6 THE COURT: States charges are within the  
7 discretion of the State prosecuting attorney.

8 MS. WAGNER: That's correct. That's  
9 correct. I try to be, as you know, when I drafted  
10 the affidavit I put in everything that I recalled  
11 about the pretrial negotiations. I didn't hide  
12 anything. I let Ms. King know through the  
13 affidavit that we did have the prior certified  
14 conviction. I did not look at it. Had I looked at  
15 it, I, too, would have recognized that it was more  
16 than just a, you know, a felony conviction per say.  
17 I just didn't look at it. I got those convictions  
18 in the off chance that this did-- I did get a  
19 conviction and would have to prove up the prior out  
20 of state criminal history. I just saw it was  
21 there, put it in the file. I didn't look at it.  
22 Whether that is deliberate conduct and misconduct,  
23 that's for the Court to decide.

24 THE COURT: I understand.

25 MS. KING: Just briefly, Your Honor, a

1 couple comments.

2 Additional criminal history is not the same as  
3 an unknown life sentence. And under 4.7, under  
4 Copeland especially, the fact that the office had  
5 it, doesn't matter whether she looked at it, the  
6 fact that they had it is enough. And she's  
7 actually misstating Michielli, Your Honor, and I'm  
8 quoting from State vs Michielli, our Supreme Court  
9 decision, governmental misconduct however need not  
10 be an evil nature; simple mismanagement is  
11 sufficient. And we all know that. We're not  
12 attributing it's purposeful.

13 And with that, Your Honor, I would ask that  
14 the Court grant either the vacation and dismissal  
15 under 8.3 and 5.7 or new trial under 7.6 and 4.7.

16 THE COURT: Well, let me tell you, our  
17 system provides a remedy here for Mr. Crawford.  
18 First of all, he's had a trial, he's had his rights  
19 of appeal, finding of guilty by a jury, and that's  
20 all preserved, obviously, because he hasn't even  
21 been sentenced yet. So the question of the  
22 fairness of his trial is going to be reviewed and  
23 that can include this.

24 I think it's the responsibility of the  
25 appellate court to look at this issue and maybe

1 finally provide us some case law with reference to  
2 his denial of due process because of the three  
3 strikes Kentucky matter that he was unaware of.  
4 And I'm not going to repeat what I've already said  
5 as far as his criminal history and the discretion  
6 of the State to file whatever charges and what  
7 affect filing a mitigation would have. And  
8 inherent in all this also is the effective  
9 assistance of counsel. All those things are  
10 preserved.

11 But I'm going to deny the motion to dismiss.  
12 I'm going to deny the motion for a new trial.

13 Now that brings us to this point. That means  
14 that he needs to be sentenced. And he waived his  
15 right to a speedy sentence up to today. And so is  
16 the State then ready and the defense ready then to  
17 proceed to sentencing today?

18 MS. KING: We are, Your Honor.

19 MS. WAGNER: I would be ready to proceed,  
20 Your Honor.

21 THE COURT: All right. I think we better  
22 do that because I'm not sure about what the  
23 timeliness issue is.

24 Please come forward. Please state your name  
25 again, Mr. Crawford.

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THE DEFENDANT: Darnell Crawford.

THE COURT: Full name, please.

THE DEFENDANT: Darnell Keno Crawford.

THE COURT: And birthday?

THE DEFENDANT: 1/13/66.

THE COURT: We are here for sentencing in cause 02-1-06037-6. I'll hear from the State.

MS. WAGNER: Your Honor, although the defendant has admitted to prior criminal history on the stand, I want to make sure my record is clear and I'm going to ask that the certified convictions of his prior criminal history that I do have, that they be made part of the record. And I'm going to hand forward those at this time.

THE COURT: Are you aware of those, Ms. King, these records?

MS. WAGNER: These are just the certified.

MS. KING: I haven't looked at them. Let me look at them real quickly with my client, Your Honor.

MS. WAGNER: The other thing is, and although I don't believe it's being disputed and I had given this to Ms. King earlier, I did obtain a, quote, pen pack from Kentucky with regard to the

1 sex abuse conviction which provided a photograph of  
2 the defendant as well as fingerprints. I had those  
3 compared to the defendant's booking print from this  
4 case. I have the report indicating that it is the  
5 same person and I'm going to make that part of the  
6 record also.

7 THE COURT: Let's mark them all.

8 MS. KING: We've looked at all of these,  
9 Your Honor, for the record, and he admits that  
10 these are his convictions.

11 THE COURT: We'll mark them and have them  
12 admitted without objection.

13 MS. WAGNER: Your Honor, the defendant  
14 was convicted on April 16, 2003 of robbery in the  
15 first degree and assault in the second degree, both  
16 of those are considered serious offenses. Both of  
17 those are considered, quote, strike offenses. He  
18 is in fact persistent offender given that he has a  
19 prior conviction for robbery in the second degree.

20 And as I indicated in my sentencing  
21 memorandum, his prior conviction for sex abuse one  
22 is comparable to the crime of child molestation in  
23 the first degree in Washington, which is also a  
24 strike offense.

25 The recommendation then from the State is a

1 sentence of life without the possibility of parole,  
2 DNA testing, \$500 crime victim penalty assessment,  
3 \$100 for the DNA test. I do not believe that  
4 there's any restitution. And \$110 court costs,  
5 Your Honor.

6 THE COURT: All right, Ms. King?

7 MS. KING: Thank you, Your Honor. For  
8 the record, Linda King, and I have looked at the  
9 convictions and looked at the case law on  
10 comparable out of state convictions and I believe  
11 that this does constitute a strike under Washington  
12 law, and so that this is his third strike. And as  
13 the Court knows, it has no discretion under the  
14 situation like this. I do believe that  
15 Mr. Crawford would like to address the Court, if  
16 we're at that point yet.

17 THE COURT: Yes, I want to hear from  
18 Mr. Crawford. What do you want to tell me,  
19 Mr. Crawford?

20 THE DEFENDANT: Your Honor, first of all,  
21 I'd like to say that this is being a very unique  
22 interesting situation that I've been going through,  
23 that I went through through my trial. Being that  
24 all I've done been through, the fact still remains  
25 the same that I only committed the crime of

1 shoplifting, but here I sit in court seven months  
2 later, still incarcerated, being convicted of  
3 crimes that I didn't commit and facing an extremely  
4 extraordinary sentence of life. And I don't  
5 believe that I was the only person in trial when  
6 noticed how conflicting the witness statements were  
7 and how the evidence was insufficient to the  
8 charges being that there was also missing evidence.  
9 However, I never stood a chance and it's being  
10 blatantly shown all the way up to this point of my  
11 judgment.

12 Furthermore, I'm asking the Court to take  
13 judicial notice of the facts and errors of my case  
14 in its entirety, which have prejudiced me severely  
15 in reference to the bill of rights pursuant to the  
16 Fifth Amendment, Sixth Amendment, and Fourteenth  
17 Amendment, also CrR 8.3 and CrR 4.7 which will show  
18 on record that my rights were materially affected  
19 in granting me a fair trial and that I was deprived  
20 of liberty without due process of law, and the  
21 Court shall deem no other remedy except to vacate  
22 and dismiss with prejudice the prosecution on  
23 tenable grounds for State's violation of  
24 fundamental constitutional guidelines, as well as  
25 criminal court rules that have left me in prejudice

1 limbo and merely incompetent to withstand making  
2 any rational decisions in good faith belief that I  
3 will nonetheless face life in prison if I'm forced  
4 to proceed to a new trial.

5 The alternative consequences can be reviewed  
6 upon completion of-- the alternative consequences  
7 can be reviewed-- can be determined by decision of  
8 the discretionary review upon completion of the  
9 decision made in this hearing to conclude the  
10 extent of the irretrievable damage that's been--  
11 that has biased me in a court to similar cases.

12 I didn't believe that an extension of time for  
13 filing for motion of new trial should have been  
14 granted due to the fact that the prosecutor was in  
15 control of information three months before my trial  
16 date and could have easily disclosed and provided  
17 it to my defense counsel, being that there was a  
18 continuance in which I contend to new discovery, on  
19 2/20/03 upon motion of defense and State.

20 Also, on 3/26/03 I had a bail reduction  
21 hearing which required my criminal history to be  
22 disclosed in open court, and yet the prosecutor  
23 failed to provide information regarding that notice  
24 of the three strikes law which is being imposed  
25 upon me and I didn't find out until one day before

1 I went to sentence.

2 I didn't commit a crime to do life in prison,  
3 Your Honor. I only stole something from a store  
4 that was-- it was misinterpreted or misperceived.  
5 I had a two-way radio in my hand that was lost in  
6 the trial, in my trial. It should have been a  
7 better defense or something. I never did pull out  
8 a gun on anyone. I only stole something that was  
9 for my kid for Christmas. I had no reason to pull  
10 out a gun. It was only a theft, a petty theft.  
11 When them gentlemen got on the witness stand here  
12 he clearly-- he clearly described the two-way radio  
13 that I had in my hand, and I was still convicted of  
14 this crime of robbery and all it was is a  
15 shoplifting charge.

16 My criminal history looks bad on paper, Your  
17 Honor, but I haven't been extremely person to  
18 commit the crimes. My record shows that I didn't  
19 never catch a felony until I was maybe 26-- 20  
20 something years old. When I took the plea bargain  
21 I didn't know the judicial system. I took the plea  
22 bargain for a second degree robbery in '98, and  
23 Your Honor, I didn't even do that crime. I was  
24 just with somebody that did it.

25 I like to submit a claim of selective

1 prosecution. I feel the discretionary decision is  
2 three strikes case has dramatic effects. And it  
3 appeals the needs of careful scrutiny due to the  
4 fact that I'm claiming discriminatory enforcement  
5 and asking the Court to order discovery that might  
6 help explain my claim that clearly shows that other  
7 defendants who were or are in similar situation  
8 circumstances got notice before going through trial  
9 which is denied me the equal protection of the  
10 laws.

11 I'm not just a criminal, Your Honor. I'm a  
12 God fearing man who is salvageable. I have kids.  
13 I have a family. I don't deserve to do life in  
14 prison. I have an education. I'm qualified to  
15 be-- to help to be abiding citizen. And in my  
16 wildest dream I would never think that I would be  
17 standing in front of a judge facing life in prison,  
18 especially knowing in my heart that I didn't rob  
19 them people, I only stole something and walked out  
20 of the store and I was talking on the two-way  
21 radio. And if the court would allow that two-way  
22 radio in my trial, I believe the jurors woulda seen  
23 that it could have been mistaken as a gun, because  
24 it had antenna, and in the picture that was-- in  
25 the picture that was shown to the witness or to the

1 jury it was-- it was two dimensional object instead  
2 of a four dimensional object, that you could have  
3 seen the antenna on it. And I didn't display it as  
4 a gun, I just was getting in a car and had it in my  
5 hand. I never committed the crime of robbery. I  
6 only shoplifted. And I suppose I hold firm to my  
7 innocence.

8 THE COURT: All right. Anything else?

9 THE DEFENDANT: No, sir.

10 THE COURT: All right. I've great  
11 confidence in the justice system, and the truth  
12 will come out sooner or later, and right now a jury  
13 has found you guilty, Mr. Crawford. And so it's  
14 the judgment of the Court that you are guilty.

15 And I'm going to sentence you as required by  
16 law, which is life without the possibility of  
17 parole.

18 Now, you have a right to appeal this  
19 conviction, and let me read those rights to you.  
20 7.2(b) the Court shall, immediately after  
21 sentencing, advise the defendant:

22 One, of the right to appeal the conviction.

23 Two, of the right to appeal a sentence outside  
24 the standard sentence range.

25 Three, that unless a notice of appeal is filed

1 within 30 days after the entry of the judgment or  
2 orders appealed from, the right to appeal is  
3 irrevocably waived.

4 Four, that the superior court clerk will, if  
5 requested by the defendant appearing without  
6 counsel, supply notice of appeal form and file it  
7 upon completion by the defendant.

8 Five, of the right if unable to pay the costs  
9 thereof to have counsel appointed and portions of  
10 the trial record necessary for review of assigned  
11 errors transcribed at public expense for an appeal.

12 And six, of the time limits on the right to  
13 collateral attack imposed by RCW 10.73.090 and 100.

14 Did you discuss those rights with Ms. King?

15 MS. KING: We have, Your Honor. And I'm  
16 prepared to file a notice of appeal today.

17 THE COURT: Is this your signature on  
18 this advisement of rights document?

19 MS. KING: Actually, it's here. I  
20 haven't had him sign that yet, Your Honor. We're  
21 working on it.

22 MS. WAGNER: I think you had it and it  
23 got handed back for the defendant's signature.

24 THE COURT: I thought I had it.

25 MS. KING: Your Honor, I'd like to make a

1 record also on the offender score. I know the  
2 Court has sentenced him, as it's required under the  
3 law, to a life sentence without the possibility of  
4 parole as a persistent offender, but I would note  
5 that I'm preserving for the record any argument in  
6 the event that this is remanded for a new trial,  
7 that if he's convicted of another crime we're not  
8 conceding that he has offender score of nine. I  
9 want to make a record of that. And maybe I should  
10 pen it in there. But I notice a lot are sentenced  
11 to the same date, and as the Court probably knows,  
12 at some point in time under the SRA that crimes  
13 that were sentenced on the same date could be  
14 counted as the same offense for the offender score,  
15 even if they were committed on different dates and  
16 did not constitute same criminal conduct. So I  
17 think I would-- I'm going to put in here defendant  
18 preserves the right to challenge offender score.

19 THE COURT: All right. Do you have the  
20 judgment and sentence then and warrant of  
21 commitment also? Mr. Crawford, I've signed the  
22 judgment and sentence and warrant of commitment.

23 Now, your attorney has also filed a notice of  
24 appeal.

25 MS. KING: I'm going to be filing that

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this afternoon, Your Honor. I have it right here.  
Can I file it here in open court? I just need a  
copy of it.

THE COURT: Ms. Martin can make you a  
copy.

MS. KING: Thank you very much, Your  
Honor.

MS. WAGNER: Your Honor, in terms of LFO,  
the \$500 crime victim penalty and \$100?

THE COURT: \$110 and \$500 and that's the  
only financial.

MS. WAGNER: What about the DNA filing?

THE COURT: We have to have the DNA.

MS. WAGNER: With that, Your Honor, I'll  
step back.

THE COURT: All right.

-Court adjourned-



# **APPENDIX “E”**

*Affidavit of Ed Murphy*



1 the LINX computer program that our county uses to track Superior Court cases. This chart  
2 shows all of the dispositions of Two Strikes/Three Strikes cases that were flagged as such  
3 in the LINX system. The chart is attached as Appendix F to the State's response.

4  
5 3. My role in these cases begins when defense counsel seeks mitigation and some  
6 resolution of the case that would be short of the defendant receiving a sentence of Life in  
7 Prison Without the Possibility of Parole. Occasionally, a defendant will choose not to  
8 mitigate the case and will decide to take their chances at trial. When they do want to  
9 mitigate the case, I review the case, mainly the Information, Declaration for Probable  
10 Cause, and the defendant's criminal history. I also meet with the Deputy Prosecuting  
11 Attorney assigned to the case and get their opinion as to the strengths and weaknesses in  
12 the case, and whether they feel it is appropriate to mitigate the case or not. Finally, I will  
13 speak with the defense attorney and get their client's position on the case.

14  
15 4. There are essentially three tracks that a case can take after this process. First, a  
16 decision may be made, based upon the defendant's criminal history and the crime with  
17 which he/she is charged at this time, that mitigation is not appropriate and that the State  
18 will not reduce the charge to a non-strike offense in order to allow the defendant to plead  
19 guilty and avoid life in prison. Second, the case may be appropriate for mitigation and the  
20 State may make an offer to a non-strike offense or offenses, but require the defendant to  
21 agree to an exceptional sentence of many years in prison. Again, this is based upon the  
22 defendant's criminal history and the nature of the crime with which he/she is charged. At  
23 the beginning of my meeting with the defense attorney, I ask the defense attorney what  
24 their client is willing to do as far as prison time in order to resolve the case short of trial. I  
25 do this because I want them to understand that mitigation alone, on a strong factual case

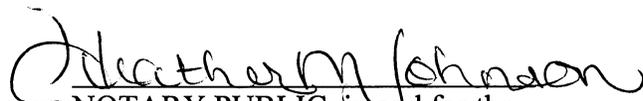
1 for the State, will usually carry a lengthy prison sentence. I want the defendant to be  
2 realistic about this fact, and I want the defendant to be the one initiating this process, not  
3 just the defense attorney. Occasionally, the parties cannot reach an agreeable resolution,  
4 and the defendant will reject the State's offer of a reduced charge and a sentence less than  
5 Life in Prison Without Parole. Third, the case may be appropriate for a reduction based  
6 upon the facts of the case alone. There are cases where proof problems develop and a  
7 reduction in the charge is an appropriate resolution. Those cases might result in a standard  
8 range sentence for the reduced crime.

9  
10 5. After I have met with the defense attorney, I will usually speak with the assigned  
11 Deputy Prosecuting Attorney again about the case, and then reach a decision about what is  
12 the appropriate way to handle the case. This decision is then conveyed to the defense  
13 attorney. Occasionally, there will be continued negotiations back and forth about the  
14 appropriate resolution.

15 Further your affiant sayeth naught.

16  
17   
ED MURPHY

18 SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of May, 2008.

19  
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22 NOTARY PUBLIC, in and for the  
23 State of Washington, residing  
24 at Kenai Co.  
25 My Commission Expires: 5/20/12



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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellanta and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/11/08  
Date Signature Johnson

## **APPENDIX “F”**

*Chart re: Two and Three Strike Resolutions  
in  
Pierce County*

**TWO STRIKES/THREE STRIKES CASES (2000-2007)**

<b>CAUSE #</b>	<b>DEFENDANT</b>	<b>CHARGES</b>	<b>DOV</b>	<b>RESOLUTION</b>	<b>SENTENCE</b>
00-1-00422-4	RICK KERR (W/M, 9-11-64)	RAPE CHILD 1 (X3)	3/99-1/00	PLED RAPE CHILD 1 (6-9-00)	<b>LWOP</b>
00-1-00602-2	DAVID MARTIN (B/M, 8-9-64)	RAPE CHILD 1, CHILD MOL 3	3-5-97	PLED CHILD MOL 3(X2) (2-9-01)	60 MONTHS
00-1-00828-9	PRENTERS BROUGHTON III (B/M, 1-15-58)	ROBBERY 1	2-14-00	CONVICTED BY JURY (11-14-00)	<b>LWOP</b>
00-1-00961-7	JOEL WILLIAMSON (B/M, 4-20-40)	ASSAULT 2	2-23-00	PLED ASSAULT 3 (6-26-00)	12 MONTHS
00-1-01846-2	RICHARD GREINKE, JR (W/M, 1-11-62)	RAPE CHILD 1(X2), CHLD MOL 1(X4)	3-1-00	PLED RAPE CHILD 1(X2), CHILD MOL 1 (11-30-01)	<b>LWOP</b>
00-1-02732-1	MARK LEE (B/M, 3-8-54)	ASSAULT 2	6-10-00	PLED ASSAULT 3 (12-15-00)	51 MOS
00-1-03407-7	STEVEN BURKHART (W/M, 8-26-55)	ASSAULT 2, INTER W/911	7-21-00	PLED ASSAULT 3 (9-19-00)	22 MONTHS
00-1-03474-3	DANIEL ARNOLD (W/M, 6-16-58)	KIDNAP 1, RAPE 1	7-9-00	ACQUITTED BY JURY (2-15-01)	NONE
00-1-03534-1	JOSEPH RODRIGUEZ (H/M, 4-1-57)	KID 1, ROB 1, ASSLT 2, ELUDE	7-31-00; 8-1-00	CONVICTED BY JURY (10-8-01)	<b>LWOP</b>
00-1-04298-3	MARK MERTZ (W/M, 8-5-61)	ROB 2, ATT ROB 2, THEFT 1(X3)	9-10-00; 9-11-00	PLED THEFT1(X4); ATT THEFT 1 (2-22-01)	120 MONTHS
00-1-04773-0	JAMES WARD (B/M, 12-19-70)	ROB 1(X13), ATT ROB 1, ATT ROB 2(X2), ROB 2	8-18-00 TO 10-3-00	PLED ROBBERY 1 (8-7-01)	<b>LWOP</b>
00-1-04936-8	DREW KENNEDY (W/M, 8-12-64)	ASSAULT 1, ASSAULT 3(X2) HARASSMENT	10-15-00	PLED RES BURG, ASLT 3(X2), HARASSMENT (7-23-01)	120 MONTHS
00-1-05161-3	ROBERT HICKS (B/M, 3-13-66)	BURG 1, RAPE 1, ROB 1, ATT ESCAPE 2	10-24-00	CONVICTED BY JURY	<b>LWOP</b>
00-1-05763-8	BRUCE FLY (B/M, 10-18-69)	ROBBERY 2	11-29-00	PLED THEFT 1 (4-30-01)	120 MONTHS
00-1-05830-8	JOHN SHEPHERD (W/M, 12-28-68)	ASSAULT 2(X3) ASSAULT 4(X2)	12-1-00	PLED ASSAULT 3, FEL HARASS (12-20-01)	120 MONTHS

00-1-05846-4	LOYAL WILSON (B/M, 1-17-78)	BURG 1, ASSAULT 2(X2)	11-8-00	PLED RES BURG, ASLT 3 (X2) (6-28-01)	20 MONTHS
01-1-00871-6	MARCUS JOHNSON (B/M, 3-26-74)	CHILD MOL 1 (X2)	UNK	PLED ASSAULT 3 (10-12-01)	60 MONTHS
01-1-01452-0	GEORGE LOVER (B/M, 3-14-55)	ASSLT 1, ASSLT 2, UNL IMPR	3-16-01	PLED ASSLT 3(X2), UNL IMPR (10-2-02)	180 MONTHS
01-1-02746-0	ROBERT HICKEY (W/M, 4-14-64)	ATT RAPE 2	5-14-01	CONVICTED BY JURY (1-8-02)	<b>LWOP</b>
01-1-03427-0	JOHN VINCENZI (W/M, 2-22-63)	RAPE 2, ASSLT 4	6-23-01	PLED ASSAULT 3 (11-28-01)	12 + MONTHS
01-1-03468-7	KEITH ANDERSON (B/M, 7-21-60)	ASSAULT 2, FEL HARASS, INT W/911, UNL IMP	12-6-99	PLED ASSLT 3(X2) UNL IMP(X2) (9-10-02)	240 MONTHS
01-1-04547-6	KIM DELAVERGNE (W/M, 12-16-54)	ASSAULT 1	UNK	PLED ASLT 3** (10-5-04)	60 MONTHS
01-1-05003-8	ARMANDO SEPULVEDA (H/M, 6-17-69)	ASSAULT 2 (X3)	9-27-01	CONVICTED BY JURY (4-23-02)	<b>LWOP</b>
01-1-05013-5	ANDRA HAGINS (B/M, 5-21-75)	MURDER 1, ARSON 1, ROBBERY 1	8-26-01	CONVICTED BY JURY (6-21-02)	<b>LWOP</b>
01-1-05087-9	ROBERT CASHMAN (W/M, 1-29-73)	ATT MURD 1 (X2), UPOF 1 (X2), UPOF 2	9-27-01	PLED ASSLT 3 (X3), UPOF 2 (3-26-03)	240 MONTHS
01-1-05773-3	TODD NELSON (W/M, 5-12-62)	ROBBERY 2	11-2-01	CONVICTED BY JURY OF THEFT 2 (6-19-02)	14 MONTHS
01-1-06501-9	KENNETH DOZIER (B/M, 2-17-64)	ROB 1, ASSLT 3 (X2)	12-20-01	PLED ASSLT 3(X3) (6-14-02)	180 MONTHS
01-1-06502-7	ROBERT BAILEY (B/M, 3-5-72)	ROBBERY 1	12-20-01	PLED RCA 1 (2-27-02)	60 MONTHS
01-1-06515-9	JOHNNY MILES (B/M, 2-22-58)	ASSAULT 2, ASSAULT 4, INT W/911	12-22-01	PLED ASSAULT 3 (5-15-02)	22 MONTHS
02-1-00850-1	CURTIS BEREITER (W/M, 8-31-71)	ROB 1, UPCS	2-19-02	PLED BURG 2, ASSLT 3 (7-25-02)	100 MONTHS
02-1-01820-5	MICHAEL JACKSON (B/M, 6-11-54)	ROB 1, ROB 2	1-27-02	PLED THEFT 1 (X2) (6-30-03)	180 MONTHS

02-1-01956-2	RUSSELL BROWN (W/M, 7-24-51)	UPCSWID W/FASE, UPCS(X2) W/FASE, UPOF1	4-21-02	PLED UPCSWID UPCS(X2), UPOF1	240 MONTHS
02-1-02784-1	DONALD MCLUCAS (I/M, 3-27-60)	ATT ROB 1 (X3), ASLT 2, ASLT 3, TH 2, THEFT 1(X5)	6-15-02	PLED THEFT 1(X6) (10-27-03)	180 MONTHS
02-1-03271-2	BRUCE OLIVER (W/M, 9-12-56)	ATT RAPE 2, ASSAULT 2	7-15-02	PLED ASSAULT 2 (3-21-03)	120 MONTHS
02-1-03588-6	RICHARD DOOLING (B/M, 6-18-72)	BURG 1, VPO, ASLT 4, INT W/911	8-1-02	PLED RES BURG (2-18-03)	120 MONTHS
02-1-04650-1	MICHAEL ROSS (B/M, 10-22-64)	ROB 2, THEFT 2	10-7-02	PLED THEFT 2 (X2) (6-26-03)	120 MONTHS
02-1-04662-4	DONALD RAPP (W/M, 12-27-51)	ROBBERY 1	10-8-02	PLED AS CHARGED (10-25-03)	<b>LWOP</b>
02-1-05651-4	MICHAEL KENYON (W/M, 4-16-64)	ROBBERY 1, MM1, MM2	11-29-02	PLED THEFT 1, ASLT 3, MM2 (7-10-03)	240 MONTHS
02-1-05716-2	NORMAN SOLOMON (B/M, 1-6-56)	ASLT 2(X2), THEFT 3	12-10-02	PLED ASLT 3(X2) (6-10-03)	120 MONTHS
02-1-05824-0	ARTHUR PAULSEN (W/M, 9-8-54)	ASSAULT 2, ASSAULT 4	12-17-02	PLED ASSAULT 3 (7-7-03)	60 MONTHS
03-1-01157-8	DAVID NELSON (W/M, 10-19-56))	RAPE 2	2-4-03	CONVICTED BY JURY	<b>LWOP</b>
03-1-01269-8	MICHAEL LIDEL (B/M, 12-10-56)	ROB 1 (X2), BURG 2	3-17-03	PLED THEFT 1(X2), BURG 2 (12-4-03)	360 MONTHS
03-1-01363-5	HAROLD MCCORD (B/M, 10-6-66)	KID 1, ASLT 4, STALKING, UPOF 1, RES ARREST	3-20-03	CONVICTED BY JURY OF KID 1, FEL HAR, RES ARR (5-30-03)	<b>LWOP</b>
03-1-01422-4	DONNELL MCKINNON (B/M, 10-26-63)	ASSAULT 1	2-18-03	CONVICTED BY JURY OF ASSAULT 2 (11-12-03)	<b>LWOP</b>
03-1-01756-8	BRUCE CASAWAY (AM, 12-21-72)	ASSAULT 1, UPOF 2	4-16-03	CONVICTED BY JURY (10-29-03)	<b>LWOP</b>
03-1-01836-0	JEREMY CAMPEAU (W/M, 8-4-75)	ASSLT 2, UPOF 1	4-17-03	DISMISSED (8-5-03)	NONE
03-1-01912-9	JEROME ROBINSON (B/M, 11-13-53)	ASSAULT 2	8-16-02	PLED ASSAULT 3 (12-15-03)	26 MONTHS

03-1-02581-1	THEODORE RHONE (B/M, 9-16-56)	UPCSWID W/FASE, ROB 1,UPOF 1, BAIL JUMP	5-30-03	CONVICTED BY JURY (5-5-05)	<b>LWOP</b>
03-1-02929-9	DAVID HELGESON (W/M, 8-20-76)	ROB1, ASLT 2, THEFT 2	6-23-03	PLED TH 1, ASLT 3 (11-5-03)	96 MONTHS
03-1-03251-6	ADOLPHUS REDDING (B/M, 6-8-70)	ROB 1, KID 1, ASSLT 2, ATT ROB 1, ASSLT 3	7-14-03	PLED TH 1, UNL IMPR, TMVOP 2, ASSLT 3 (X2) (4-15-04)	360 MONTHS
03-1-03428-4	JAMES MOODY (W/M, 12-13-63)	ASSAULT 1	7-27-03	CONVICTED AFTER BENCH TRIAL (4-23-04)	<b>LWOP</b>
03-1-03783-6	WILLIAM MANUS (B/M, 8-6-68)	ASSAULT 2, FEL HARASS	7-26-03	ACQUITTED BY JURY (12-1-03)	NONE
03-1-03797-6	HOYT CRACE (W/M, 2-28-63)	ASSAULT 2, RES BURG, MM 2	8-17-03	CONVICTED BY JURY OF ATT ASLT 2 W/DWSE (5-14-04)	<b>LWOP</b>
03-1-04144-2	TIMOTHY MOON (B/M, 8-28-60)	BURG 1, ASLT 2, DVCOV	8-7-03	PLED RES BURG (4-20-04)	120 MONTHS
03-1-04668-1	DOUGLAS LOCKETT (W/M, 1-31-65)	RAPE 1, KID 1, ASLT 2, FTRSO	9-27-03	PLED UNL IMPR, ATT ASLT 2 (10-26-04)	180 MONTHS
03-1-04813-7	DON JACKSON (B/M, 12-3-73)	BURG 1, ASLT 4, TAMP W/WIT, INT WIT	10-4-03	PLED RES BURG, ASLT 3 (9-23-04)	126 MONTHS
03-1-05003-4	LOUIS COTE (W/M, 11-5-53)	ASLT 1(X2), ASLT 2(X4), UPOF 1, ASLT 4, ESC 3, UPFGLM	10-25-03	PLED ASLT 3(X2), UPOF 1 (10-21-04)	116 MONTHS
03-1-05918-0	ROBERT LEWIS (I/M, 6-19-73)	MURDER 1	7-23-02	CONVICTED BY JURY OF MURDER 2 (10-5-05)	<b>LWOP</b>
03-1-05971-6	ROBERT VESTAL (W/M, 6-13-67)	ROB 1, RES BURG, KID 1	12-20-03	CONVICTED BY JURY (11-30-04)	<b>LWOP</b>
03-1-06167-2	FRANK EARL (I/M, 7-17-52)	RAPE CHILD 1(X2), ATT RAPE CHILD 1,CHILD MOL 1, RAPE CHD 2	7-14-99	CONVICTED BY JURY OF RC1(X2), ARC1, CM2, RC2 (12-19-05)	<b>LWOP</b>
04-1-00100-7	ANDERSON DURHAM (B/M, 7-30-47)	ASSAULT 2	11-13-03	PLED BAIL JUMPING (11-19-04)	6 MONTHS

04-1-00241-1	DANNY NEELEY (W/M, 6-27-51)	ROBBERY 1	1-18-04	PLED THEFT 1 (11-17-04)	96 MONTHS
04-1-00246-1	KHA MAJORS (A/M, 12-31-79)	ASLT 2, UNL IMP, VNCO	1-16-04	CONVICTED BY JURY	<b>LWOP</b>
04-1-00398-1	MICHAEL GORDON (W/M, 2-24-54)	ASLT 1, FEL HARASS	1-27-04	PLED ASLT 3, FH (6-2-04)	120 MONTHS
04-1-01259-9	SHANE CARPENTER (W/M, 3-3-75)	ATT ASLT 1(X2), ASLT 3	3-10-04	PLED ASSAULT 3(X3) (4-12-05)	180 MONTHS
04-1-01273-4	PRINCE ALEXANDER (B/M, 6-7-67)	VEH ASSAULT, ELUDE	3-11-04	PLED ELUDE (5-3-04)	29 MONTHS
04-1-01514-8	JONATHAN PLUHAR (W/M, 5-7-71)	ROB 2, UPCS	3-26-04	PLED THEFT 1, UPCS (10-11-04)	180 MONTHS
04-1-01596-2	GEORGE WALLS (W/M, 4-7-43)	CHILD MOL 1	2-1-02	PLED CHILD MOL 3 (12-16-04)	60 MONTHS
04-1-02864-9	SANTIAGO SISON, JR (A/M, 5-14-62)	CHILD MOL 1	9-25-03	PLED ATT ASLT 2 (1-25-05)	9 MONTHS
04-1-03352-9	TIMOTHY BROWN (W/M, 5-11-54)	RAPE 2, FTRSO	7-4-04	PLED ASSAULT 3 (1-12-05)	60 MONTHS
04-1-03439-8	TIMOTHY BREWSTER (B/M, 9-30-56)	ARSON 1, RES BURG, MM2, FEL HAR, ASLT 4	7-11-04	PLED MM1, RES BURG (2-14-05)	240 MONTHS
04-1-03521-1	MARC DECEAULT (W/M, 1-12-55)	ASSAULT 1	7-17-04	DISMISSED (11-18-04)	NONE
04-1-03534-3	DONALD BETTS (B/M, 12-31-63)	RAPE 2 (X2), BURG 1, THEFT 3, ASLT 4	6-6-04	CONVICTED BY JURY OF RAPE 2(X2), BURG 1, AST 4 (11-18-05)	<b>LWOP</b>
04-1-03722-2	HARRY CARRIER (W/M, 2-26-50)	RAPE CHILD 1, CM 1, SEOM, DDMESC, PDMESSEC	7-30-04	PLED CHILD MOL 1, DDMESSEC, PDMESSEC (6-13-05)	<b>LWOP</b>
04-1-03895-4	JEFFERY HENDERSON (W/M, 2-22-62)	ATT KID 1	7-30-04	DISMISSED (2-27-06)	NONE
04-1-04252-8	ROBERT LEWIS (B/M, 7-12-70)	ASSAULT 2, HARASSMENT	9-30-04	PLED INT WEAP, HARASSMENT (2-18-05)	SUSP SENTENCE, 179 DAYS SERVED
04-1-04291-9	SAHIEM GREEN (B/M, 9-2-74)	ROB 1, UPOF 1, UPCSUID	9-7-04	PLED UPOF 1 & OTHER CASES (9-23-05)	270 MONTHS

04-1-04404-1	ROBINSON SMITH (W/M, 4-6-55)	ASSAULT 1	9-11-04	DISMISSED (2-8-05)	NONE
04-1-05043-1	DARREN PERKINS (W/M, 3-12-67)	RAPE 2, IND LIBS, KID 1	10-22-04	PLED ASLT 3, UNL IMP, FTRSO	115 MONTHS
04-1-05575-1	ERONI WILLIAMS (A/M, 6-28-81)	MURDER 1, MURDER 2	10-30-04	CONVICTED BY JURY OF MURDER 2 (8-4-06)	<b>LWOP</b>
04-1-05829-7	RICHARD REIFSNYDER (W/M, 5-25-59)	BURG 1, VNCO, ASLT 4(X2)	12-15-04	PLED ASLT 2, THEFT 1 (3-15-05)	22 MONTHS
04-1-05842-4	EDDIE LOWERY (B/M, 11-23-63)	ROBBERY 1	12-18-04	PLED ATT TH 1 (6-27-05)	21 MONTHS
05-1-00152-8	CORNELL SHEGOG (B/M, 11-15-58)	ROBBERY 2, FALSE STMTS	1-8-05	CONVICTED BY JURY (7-21-05)	<b>LWOP</b>
05-1-00201-0	CECIL DAVIS (B/M, 9-1-59)	MURDER 2	4-14-96	CONVICTED BY JURY (11-3-06)	<b>LWOP</b>
05-1-00372-5	DEAN BARKER (W/M, 2-5-61)	ASLT 2, UNL IMP, RES ARR	1-18-05	DISMISSED DEF INCOMPETENT (3-16-06)	NONE
05-1-00565-5	DAN CHISOLM (B/M, 2-5-66)	ROBBERY 2	9-5-04	PLED ATT THEFT 1 (12-7-05)	9 MONTHS
05-1-01060-8	APELU TAMAU (A/M, 10-5-77)	ASSAULT 2, VPO	11-23-04	PLED ASSAULT 3 (X2), TAMP W/ WITNESS (3-6-08)	180 MONTHS
05-1-01253-8	ANTHONY TOWNSEND (W/M, 10-10-79)	ROBBERY 1, ASSAULT 2	1-21-05	PLED ASSAULT 3 (1-20-06)	17 MONTHS
05-1-01667-3	THOMAS GALLAGHER (W/M, 11-10-52)	BURGLARY 1, ASSAULT 2(X4)	4-6-05	PLED RES BURG, ASSAULT 3 (11-1-05)	300 MONTHS
05-1-01671-1	THOMAS GALLAGHER (11-10-52)	ROBBERY 1, ASSAULT 3	4-5-05	PLED THEFT 1, ASSAULT 3 (11-1-05)	300 MONTHS
05-1-01781-5	DONALD SCHNEIDER (W/M, 11-6-58)	RAPE 1(X5), KID 1(X2)	4-29-04	CONVICTED BY JURY OF RAPE 1(X3), UNL IMP, ASLT 2, KID 1 (1-12-07)	<b>LWOP</b>
05-1-01965-6	LATEQUE BANKS	ASSAULT 2, ASSAULT 4(X2)	9-6-04	PLED ASSAULT 3,	14 MONTHS

	(B/M, 6-8-80)			FEL HARASS (11-28-05)	
05-1-02709-8	PATRICK NOEL (W/M, 2-2-82)	ASSAULT 2, ELUDE, PSP 1, PSP 3, WEAP VIO	6-2-05	PLED ASSAULT 3, ELUDE, PSP 1 (12-20-05)	96 MONTHS
05-1-03940-1	TYRONE GATHINGS (B/M, 7-29-60)	ROBBERY 1, BURGLARY 1, ASSAULT 2, ELUDE	8-5-05	PLED ATT THEFT 1 ELUDE (8-14-06)	42.75 MONTHS
05-1-04069-8	WILLIAM MANUS (B/M, 8-6-68)	RAPE CHILD 2	8-15-05	DISMISSED	NONE
05-1-04496-1	NORMAN WHITTIER (W/M, 3-20-40)	ASSAULT 1, INT WIT, FEL HAR	9-12-05	PLED INT WIT, FH (11-2-06)	180 MONTHS
05-1-04597-5	MARK COULDEN (W/M, 9-23-66)	ASLT CHILD 1, RAPE 1, RAPE CHILD 2	9-17-05	CONVICTED AFTER BENCH TRIAL (7-24-06)	<b>LWOP</b>
05-1-05028-6	KENNETH RILEY (B/M, 7-8-69)	ASSAULT 2 ASSAULT 4	7-2-05	PLED ASSAULT 4 (1-10-06)	4 MONTHS
05-1-05257-2	JOCQUESS BRAXTON (B/M, 11-25-84)	ROBBERY 1, BURG1,UPOF1, THEFT 1(X2), UNL IMPR	10-21-05	PENDING	
05-1-05373-1	PRINCE ALEXANDER (B/M, 6-7-67)	ROBBERY 1	10-24-05	PLED BURG 2, THEFT 1 (7-11-07)	360 MONTHS
05-1-05577-6	JAMES SPENCER (B/M, 1-5-76)	ATT ARSON 1, ATT ASLT 2, FEL HAR, MM3	11-9-05	PLED FEL HARASS (5-9-06)	9 MONTHS
05-1-05881-3	KEVIN YARBROUGH (B/M, 11-6-63)	ASSAULT 2, ASSAULT 4	11-24-05	PLED MM2, ASLT 4 (11-24-05)	22 MONTHS
05-1-06195-4	EUGENE WYNDHAM (B/M, 9-9-69)	ASSAULT 1, ASSAULT 4	12-13-05	DISMISSED (3-21-06)	NONE
06-1-00046-5	GREGORY DAWN (B/M, 7-9-68)	BURGLARY 1	12-28-05	PLED ATT MM1 (3-29-06)	36 MONTHS
06-1-00620-0	EDDIE CRUMBLE (B/M, 4-26-79)	ROBBERY 1, UPOF 1	1-21-06	PLED THFT 1, UPOF 1 (10-12-06)	75 MONTHS
06-1-00814-8	EDDIE CRUMBLE (B/M, 4-26-79)	ATT MURD 1(X2), UPOF 1, ASLT 1(X2), BURG 1	2-15-06	CONVICTED AFTER BENCH TRIAL (10-23-06)	<b>LWOP</b>
06-1-00822-9	JOHN KAZMIERCZAK (W/M, 4-8-67)	ROBBERY 1, ASSAULT 2	2-16-06	CONVICTED BY JURY OF ROB1, ASLT 3 (11-9-06)	<b>LWOP</b>
06-1-01247-	NORMAN	ROB 1, ASLT	1-25-06	PLED	120 MONTHS

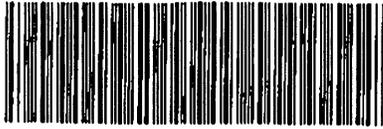
1	BRAXTON, JR (B/M, 3-4-49)	2(X2)		THEFT 1, ASSAULT 3 (1-8-07)	
06-1-01574-8	ROBERT FAILEY (W/M, 3-18-53)	ROBBERY 1	4-7-06	CONVICTED BY JURY (10-31-06)	<b>LWOP</b>
06-1-02168-3	EDDIE TRICE (B/M, 1-28-57)	RAPE CHILD 1(X3), CHILD MOL 1, BURG 1	5-9-06	CONVICTED BY JURY (4-16-08)	<b>PENDING</b>
06-1-02210-8	CYRUS ELLIS (B/M, 5-24-70)	ASSAULT 2, FEL HARASS, MM1, THEFT OF MV	5-15-06	PLED ASLT 3, FEL HARASS, MM1, THEFT (11-28-07)	336 MONTHS
06-1-02520-4	SUZANNE SPEIGHTS (W/F, 4-23-62)	ASSAULT 1 ROBBERY 1	6-2-06	CONVICTED AFTER BENCH TRIAL (2-9-07)	<b>LWOP</b>
06-1-03401-7	EUGENE WYNDHAM (B/M, 9-9-69)	VNCO, ASLT 4, BURG 1	7-23-06	PLED RES BURG (12-5-07)	57 MONTHS
06-1-03416-5	JAMES MATCHETT (W/M, 12-22-71)	RAPE 2, UNL IMP, FEL HAR	5-12-06	PLED FEL HAR, UNL IMP, SDCS (4-30-07)	132 MONTHS
06-1-03900-1	AARON ALEXANDER (I/M, 5-18-72)	ASLT 2, MM2, ATT ARSON 2, OBSTRUCTING	8-20-06	PLED MM2 (11-27-06)	22 MONTHS
06-1-04578-7	KENNETH LEIGH (B/M, 6-29-55)	ASSAULT 2(X2)	9-23-06	PLED ASSAULT 3 (1-25-07)	43 MONTHS
06-1-04769-1	LATRON SWEARINGTON (B/M, (8-27-75)	BURG 1, ASLT 4, VNCO	10-7-06	PLED RES BURG, ASLT 3 (4-16-07)	120 MONTHS
06-1-05013-6	CHRISTOPHER SMITH (B/M, 2-23-63)	RAPE 1, RAPE CHILD 2, KID 1(X2), ASLT 1, FH (X2)	10-22-06	PENDING	
06-1-05269-4	JAMES BAKER (W/M, 1-23-71)	CHILD MOL 1(X4)	6-14-00	PLED GUILTY AS CHARGED (2-27-07)	<b>LWOP</b>
06-1-05599-5	FERNANDO IRIZARRY (H/M, 10-7-76)	IND LIBS, TAMP W/ WIT	11-28-06	PENDING	
06-1-06142-1	KIM DELAVERGNE (W/M, 12-16-54)	ROBBERY 1	12-27-06	CONVICTED BY JURY (12-7-07)	<b>LWOP</b>
07-1-00486-8	MARVIN WILEY (B/M, 2-29-64)	RAPE 2	1-24-07	DISMISSED (6-27-07)	NONE
07-1-00510-4	SEAN LITSHEIM (W/M, 6-21-69)	ROBBERY 1	1-25-07	PLED ASSAULT 3 (10-10-07)	60 MONTHS
07-1-00612-	DERRICK	ATT KID 1,	11/06-1/07	PENDING	

7	HUNTER (B/M, 10-29-68)	FTRSO, CWMIP (X2), ASLT 2, ATT KID 1			
07-1-00826-0	DERRICK JONES (B/M, 5-12-75)	UPOF 1, ELUDE W/FASE, RES ARR, UPFGLM	2-9-07	PLED UPOF 1, ELUDE (1-23-08)	87 MONTHS
07-1-01188-1	ROBERT JANUARY (W/M, 7-21-64)	CHILD MOL 1	3-3-07	PENDING	
07-1-01344-1	MICHAEL STAUDINGER (W/M, 1-27-72)	CHILD MOL 1	2-4-07	PLED ASSAULT 1 (X2) (2-25-08)	240 MONTHS
07-1-01353-1	DEMOND LOWE (B/M, 7-18-72)	ASSAULT 2, UPCSWID, MM2	3-11-07	PLED UPCS, THEFT 2, MM2 (9-6-07)	29 MONTHS
07-1-01500-2	ROSA WILLIAMS (B/F, 3-15-63)	ASSAULT 2	3-19-07	PLED ASSAULT 3 (7-17-07)	9 MONTHS
07-1-01845-1	DWAYNE SANDERS (B/M, 3-21-72)	ASSAULT 2	3-30-07	CONVICTED BY JURY (10-16-07)	<b>LWOP</b>
07-1-01916-4	RICKY OLSON (W/M, 10-18-56)	ASLT 2, ANIMAL CRUELTY 2	4-6-07	DISMISSED (12-11-07)	NONE
07-1-01943-1	JAMES MATCHETTE (W/M, 12-22-71)	RAPE 2, ROB 2, IND LIBS, UNL IMP	5-14-06	PLED UNL IMP, THEFT 2, ATT UDCS (4-30-07)	132 MONTHS
07-1-01946-6	LOUIS JOHNSON III (B/M, 12-5-58)	ATT MURD 1, ASLT 1, VNCO, ASLT 4	4-9-07	DISMISSED (4-27-07) DEF DEAD	NONE
07-1-01991-1	DAVID BREZEE (W/M, 8-30-67)	CHILD MOL 1(X4), SEOM (X5)	11-1-06	PENDING	
07-1-02399-4	GARY PEASLEY (W/M, 8-16-67)	ASSAULT 2	5-3-07	PLED ASSAULT 3 (2-15-08)	24 MONTHS
07-1-02708-6	RICKY MCGINNIS (W/M, 9-4-59)	ASSAULT 2	5-18-07	PENDING	
07-1-03234-9	GERALD HATFIELD (B/M, 8-26-60)	ASSAULT 2 UPOF 1, UPCS, THEFT OF F/A	6-18-07	PENDING	
07-1-03497-0	LUCKY SIMPSON (B/M, 5-2-53)	ROBBERY 1	4-7-07	DISMISSED (3-6-08) DEF INCOMPETENT	NONE
07-1-03964-5	LAWRENCE LEFFALL III (B/M, 12-24-75)	ATT RAPE 2, IND LIBS, UPCS	7-28-07	PENDING	
07-1-04242-	ALLEN	ROBBERY 1	8-14-07	DISMISSED TO	NONE

5	LOUCKS (W/M, 11-24-52)			US ATTY (9-25-07)	
07-1-04443-6	DAVID EBE (W/M, 2-9-59)	ROBBERY 1	8-22-07	DISMISSED TO US ATTY (1-14-08)	NONE
07-1-04616-1	FERMAN SOWELL (B/M, 12-25-80)	ASSAULT 2, VNCO, INT W/911	9-4-07	PENDING	
07-1-05074-6	DAVID GOWER (W/M, 4-7-63)	RAPE CHILD 2, RAPE 3, INCS 1, ASLT 2	9-19-07	PENDING	
07-1-05637-0	OREE ROBERTS (B/M, 4-16-58)	ASSAULT 2	10-31-07	PENDING	
07-1-05900-0	TRAMAINE MILES (B/M, 1-16-61)	ROBBERY 1, ELUDE, OBSTRUCTING, DWLS 2	11-24-07	CONVICTED BY JURY (1-29-08)	<b>LWOP</b>
08-1-00026-7	ERIC SYKES (B/M, 7-15-74)	ROBBERY 1	12-31-07	PENDING	

# **APPENDIX “G”**

*Sentencing Memorandum*



02-1-06037-8 19024400 MM 05-28-03

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A.M. MAY 27 2003 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY W DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 02-1-06037-<sup>7-6</sup>~~4~~

vs.

DARNELL KEENO CRAWFORD,

STATE'S SENTENCING  
MEMORANDUM

Defendant.

I. PROCEDURE

Defendant was charged on December 27, 2002 with one count of Robbery in the First Degree and one count of Assault in the Second Degree. Trial began on April 14, 2003 and the jury returned a verdict on April 16, 2003. The jury found the defendant guilty as charged.

II. FACTS

Defendant stands convicted of one count of Robbery in the First Degree, a class A felony, and one count of Assault in the Second Degree. Each conviction qualifies as a "most serious offense" under RCW 9.94A.030(28)<sup>1</sup>. Defendant has the following criminal history:

<sup>1</sup> RCW 9.94A.030(28) provides as follows:

"Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:

- (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- (b) Assault in the second degree. ...

**ORIGINAL**

<u>Crime</u>	<u>Date of Sentence</u>	<u>Jurisdiction</u>	<u>Date of Crime</u>
Sex Abuse I	9/23/93	Jefferson, KY	12/20/91
Bail Jump I	9/23/93	Jefferson, KY	1/28/93
Fraudulent use Of a Credit Card	07/27/93	Jefferson, KY	9/7/92
Fraudulent use Of a Credit Card	7/27/93	Jefferson, KY	10/92
Fraudulent Use Of a Credit Card	7/27/93	Jefferson, KY	3/8/93
UPOF 2	4/8/97	Pierce, WA	2/8/97
Robbery 2	3/24/98	Pierce, WA	9/16/97
PSP 2	3/24/98	Pierce, WA	10/5/97

Pursuant to RCW 9.94A.030(28)(o), the March, 24 1998 conviction for Robbery in the Second Degree qualifies as a "most serious offense." The defendant's 1993 Kentucky conviction for Sex Abuse I is comparable to the crime of Child Molestation in the First Degree in Washington. Child Molestation in the First Degree is a class A felony and is considered a "most serious offense". Therefore, as will be argued below, the Sexual Abuse I conviction would also qualify as a "most serious offense" under Washington law. Accordingly, the defendant is a "persistent offender" as defined by RCW 9.94A.360(32)<sup>2</sup>, and must be sentenced to a term of total confinement for life without the possibility of release pursuant to RCW 9.94A.570.<sup>3</sup>

<sup>2</sup> RCW 9.94A.030(32) provides as follows:

"Persistent offender is an offender who:

(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

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

<sup>3</sup> RCW 9.94A.570 provides as follows:

1           III.    LAW AND ARGUMENT

2           Defendant's Kentucky conviction for Sex Abuse I is comparable to a conviction for Child  
 3           Molestation in the First Degree in Washington.

4           RCW 9.94A.525(3) addresses out-of-state convictions and provides as follows:

5           Out-of-state convictions for offenses shall be classified according to the comparable  
 6           offense definitions and sentences provided by Washington law.

7           The purpose of the statute is to give an out-of-state conviction the same effect as if it had been  
 8           rendered in-state, or, in alternative terms, to treat a person convicted outside the state as if he had  
 9           been convicted in Washington. State v. Cameron 80 Wn.App. 374, 378, 909 P.2d 309 (1996)  
 10          *citing* State v. Weiland, 66 Wn.App. 29, 34, 831 P.2d 749 (1992).

11          To determine whether an out-of-state conviction qualifies as a "most serious offense"  
 12          under Washington law, a "comparability" analysis is conducted. The goal is to match the out-of-  
 13          state crime to the comparable Washington crime and to "treat a person convicted outside the  
 14          state as if he or she had been convicted in Washington." State v. Berry, 141 Wn.2d 121, 130-  
 15          131, 5 P.3d 658 (2000).

16          The comparability analysis is a three step process: 1) The court must identify any  
 17          comparable Washington offenses by comparing the elements of the out-of-state crime with the  
 18          elements of the potentially comparable Washington crimes;<sup>4</sup> 2) The court must classify the  
 19          comparable Washington offense; 3) The court must treat the out-of-state conviction as if it were  
 20          a conviction for the comparable Washington offense. State v Berry, *supra*. *citing* State v.  
 21          Cameron, 80 Wn.App. 374, 378-379, 909 P.2d 309 (1996). To classify the comparable  
 22

23  
 24          Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent  
 25          offender shall be sentenced to a term of total confinement for life without the possibility of release...

<sup>4</sup> The elements of the out-of-state crime are compared with the elements of the potentially comparable Washington  
 crimes as defined on the date the out-of-state crime was committed. State v. Cameron 80 Wn.App. 374, 378-79, 909  
 P.2d 309 (1996)

1 Washington offense, the court must determine whether it is a felony under Washington law and,  
2 if so, whether it is an A, B, or C felony. State v. Weiland, 66 Wn.App at 32.

3 The defendant has a prior conviction for Sex Abuse I from Jefferson County Kentucky.  
4 The date of the conviction is September, 1993. There are several Kentucky statutes that were in  
5 effect in 1993 that the court must consider in order to determine if the Kentucky conviction is  
6 comparable to the Washington crime of Child Molestation in the First Degree. The first statute  
7 to consider is Kentucky Revised Statute (KRS) 510.110, which defined Sexual Abuse I<sup>5</sup> as  
8 follows:

9 "Sexual abuse in the first degree

10 (1) A person is guilty of sexual abuse in the first degree when:

11 (a) He subjects another person to sexual contact by forcible compulsion; or

12 (b) He subjects another person to sexual contact who is incapable of consent because he:

13 1. Is physically helpless; or

14 2. Is less than twelve (12) years old.

15 (2) Sexual abuse in the first degree is a Class D felony."

16 "Sexual contact" is defined by KRS 510.010<sup>6</sup>, which provides as follows:

17 "The following definitions apply in this chapter unless the context otherwise requires: ...

18 (7) 'Sexual contact' means any touching of the sexual or other intimate parts of a  
19 person done for the purpose of gratifying the sexual desire of either party. ..."

20 Pursuant to KRS 532.010, there are five classes of felonies in Kentucky: 1) Capital  
21 offenses; 2) Class A felonies; 3) Class B felonies; 4) Class C felonies and 5) Class D felonies.<sup>7</sup>

22 A felony is defined as an offense for which a sentence to a term of imprisonment of at least one  
23 (1) year in the custody of the Department of Corrections may be imposed.<sup>8</sup> With regard to the

24 <sup>5</sup> A copy of KRS 510.110 is attached hereto as Attachment "A"

25 <sup>6</sup> A copy of KRS 510.010 is attached hereto as Attachment "B"

<sup>7</sup> KRS 532.010 attached hereto as Attachment "C"

<sup>8</sup> KRS 500.080, a copy of which is attached hereto as Attachment "D"

1 various classification of felonies, KRS 532.020<sup>9</sup> ("Designation of Offenses") provides as  
 2 follows:

3 (1) Any offense defined outside this code for which a law outside this code provides a  
 4 sentence to a term of imprisonment in the state for:

5 (a) At least one (1) but not more than five (5) years shall be deemed a Class D felony;

6 (b) At least five (5) but not more than ten (10) years shall be deemed a Class C felony;

7 (c) At least ten (10) but not more than twenty (20) years shall be deemed a Class B  
 8 felony;

9 (d) For twenty (20) or more years shall be deemed a Class A felony. ...

10 The comparable crime in Washington is Child Molestation in the First Degree, which is  
 11 defined in RCW 9A.44.083. This statute, which was in effect in 1993, provided as follows:

12 "(1) A person is guilty of child molestation in the first degree when the person has sexual  
 13 contact with another who is less than twelve years old and not married to the  
 14 perpetrator and the perpetrator is at least thirty six months older than the victim.

15 (2) Child molestation in the first degree is a class A felony."

16 RCW 9.44.010, also in effect in 1993, defined "sexual contact" follows:

17 "...(2) "Sexual contact" means any touching of the sexual or other intimate parts of a  
 18 person done for the purpose of gratifying sexual desire of either party.

19 In comparing the elements of the two crimes the court can see that both statutes require  
 20 (1) sexual contact (2) with another person who is less than twelve years old. The definition of  
 21 "sexual contact" is identical in the Washington and Kentucky statutes. The Washington statute  
 22 also has requirement that the victim not be married to the perpetrator and additionally requires  
 23 that the perpetrator be at least thirty six months older than the victim.

24 The facts as alleged in the Sexual Abuse I charging document are that between the 16<sup>th</sup>  
 25 day of December, 1991 and the 20<sup>th</sup> day of December, 1991, the defendant subjected LaKasha  
 James, a person less than twelve years of age, to sexual contact.<sup>10</sup> Within the defendant's Plea  
 of Guilty, which was entered on September 23, 1993, the facts of the case were provided as

<sup>9</sup> A copy of KRS 532.020 is attached hereto as Attachment "E"

<sup>10</sup> A copy of the Complaint is attached hereto as Attachment "F"

1 follows: "B/W (sic) Dec. 16 and Dec. 20, 1991 the D (sic) digitally penetrated the vagina of his  
2 7 year old niece in Jeff.Co. Ky...."<sup>11</sup> The Plea of Guilty indicates that it was entered pursuant to  
3 North Carolina v. Alford, 400 U.S. 25, 27 L.Ed 2d 162, 91 S.Ct 160 (1970).

4 Washington case law provides that if the elements of the two crimes are not identical, or  
5 if the foreign statute is broader than the Washington definition of the particular crime, the  
6 sentencing court may look at the defendant's conduct, as evidenced by the indictment or  
7 information, to determine whether the conduct would have violated the comparable Washington  
8 statute. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998), *citing* State v. Duke, 77  
9 Wn.App 532, 535, 892 P.2d 120 (1995); State v. Mutch, 87 Wn.App 433, 437, 942 P.2d 1018  
10 (1997). "The key inquiry is under what Washington statute could the defendant have been  
11 convicted if he or she had committed the same acts in Washington." State v. Morley, 134 Wn.2d  
12 at 606, *quoting from* State v. McCorkle, 88 Wn.App 485, 495, 945 P.2d 736 (1997).

13  
14 The defendant was alleged to have digitally penetrated the vagina of his seven year old  
15 niece in December, 1991 and, within his guilty plea, the defendant admitted committing this  
16 crime. The defendant's date of birth is January 16, 1966. In 1991 he would have been 25 years  
17 of age, so he clearly was more than 36 months older than the victim. As for the requirement in  
18 RCW 9A.44.083 that the perpetrator not be married to the victim, the State is not aware of any  
19 jurisdiction in the United States that would allow the legal marriage between a 25 year old male  
20 and his seven year old niece.

21 It is clear that the digital penetration of the vagina of a 7 year old by a 25 year old man  
22 would have violated the provisions of Washington's Child Molestation in the First Degree  
23 statute. The elements of Kentucky's Sexual Abuse I statute are comparable to the elements of  
24 Washington's Child Molestation in the First Degree statute. Child Molestation in the First  
25

---

<sup>11</sup> Copies of the Plea of Guilty and Judgment and Sentence are attached hereto as Attachment "G"

1 Degree is a class A felony and, pursuant to RCW 9.94A.030(28), all class A felonies are  
2 considered "most serious" offenses for purposes of Washington's three strikes law. Accordingly,  
3 the defendant is a "persistent offender" as defined by RCW 9.94A.360(32) and must be  
4 sentenced to a term of confinement of life without the possibility of release.

5 RESPECTFULLY SUBMITTED this 25 day of May, 2003.

6 GERALD A. HORNE  
7 Prosecuting Attorney

8  
9 By: LKW  
10 LISA K. WAGNER  
11 Deputy Prosecuting Attorney  
12 WSB # 16718

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lkw

**ATTACHMENT "A"**

Source: [Legal > / ... / > KY - Kentucky Revised Statutes Annotated, 1993](#) ⓘ  
 Terms: [510.110](#) ([Edit Search](#))

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*KRS § 510.110*

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\*\*\* ARCHIVE MATERIAL \*\*\*

\*\*\* THIS SECTION IS CURRENT THROUGH THE 1993 SUPPLEMENT \*\*\*  
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TITLE L. KENTUCKY PENAL CODE  
 CHAPTER 510. SEXUAL OFFENSES

*KRS § 510.110* (Michie-1993)

**§ 510.110.** Sexual abuse in the first degree

(1) A person is guilty of sexual abuse in the first degree when:

(a) He subjects another person to sexual contact by forcible compulsion; or

(b) He subjects another person to sexual contact who is incapable of consent because he:

1. Is physically helpless; or

2. Is less than twelve (12) years old.

(2) Sexual abuse in the first degree is a Class D felony.

**HISTORY:** (Enacts. Acts 1974, ch. 406, § 91.)

**NOTES:**

KENTUCKY BENCH & BAR. Hawse, Spoliation of Evidence, Vol. 54, No. 3, Summer 1990, Ky. Bench & Bar 13.

KENTUCKY LAW JOURNAL. Kentucky Law Survey, Brice and Taylor, Criminal Law, 67 Ky. L.J. 569 (1978-1979).

NORTHERN KENTUCKY LAW REVIEW. Comments, Relevancy of Evidence of Prior Sexual Conduct Under the Kentucky Revised Statute Section 510.145, 4 Northern Ky. L. Rev. 345 (1977).

Armstrong & Gillig, Responding to Child Sexual Abuse and Exploitation: The Kentucky Approach, 16 N. Ky. L. Rev. 17 (1988).

Lotz, A Survey of Criminal Law Statutes Enacted in 1992, 20 N. Ky. L. Rev. 745 (1993).

CITED: Hulan v. Commonwealth, 634 S.W.2d 410 (Ky. 1982); Commonwealth v. Arnette, 701 S.W.2d 407 (Ky. 1985).

NOTES TO DECISIONS

**ATTACHMENT "B"**

Source: [Legal > / . . . / > KY - Kentucky Revised Statutes Annotated, 1993](#) ①  
 Terms: 510.010 ([Edit Search](#))

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*KRS § 510.010*

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TITLE L. KENTUCKY PENAL CODE  
 CHAPTER 510. SEXUAL OFFENSES

*KRS § 510.010 (Michie 1993)*

**§ 510.010. Definitions**

The following definitions apply in this chapter unless the context otherwise requires:

- (1) "Deviate sexual intercourse" means any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another;
- (2) "Forcible compulsion" means physical force or threat of physical force, express or implied, which places a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped;
- (3) "Mental illness" means a diagnostic term that covers many clinical categories, typically including behavioral or psychological symptoms, or both, along with impairment of personal and social function, and specifically defined and clinically interpreted through reference to criteria contained in the Diagnostic and Statistical Manual of Mental Disorders (Third Edition) and any subsequent revision thereto, of the American Psychiatric Association;
- (4) "Mentally retarded person" means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as defined in KRS Chapter 202B;
- (5) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent;
- (6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act;
- (7) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party;
- (8) "Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs or anus of one person by a foreign object manipulated by

another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. "Sexual intercourse" does not include penetration of the sex organ or anus by a foreign object in the course of the performance of generally recognized health care practices; and

(9) "Foreign object" means anything used in commission of a sexual act other than the person of the actor.

**HISTORY:** (Enact. Acts 1974, ch. 406, § 81; 1986, ch. 486, § 1, effective July 15, 1986; 1988, ch. 78, § 1, effective July 15, 1988; 1988, ch. 283, § 9, effective July 15, 1988; 1990, ch. 448, § 1, effective July 13, 1990; 1992, ch. 355, § 1, effective July 14, 1992.)

**NOTES:**

**CROSS-REFERENCES.** Endangering welfare of incompetent person, KRS 530.080.  
Incest, KRS 530.020.

**KENTUCKY LAW JOURNAL.** Kentucky Law Survey, Brice and Taylor, Criminal Law, 67 Ky. L.J. 569 (1978-1979).

Kentucky Law Survey, Sellars, Criminal Law, 71 Ky. L.J. 355 (1982-83).

**NORTHERN KENTUCKY LAW REVIEW.** Comments, For Better or for Worse: Marital Rape, 15 N. Ky. L. Rev. 611 (1988).

Lotz, A Survey of Criminal Law Statutes Enacted in 1992, 20 N. Ky. L. Rev. 745 (1993).

**CITED:** Timmons v. Commonwealth, 555 S.W.2d 234 (Ky. 1977); Boyle v. Commonwealth, 694 S.W.2d 711 (Ky. Ct. App. 1985); United States v. Short, 790 F.2d 464 (6th Cir. 1986); Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); Mounce v. Commonwealth, 795 S.W.2d 375 (Ky. 1990); Martin v. Kassulke, 970 F.2d 1539 (6th Cir. 1992).

**NOTES TO DECISIONS**

**ANALYSIS**

1. Incapacity to consent.
2. Mental defectiveness.
3. Forcible compulsion.
4. Evidence of penetration.
5. Sodomy.
6. Sexual contact.

**1. INCAPACITY TO CONSENT.**

Forcible compulsion places the victim in fear of death or physical injury but with mental incapacity to consent, fear may be completely absent. Salsman v. Commonwealth, 565 S.W.2d 638 (Ky. Ct. App. 1978).

Mental incapacity to consent is no longer the equivalent of force but, rather, lack of is a separate element of every offense denied by this chapter; whether this element of the offense is supplied by forcible compulsion rather than incapacity to consent can affect the degree of the offense. Salsman v. Commonwealth, 565 S.W.2d 638 (Ky. Ct. App. 1978).

Where the record established that the prosecutrix did understand that the defendant was seeking to perform sexual acts upon her, the defendant could not be guilty of either rape in the third degree or sexual abuse in the second degree on the theory that the prosecutrix was incapable of giving consent. Salsman v. Commonwealth, 565 S.W.2d 638 (Ky. Ct. App. 1978).

**2. MENTAL DEFECTIVENESS.**

Under the definition of "mental defectiveness," it is immaterial whether the person does

**ATTACHMENT "C"**

Source: [Legal > / . . . / > KY - Kentucky Revised Statutes Annotated, 1993](#) ①  
Terms: **532.010** ([Edit Search](#))

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**KRS § 532.010**

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TITLE L. KENTUCKY PENAL CODE  
CHAPTER 532. CLASSIFICATION AND DESIGNATION OF OFFENSES -- AUTHORIZED  
DISPOSITION

**KRS § 532.010 (Michie 1993)**

**§ 532.010. Classification of offenses**

Felonies are classified, for the purpose of sentencing, into five (5) categories:

- (1) Capital offenses;
- (2) Class A felonies;
- (3) Class B felonies;
- (4) Class C felonies; and
- (5) Class D felonies.

**HISTORY:** (Enact. Acts 1974, ch. 406, § 273.)

**NOTES:**

CROSS-REFERENCES. Felonies and misdemeanors defined, KRS 431.060.

NORTHERN KENTUCKY LAW REVIEW. Lotz, A Survey of Criminal Law Statutes Enacted in 1992, 20 N. Ky. L. Rev. 745 (1993).

CITED: Gregory v. Commonwealth, 557 S.W.2d 439 (Ky. Ct. App. 1977); Cole v. Commonwealth, 609 S.W.2d 371 (Ky. Ct. App. 1980); Hamilton v. Commonwealth, 754 S.W.2d 870 (Ky. Ct. App. 1988); George v. Seabold, 909 F.2d 157 (6th Cir. 1990).

**NOTES TO DECISIONS**

**ANALYSIS**

- 1. Murder.
- 2. Enhancement.

- 1. MURDER.

**ATTACHMENT "D"**

Search - 21 Results - 500.080

Source: [Legal > / . . . / > KY - Kentucky Revised Statutes Annotated, 1993](#) ①  
Terms: **500.080** ([Edit Search](#))

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*KRS § 500.080*

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TITLE L. KENTUCKY PENAL CODE  
CHAPTER 500. GENERAL PROVISIONS

**KRS § 500.080 (Michie 1993)**

**§ 500.080. Definitions for Kentucky Penal Code**

As used in the Kentucky Penal Code, unless the context otherwise requires:

- (1) "Actor" means any natural person and, where relevant, a corporation or an unincorporated association;
- (2) "Crime" means a misdemeanor or a felony;
- (3) "Dangerous instrument" means any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury;
- (4) "Deadly weapon" means any weapon:
  - (a) Any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged;
  - (b) Any knife other than an ordinary pocket knife or hunting knife;
  - (c) Billy, nightstick, or club;
  - (d) Blackjack or slapjack;
  - (e) Nunchaku karate sticks;
  - (f) Shuriken or death star; or
  - (g) Artificial knuckles made from metal, plastic, or other similar hard material;
- (5) "Felony" means an offense for which a sentence to a term of imprisonment of at least one (1) year in the custody of the Department of Corrections may be imposed;

(6) "Government" means the United States, any state, county, municipality, or other political unit, or any department, agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government;

(7) "He" means any natural person and, where relevant, a corporation or an unincorporated association;

(8) "Law" includes statutes, ordinances, and properly adopted regulatory provisions. Unless the context otherwise clearly requires, "law" also includes the common law;

(9) "Minor" means any person who has not reached the age of majority as defined in KRS 2.015;

(10) "Misdemeanor" means an offense, other than a traffic infraction, for which a sentence to a term of imprisonment of not more than twelve (12) months can be imposed;

(11) "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law, or ordinance of a political subdivision of this state or by any law, order, rule, or regulation of any governmental instrumentality authorized by law to adopt the same;

(12) "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government, or a governmental authority;

(13) "Physical injury" means substantial physical pain or any impairment of physical condition;

(14) "Possession" means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object;

(15) "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ;

(16) "Unlawful" means contrary to law or, where the context so requires, not permitted by law. It does not mean wrongful or immoral; and

(17) "Violation" means an offense, other than a traffic infraction, for which a sentence to a fine only can be imposed.

**HISTORY:** (Enact. Acts 1974, ch. 406, § 8; 1974, ch. 74, Art. V, § 24(14); 1978, ch. 78, § 1, effective June 17, 1978; 1986, ch. 331, § 56, effective July 15, 1986; 1990, ch. 282, § 1, effective July 13, 1990; 1992, ch. 211, § 130, effective July 14, 1992.)

**NOTES:**

CROSS-REFERENCES. Felonies and misdemeanors defined, KRS 431.060.

KENTUCKY LAW JOURNAL. Kentucky Law Survey, Brice and Taylor, Criminal Law, 67 Ky. L.J. 569 (1978-1979).

Comment, Feticide: Murder in Kentucky?, 71 Ky. L.J. 933 (1982-83).

NORTHERN KENTUCKY LAW REVIEW. Elder, Kentucky Criminal Libel Law and Public Officials - An Historical Anachronism, 8 N. Ky. L. Rev. 37 (1981).

Note -- Criminal Law -- Murder -- Intentional Killing of Viable Fetus Not Murder, 11 N. Ky.

**ATTACHMENT "E"**

Source: [Legal > /.../ > KY - Kentucky Revised Statutes Annotated, 1993](#) ⓘ

Terms: [532.020](#) ([Edit Search](#))

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**KRS § 532.020**

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TITLE L. KENTUCKY PENAL CODE  
CHAPTER 532. CLASSIFICATION AND DESIGNATION OF OFFENSES -- AUTHORIZED  
DISPOSITION

**KRS § 532.020 (Michie 1993)**

**§ 532.020. Designation of offenses**

(1) Any offense defined outside this code for which a law outside this code provides a sentence to a term of imprisonment in the state penitentiary or reformatory for:

(a) At least one (1) but not more than five (5) years shall be deemed a Class D felony;

(b) At least five (5) but not more than ten (10) years shall be deemed a Class C felony;

(c) At least ten (10) but not more than twenty (20) years shall be deemed a Class B felony;

(d) For twenty (20) or more years shall be deemed a Class A felony.

(2) Any offense defined outside this code for which a law outside this code provides a sentence to a definite term of imprisonment with a maximum which falls between ninety (90) days and twelve (12) months shall be deemed a Class A misdemeanor.

(3) Any offense defined outside this code for which a law outside this code provides a sentence to a definite term of imprisonment with a maximum of less than ninety (90) days shall be deemed a Class B misdemeanor.

(4) Any offense defined outside this code for which a law outside this code provides a sentence to a fine only or to any other punishment, whether in combination with a fine or not, other than death or imprisonment shall be deemed a violation.

**HISTORY:** (Enact. Acts 1974, ch. 406, § 274; 1976 (Ex. Sess.), ch. 15, § 2, effective December 22, 1976; 1980, ch. 309, § 5, effective July 15, 1980.)

**NOTES:**

CROSS-REFERENCES. Felonies and misdemeanors defined, KRS 431.060.

OPINIONS OF ATTORNEY GENERAL. Subsections (10) and (17) of KRS 500.080 specifically

**ATTACHMENT "F"**

# THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

93CB1623-15

CERTIFIED COPY OF RECORD  
OF JEFFERSON DISTRICT COURT

TONY MILLER, CLERK

THE COMMONWEALTH OF KENTUCKY

Against

Term A. D., 19  
93

JULY

SEXUAL ABUSE I  
KRS 510.110 Class D Felony  
1 to 5 years  
UOR #11211

BAIL JUMPING I  
KRS 520.070 Class D Felony  
1 to 5 years  
UOR #49201

KEENO DARNELL CRAWFORD

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

15

COUNT ONE

That between the 16th day of December, 1991, and the 20th day of December, 1991, in Jefferson County, Kentucky, the above-named defendant, KEENO DARNELL CRAWFORD, committed the offense of Sexual Abuse in the First Degree by subjecting LaKeshia James, a person less than twelve years of age, to sexual contact.

COUNT TWO

That on or about the 28th day of January, 1993, in Jefferson County, Kentucky, the above-named defendant, KEENO DARNELL CRAWFORD, committed the offense of Bail Jumping in the First Degree when, having been released from custody by court order, with or without bail, upon a condition that he would subsequently appear at Jefferson Circuit Court, Division Twelve, on January 28, 1993, in connection with a charge of having committed a felony, he intentionally failed to appear.

THE COMMONWEALTH OF KENTUCKY  
Jefferson Circuit Court, Criminal Division

Term A. D., 19  
JULY 93

THE COMMONWEALTH OF KENTUCKY

Against

KEENO DARNELL CRAWFORD

PAGE 2 OF 2 PAGES

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A TRUE BILL

*Robert F. ...*  
Foreperson

Wit: Det. T. Schiller #2715, CACU  
Clerk, Division Twelve, Jefferson Circuit Court

7-27 19 93  
RECEIVED, from the Foreman of the Grand Jury, in their presence, and filed in open Court.  
ATTEST: TONY MILLER, Clerk  
By *...* D.C.

1-2

CERTIFIED COPY OF RECORD  
OF JEFFERSON DISTRICT COURT  
TONY MILLER, CLERK  
BY *...* D.C.

**ATTACHMENT "G"**

AOC-491.1  
8-89

Commonwealth of Kentucky  
Court of Justice



COMMONWEALTH'S OFFER  
ON A PLEA OF GUILTY

Case No. 93CR1623  
Court Circuit  
Division 12  
County Jeff.

*N.C. vs Afford as to Ct. 1*

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

Keeno Darnell Crawford

CERTIFIED COPY OF RECORD  
OF JEFFERSON DISTRICT COURT  
TONY MILLER, CLERK

DEFENDANT

BY [Signature] D.C.

Penalty:

1. Charge(s):

Ct. 1 Sex Abuse 1<sup>o</sup>  
Ct. 2 Bail Jump 1<sup>o</sup>

1 to 5 years  
1 to 5 years

2. Amended Charge(s) (If Applicable):

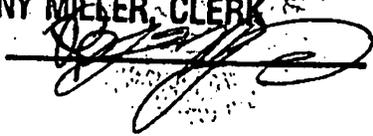
Penalty:

3. Facts of the case:

Blw Dec. 16 and Dec. 20, 1991 the D digitally penetrated the  
virgin of his 7 year old niece in Jeff. Co. Ky. On 1-28-93  
the D failed to appear for trial under indictment #93CR0031.

4. Recommendations on a Plea of Guilty (Plea Agreement):

S.A. 1<sup>o</sup> 1yr. Consecutive for a total of 2 years to  
B.J. 1<sup>o</sup> 2 yrs. Served.

CERTIFIED COPY OF RECORD  
OF JEFFERSON DISTRICT COURT  
TONY MILLER, CLERK  
BY  D.C.

JEFFERSON CIRCUIT COURT  
12th DIVISION  
JUDGE SCHROERING

NO. 93CR1623

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

JUDGMENT OF CONVICTION AND SENTENCE

KEENO DARNELL CRAWFORD

DEFENDANT

\*\*\*\*\*

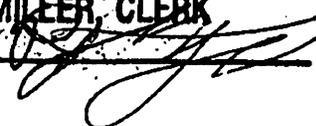
At a Court held September 23, 1993

Came the Defendant and counsel, CHRIS POLK

The Defendant on this date having appeared in open Court with his attorney, by agreement with the attorney for the Commonwealth, withdrew his plea of not guilty and entered a plea of guilty to: SEXUAL ABUSE I AND BAIL JUMPING I

as charged in the indictment, and the Court having found the plea to be voluntary, and having accepted the plea; and.

The Defendant having voluntarily waived a written presentence investigation report by the Division of Probation and Parole, and not being eligible for probation under the law; and,

CERTIFIED COPY OF RECORD  
OF JEFFERSON DISTRICT COURT  
TONY MILLER, CLERK  
BY  D.C.

The Court having inquired of the Defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and having afforded the Defendant and his counsel the opportunity to make statements in the Defendant's behalf, and to present any information in mitigation of punishment; and,

No sufficient cause having been shown why judgment should not be pronounced,

IT IS ORDERED AND ADJUDGED BY THE COURT, that the Defendant is guilty of the following offense(s) and sentenced as follows:

1 YEAR ON SEXUAL ABUSE I AND 1 YEAR ON BAIL JUMPING I, TO RUN CONSECUTIVE  
FOR 2 YEARS  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Accordingly, he is hereby sentenced to a total term of imprisonment of 2 years, or until released in accordance with the law.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant be remanded to the Jefferson County Jail, and that the Sheriff of Jefferson County, shall deliver the Defendant to the Department of Corrections at his earliest convenience, at such location within this state as the Department shall designate, for the purpose of the Defendant serving the sentence imposed upon him hereunder.

The Defendant shall be entitled to credit for time spent in custody prior to sentencing in the amount of \_\_\_\_\_ days to be determined by Department of Probation and Parole. \*AFTER CALCULATION OF CREDIT TIME SERVED IS MADE, PROBATION AND PAROLE IS HEREBY DIRECTED TO SEND A COPY OF SAME TO CAROL COBB AND CHRIS POLK.

*[Signature]*  
JUDGE  
DATE: SEP 24

CERTIFIED COPY OF RECORD  
OF JEFFERSON DISTRICT COURT  
TONY MILLER, CLERK  
BY *[Signature]* D.C.

24  
*[Signature]*  
Debra McDonald  
Deputy Clerk

# **APPENDIX “H”**

*Appellant's Opening Brief*

# 30650-6-II

BEFORE THE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

DARNELL K. CRAWFORD

Appellant.

---

APPELLANT'S OPENING BRIEF

---

Appeal from the Superior Court for Pierce County

The Honorable Frederick W. Fleming, Judge

---

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**FEB 09 2004**

GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY  
APPELLATE DIVISION

LESLIE STOMSVIK  
Attorney for Appellant  
133 South 51st Street S.  
Tacoma, WA 98408  
(253)565-9561

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I. ASSIGNMENTS OF ERROR

- 1) The Trial Court erred in sentencing the Appellant in accordance with the Persistent Offender Accountability Act. (Initiative Measure No. 593, approved November 2, 1993).
- 2) The Trial Court erred in denying Appellant's motion for a new trial in this case.
- 3) The Trial Court erred in denying Appellant's motion to dismiss the charges against him based on the State's actions in this case.
- 4) The Trial Court erred in denying Appellant's motion for a new trial on the basis that he did not receive effective assistance of counsel.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

- 1) Did the Trial Court err in sentencing the Appellant under the Persistent Offender Accountability Act, now RCW 9.94A.030(28), .555, .561, .565 and .570, where the State of Washington had not given the Appellant or his attorney notice, prior to the trial in the matter, of the intent of the State to seek a finding that the Appellant was subject to life imprisonment without possibility of parole pursuant to the Persistent Offender Accountability Act?

- 2) Did the Trial Court err in denying post-trial motions for a new trial and for dismissal of the charges on the basis that the State had mismanaged the prosecution in this matter to the prejudice of the Appellant by failing to make discovery of information contained in the State's file relating to the Appellant's potential liability under the Persistent Offender Accountability Act and failing to give the Appellant notice that the State intended to proceed to request that the Appellant be sentenced under that statute.
- 3) Did the Appellant receive effective assistance of counsel in the preparation and trial of this matter.
- 4) Did the rulings of the Trial Court relative to the Persistent Offender Accountability Act deny the Appellant due process with regard to with failure to give the Appellant or his attorney notice of the potential applicability of the statute and with regard to sentencing the Appellant under the statute.

### III. STATEMENT OF THE CASE

#### a) Procedural History

The Appellant was charged with the crimes of first degree robbery and second degree assault. After a jury trial, the Appellant was convicted of

both of these charges. (VRP 262). Thereafter, the State of Washington indicated an intention to request the Appellant to be sentenced to life without possibility of parole pursuant to the Persistent Offender Accountability Act. The State filed a sentencing memorandum. (CP 8-34). The Appellant responded with a motion to vacate and dismiss the conviction or, in the alternative, for a new trial. (VRP 35-52). The Trial Court denied the Appellant any relief on this motion to dismiss or for a new trial and elected to sentence the Appellant to a term of life without possibility of parole. (CP 53-62).

b) Statement of the Facts

A person who was later identified as the Appellant Darnell Crawford was observed at the Best Buy store on South 48th Street in Tacoma (VRP 8) attempting to shoplift a piece of computer equipment called an MP3 player. (VRP 12). When the shoplifter attempted to leave the store, he set off a theft alarm. (VRP 14). At that point, two store employees followed the individual out of the store and into the store's parking lot. A witness indicated that the shoplifter had run into a bystander and then had gotten into a waiting car. (VRP 19). The same witness indicated at the time that the individual was getting into the car, he

pointed some sort of firearm at the witness. (VRP 22).

The bystander mentioned by the first witness was also called. He identified himself as an attorney who worked for the Department of Assigned Counsel in Pierce County. (VRP 77). This witness also said that he saw a person who was being followed by the two store employees get into a car and that this person then produced some sort of a firearm. (VRP 88). This same witness then said that he was taken to the place where an individual had been arrested and indicated that that individual was the same person that he had seen in the parking lot. (VRP 95). The witness, however, was not able to identify the Defendant, at the time of trial, as the same person that he saw in the parking lot. (VRP 99).

After the DAC employee completed his testimony on the first morning of the trial, one of the jurors went to the bailiff and later to the trial judge to indicate that she had recognized the witness as an attorney who had represented her son in a juvenile court proceeding approximately 14 months prior to the trial. (VRP 102-106). No motion for a mistrial or any other relief was made by the Defense. (VRP 106).

A Tacoma police officer testified that he and his partner had observed a vehicle with a license number similar to that of the car which

left the scene of the robbery. (VRP 179). The officers followed this car and ultimately it stopped in an alley. (VRP 180). The officer then indicated that he had seen the Appellant exit the vehicle and drop a box. (VRP 181-182). After a chase of about 3 blocks, the officer indicated that he had apprehended the Defendant. (VRP 185). The officers did recover the box, which contained an MP3 player. (VRP 160). This box had fingerprints from the Appellant on it. (VRP 171). The police were not, however, able to recover any firearm. (VRP 204).

The Defense elected not to call any witnesses. (VRP 212). Both the State and the Defense agreed that they had been unable to find the driver of the getaway car though they did know that individual's name. (VRP 211). The Defense also took no exceptions to the State's proposed instructions (VRP 214) though the Court, on its own motion, did include a separate verdict form and additional language about the second degree assault charge to meet what the Trial Court indicated the statute required. (VRP 217). Finally, the Defense attorney did place in the record the fact that the Appellant had said that he had observed one of the jurors sleeping during the trial but both attorneys and the trial judge indicated they had not observed this happening. (VRP 267).

About three weeks after the conclusion of the trial, the State, for the first time, provided the Defense with information that indicated that Mr. Crawford had two prior convictions that counted as strikes and that, as a result, he was subject to being sentenced to life without the possibility of parole under the Persistent Offender Accountability Act. (VRP 318). The State also admitted that it had information from which it could have concluded that the case was a three-strike case by February 24, 2003, which was well before the trial, but that it had not provided this material to the Defense until approximately three weeks after the trial. (VRP 318-330). There was no question that the issue of the Appellant being a persistent offender was never raised until after his conviction in the present case. The Appellant brought motions to dismiss the charges and, in the alternative for a new trial based on this failure to provide information. (CP 35-52). After hearing testimony and argument regarding these motions, the Trial Court denied any relief. (VRP 332). The Appellant was then sentenced to a term of life without possibility of parole. (CP 53-62).

IV. ARGUMENT

The major issue in this case relates to the application of the Persistent Offender Accountability Act under the particular circumstances of this case. As will be discussed below, the factors which make this case one of particular significance are that the State was aware of the exact nature of the Appellant's prior criminal history in February, at least six weeks prior to the trial, but did not disclose that information to the Appellant's trial counsel until approximately three weeks after the Appellant's trial and conviction. Also of particular significance is the fact that the State did not give notice that it was seeking to have the Appellant sentenced under the Persistent Offender Accountability Act until after the Appellant's trial and conviction. It is the effect of these facts which must be determined in a decision of this appeal.

Admittedly, the Persistent Offender Accountability Act has been found not to violate the constitutional doctrine of equal protection, State v. Manussier, 129 Wn. 2d 652, 921 P. 2d 473 (1996). It has likewise been found, in the abstract, not to impose a cruel or unusual punishment. State v. Flores, 114 Wn. App. 218, 56 P. 3d 622 (2002). In the present case, however, this Court is faced with an argument which has not been

addressed in earlier challenges to the Persistent Offender Accountability Act.

In State v. Thorne, 129 Wn. 2d 736, 921 P. 2d 514 (1996), the Supreme Court found that there was not a constitutional mandate requiring that there be a separate charge that an individual was subject to the provisions of the Persistent Offender Accountability Act . However, the Court did specifically indicate that it approved the practice of giving notice to a defendant that he may be found to be a persistent offender. The Court also indicated that the failure to give such a notice may have constitutional implications, though it did not reach the question because in State v. Thorne, supra, the defendant was given notice that he may be subject to the statute at the time he was charged.

In the present case, the question which the Thorne court did not address is clearly presented. In this case, no notice of the possible applicability of the Persistent Offender Accountability Act was given until after the Appellant was convicted of the crime which was to be the third strike under this statute. For the reasons which are outlined below, the State's failure to give the notice, in the context of this case, raises constitutional problems which require that the finding that the Appellant is

a persistent offender and the sentence of life without possibility of parole both must be set aside.

The failure to give the notice in this case raises two separate but related constitutional issues. The first of these issues is raised by the State's failure to disclose information it had available to it to the defense. It is undisputed that in this matter, the State received complete information, including statements of defendant on plea of guilty, regarding the Appellant's prior convictions at least by February. The Appellant's trial in this matter occurred in April. Disclosure of the statements of defendant on plea of guilty, including the description of what it was that he actually did to be convicted, were not disclosed until early May. The attorney who represented the Appellant at trial testified, at a hearing on a motion to dismiss brought after the conviction, that she relied upon the State to provide information about prior criminal history. (VRP 298). Likewise, she said that in her experience the prosecutor did not provide specific information (including copies of plea agreements or judgments) in any case other than a three strike case. (VRP 298). The attorney also indicated that in all other persistent offender cases she had handled, she had received a notice, prior to the trial, that the case was potentially a third

strike case. She indicated that this was standard practice in Pierce County as well as in Thurston County. (VRP 299). In the present case, the attorney indicated that she had received notice that the Appellant had some sort of out-of-state conviction from Kentucky prior to the trial but no information that that conviction was in any way comparable with a Washington strike offense. She likewise received no notice from the prosecuting attorney that any effort was going to be made to make this a third strike case. Indeed, the prosecuting attorney apparently persisted, even after finding out about the Kentucky case, in offering a plea bargain which included a sentence within a 57-75 months standard range. (VRP 301). Finally, the attorney testified that the information presented by the prosecutor, after the conviction, clearly indicated that the Kentucky conviction would be a strike in Washington. (VRP 303).

Under the Rules of Criminal Procedure, prosecuting attorneys have an obligation, no later than the omnibus hearing, to provide any record of prior criminal convictions known to the prosecuting attorney relating to the defendant or persons whom the prosecutor intends to call as witnesses. This obligation to produce information is specifically found in CrR 4.7 (a) (1) (VI), which reads:

Any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

Subsection (h) (2) imposes a continuing duty upon a party to disclose if information is discovered after the time for an initial disclosure. The obligation is one to produce that information promptly upon its discovery.

Subsection (h) (2) reads:

Continuing duty to disclose. If, after compliance with these rules or orders pursuant thereto, the party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

Failure to disclose and preserve material evidence generally will violate a defendant's constitutional right to a fair trial. State v. Blackwell, 120 Wn. 2d 822, 845 P. 2d 1017 (1993). This obligation of the State to make discovery is, in turn, embodied in a constitutional doctrine first articulated

in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). While the Brady rule, on its face, relates to exculpatory evidence, the same principle should apply in the present case. The State had available to it information indicating that the present charge was a third strike charge and did not disclose that information to the Defense until after the Appellant had been convicted of crimes which would constitute the third strike. The Defendant did not have an opportunity either to negotiate on the basis of a mitigation package or to accept a guilty plea to a lesser charge which would not have subjected him to the penalty of imprisonment for life without possibility of parole. The State had evidence available to it which would have shown the existence of a criminal history including two strikes under RCW 9.94A.570 and RCW 9.94A.030 (28). The State admits that it had this information available prior to trial, admits that it did not disclose the information until after trial and, thereby admits that it violated CrR 4.7. In order to determine what the appropriate sanction for this particular discovery violation is, it is now necessary to explore the question left open by State v. Thorne, 129 Wn. 2d 736, 921 P. 2d 514 (1996), namely what happens if the State does not give a notice that conviction of the present charge may constitute a third strike

under the Persistent Offender Accountability Act.

The opinion in State v. Thorne, supra, offers a suggestion of what constitutional issues the Supreme Court perceives to be related to the failure by the State to give notice of the possibility that a defendant may be sentenced under the Persistent Offender Accountability Act. The suggestion is that the constitutional question would be a due process question and that the answer to it would turn on a showing of some prejudice to the defendant because of the lack of notice by the State. Since due process relates to fundamental fairness in a particular set of circumstances, State v. Al-hamdani, 109 Wn. App. 599 36 P. 3d 1103 (2001), it is again necessary to review what occurred in the Appellant's case and to determine prejudice based on those occurrences. As has already been noted above, the prosecutor's duty to make discovery also turns on the same due process fundamental fairness concept.

The record in this case contains the testimony of a person employed by the Pierce County Department of Assigned Counsel as a mitigation specialist and investigator. She indicated that she had prepared twelve mitigation packages in potential third strike cases and that none of these cases had actually resulted in a sentence of life without the

possibility of parole. (VRP 287-291). Instead, in each of these cases, negotiated pleas had resulted after the prosecuting authorities were presented with information showing the nature of the defendant's past criminal activity and information about why sentences other than life without possibility of parole were appropriate under the circumstances of those particular cases. (VRP 290-291). This same witness testified that mitigation packages can be prepared prior to the trial in a potential third strike case because the prosecutor's office ordinarily provides notice of its intent to invoke the Persistent Offender Accountability Act at the arraignment or early in the pre-trial proceedings. (VRP 289). Finally, this witness testified that she did not do any work on the Appellant's case because there was nothing to indicate that the case was a potential third strike case until after the trial had already been held in the matter. (VRP 294).

The Appellant's trial attorney also testified. She indicated that prior to the trial, the deputy prosecuting attorney assigned to the case had offered to settle the matter for an agreed plea of guilty in exchange for a recommendation which the Court sentenced the Appellant to a fifty-seven month term of confinement. (VRP 301). According to the defense

attorney, the prosecuting attorney's position on the sentencing range did not change until after the trial. (VRP 307). The information about the exact nature of Mr. Crawford's prior convictions was not received by the Defense until approximately three weeks after the trial ended. (VRP 303). The information in question involved Mr. Crawford's guilty plea to a crime in Kentucky. (VRP 297). The information, according to the defense attorney, was available to the prosecutor but not directly to defense attorneys. (VRP 298). The defense attorney therefore indicated she assumed there was no problem with a potential three strike situation because the State had not provided any information that such a problem may indeed exist. (VRP 307-310). Given the offer of a plea bargain which the prosecuting attorney had presented, the defense attorney indicated that in her view, the Appellant's only risk in going to trial was the possibility of a sentence up to the high end of the standard range (seventy-five months) as opposed to the fifty-seven months the prosecuting attorney was offering to recommend. (VRP 301).

When, after the Appellant's trial was completed, the State filed a motion to have him sentenced to a term of life without possibility of parole, the Defense filed motions to dismiss or in the alternative for a new

trial. Essentially, the State's response to these motions was that since the State had no duty to plea bargain with a defendant, even if the State had information and failed to disclose it, there could be no finding of prejudice to the Defendant's position. In essence, this argument became the ruling of the Trial Court in response to the Defendant's post-trial motion.

If, indeed, the requirements of either due process or of CrR 4.7 are to effectively mean anything in a third strike case, the State's position must be found to be in error. First of all, the fact that the State has no duty to bargain does not prove that it does not in fact engage in plea bargaining. The record shows at least twelve cases in which potential third strike cases were negotiated to pleas to some charge which did not involve a third strike and the imposition of a sentence of life without possibility of parole. The prejudice Mr. Crawford, the Appellant, has suffered comes not because of the State's lack of a duty to bargain but rather because Mr. Crawford had no opportunity to bargain because of the State's failure to make disclosure of information it had showing that Mr. Crawford's conviction in the current case would be a third strike resulting in imposition of the sentence of life imprisonment without the possibility of parole under the Persistent Offender Accountability Act. While the State

may assert that it is speculation to argue that a guilty plea to a lesser charge could have been negotiated, it is equally speculative to assert that there was no prejudice to Mr. Crawford from failure to make disclosure because no plea would have been negotiated. In fact, because of the failure to give Mr. Crawford notice of the State's intent to seek a sentence under the Persistent Offender Accountability Act and because of the State's failure to disclose information which would have allowed the defense to determine that such a sentence might have been possible, no bargaining on the applicability of the act in fact occurred. The State attempted to assert that the act applied only after Mr. Crawford had already been convicted of the current offense. By that time, no mitigating evidence could be presented and no effective negotiation could take place because Mr. Crawford had already accumulated three felony convictions which counted as strikes under the statute and the sentence of life without possibility of parole was therefore mandatory. The prejudice to the Appellant's position had thus already accrued by the time the State finally disclosed the information it had about Mr. Crawford's criminal history.

The criminal rule which discusses sanctions for failure to make discovery, CrR 4.7 (h) (7), is drafted in extremely broad terms, allowing

the Court to enter such orders as it deems just under the circumstances. This rule creates broad, but not unlimited, discretion for trial courts. Review of such situations is on a case by case, fact centered, basis and, if appropriate prejudice to the defense is shown, the sanctions may include dismissal of charges. State v. Hoffman, 115 Wn. App. 91, 62 P. 3d 1261 (2003). The fact pattern in this particular case, combining as it does a failure by the State to make discovery with a failure by the State to give pre-trial notice of intent to seek imposition of a sentence of life imprisonment without possibility of parole under the Persistent Offender Accountability Act is, in Washington, unprecedented. This does not mean, however, that no remedy exists. Indeed, under the criminal rule and under due process, the Court clearly has the ability to fashion an appropriate sanction upon a finding that the State failed to make a proper disclosure. In other situations involving violation of fundamental constitutional principles, an appropriate sanction has been suppression of evidence gathered in violation of a constitutional guarantee, E.g. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). The State's actions in this case have permanently removed Mr. Crawford's opportunity to bargain about his being subject to the sentence of life imprisonment

without the possibility of parole. The appropriate response to this situation would be to remove from consideration in sentencing the information which the State did not timely provide. In essence, the Trial Court should be directed to suppress any evidence of Mr. Crawford's prior offenses in the State of Kentucky. This would leave Mr. Crawford with no more than two strikes under the Persistent Offender Accountability Act and would vindicate Mr. Crawford's rights both under CrR 4.7 and under the due process clause as alluded to in State v. Thorne, 129 W. 2d 736, 921 P. 2d 514 (1996).

This case also raises a second, but in some ways related issue. This is whether the Appellant received adequate assistance of counsel as required by the Sixth and Fourteenth amendments to the Federal Constitution. The definition of adequate representation is set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 Ed. 2d 674 (1984), which is also the rule followed in Washington. State v. Sardinia, 42 Wn. App. 533, 713 P. 2d 122 (1986). The test outlined in these cases requires a showing that 1) defense counsel's performance fell below an objective standard of reasonableness and 2) that the deficiency prejudice the defendant. State v. James, 48 Wn. App. 353, 739 P. 2d 1161 (1987).

This record presents three instances in which the Strickland test is potentially met. First of all, in her testimony in support of Mr. Crawford's post-trial motions, the trial attorney indicated that approximately one month before the trial, she had been presented with information indicating that Mr. Crawford had been convicted of some crime in the State of Kentucky. (VRP 301). However, the attorney further testified that because the prosecutor's office continued to move the same plea bargain proposal after this Kentucky information was provided, the defense attorney had no reason to believe that the Kentucky material would be comparable to a strike under the Washington Persistent Offender Accountability Act. (VRP 301-302). The attorney then testified that she did not receive information about exactly what actions Mr. Crawford had pled guilty to in Kentucky until about three weeks after the trial in the present case had ended. (VRP 303). The attorney finally testified that she had not talked with Mr. Crawford about whether his Washington priors were strikes under the Persistent Offender Accountability statute or whether his Kentucky conviction might be such a strike because she had received no information from the prosecutor's office indicating that there was a potential third strike situation and no notice from the prosecuting

attorney that the State contemplated asking for such a sentence. (VRP 303; 307; 310). If the assumption is made, and is argued above that it should not be made, that the information provided to the Defense was enough to satisfy the State's obligation under CrR 4.7 and State v. Thorne, 129 Wn. 2d 736, 921 P. 2d 514 (1996), then the actions of the defense counsel, after receiving this information, fall short of the performance required by Strickland v. Washington, *supra*. First of all, the failure to inform a defendant that if he is convicted at trial, he will receive a life sentence if critical information which the defendant needs in order to appropriately make decisions regarding his case. U.S. v. Blaylock, 20 F. 3d 1458 (9th Cir. 1994). Incorrect and insufficient advice received by a defendant about the nature of a proposed plea agreement so undermines his ability to make a decision about whether to accept the offer that it raises a valid Sixth Amendment claim. U.S. v. Day, 969 F. 2d 39 (3d Cir. 1992).

In this case, Mr. Crawford clearly was never told that he faced a potential third strike situation until after his trial. If it is found that the State, by providing any information to defense counsel, triggered a duty on the part of defense counsel to either investigate the nature of Mr.

Crawford's Kentucky conviction or in some other way determining that there was a potential third strike situation, even in the absence of a State notice to that effect, then the failure of defense counsel to make the appropriate investigation or to otherwise discover the existence of the potential third strike situation deprived Mr. Crawford of vital information and rendered the advice he received deficient as measured under the Strickland v. Washington, *supra*, test. Because the failure to provide Mr. Crawford with the correct information resulted in a sentence grossly in excess of that which he is advised he could receive, prejudice to him from his attorney's deficient behavior is obvious.

The record also contains other elements which potentially raise Sixth Amendment questions. First of all, the Appellant, Mr. Crawford, elected not to testify and no evidence was presented by the Defense at his trial. (VRP 212). Once again, if Mr. Crawford's defense attorney had a duty to discover that the case was a potential third strike case, the failure to discover that information left Mr. Crawford in a position in which he could not make a knowing and intelligent decision regarding whether or not to testify. Again, the information that a defendant faces a potential life sentence is crucial information which must be provided in order that that

defendant to make knowing and intelligent decisions. U.S. v. Blaylock, 20 F. 3d 1458 (9th Cir. 1994).

The other potential instance of ineffective assistance of counsel is raised by an incident in which a juror volunteered the information that she was acquainted with one of the State's witnesses. In this incident, a juror indicated that she recognized one of the State's witnesses as an attorney who had represented her son at a juvenile court proceeding approximately 14 months prior to this trial. The juror indicated that she had not informed the rest of the jury about this incident and further stated that she did not believe that her relationship with the witness would interfere with her duties as a juror. In response to this disclosure, neither the State nor the defense attorney sought any relief from the court. (VRP 105-106).

It is clear from the juror's statement that she was acquainted with the State's witness on a professional basis, though that acquaintanceship had been apparently relatively brief. It is also clear that an alternate juror had been selected and was participating in hearing testimony. (VRP 259-260). The juror who was chosen as the alternate was not the juror who was acquainted with the witness. (VRP 102; 259). It is obviously unknown, from the record, what, if any, effect the juror's acquaintance

with a state witness had on deliberation in this case. It is clear that the Appellant was convicted by the jury including the juror who knew one of the witnesses. It is also clear that the defense attorney elected to take no action in the face of a potential conflict by the juror when that conflict could have been remedied by making a motion to exclude the juror and to allow the alternate to sit on the case. No prejudice to either the State or the Defense would have flowed from such an action while potential prejudice flows from the situation involving the potentially prejudiced juror which the defense counsel allowed to persist.

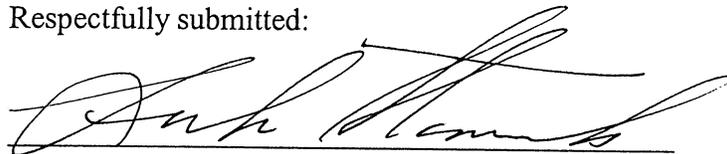
It has long been held that the remedy for ineffective assistance of counsel must be determined based on the particular facts of the case in which the violation occurred. U.S. v. Morrison, 449 U.S. 261, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981). In the present case, the appropriate remedy for the juror conflict situation would involve a new trial with an untainted jury panel. In the case of failing to provide information regarding Mr. Crawford's prior criminal history and the failure to discover information about that criminal history, once again the appropriate remedy, as suggested above, would be suppression of the information regarding the Kentucky conviction and a sentencing without regard to that conviction.

V. CONCLUSION

For the reasons stated above, the Appellant's conviction and sentence should be reversed and this matter remanded to the Trial Court with instructions to enter appropriate sanctions against the Respondent for its failures to make discovery and give notice of its intent to seek a sentence under the Persistent Offender Accountability Act and for such other relief as is appropriate.

DATED this 5th day of February, 2004.

Respectfully submitted:

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

Leslie Stomsvik, WSBA #3071  
Attorney for Appellant Darnell K. Crawford

CERTIFICATE OF SERVICE

I, Leslie Stomsvik, certify that I served a copy of Appellant's Brief upon the Appellate Division, Pierce County Prosecuting Attorney's Office, and to Darnell Crawford, Appellant, by U.S. Mail, first-class postage prepaid and addressed as follows:

Pierce County Prosecuting Attorney's Office  
Appellate Division  
930 Tacoma Ave. South, 9th Floor  
Tacoma, WA 98402

Darnell Crawford  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla WA 99362

DATED this 5th day of February, 2004.

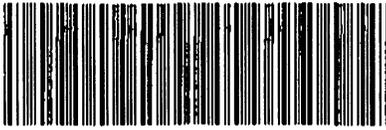


Leslie Stomsvik, WSBA #3071

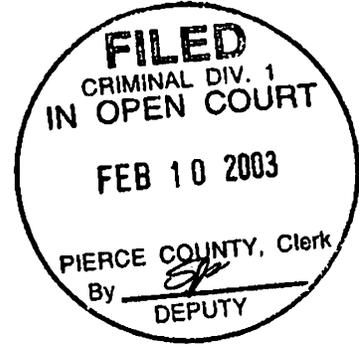
## **APPENDIX “I”**

*Order on Omnibus Hearing*

CERTIFIED COPY



02-1-08037-6 18426382 OOR 02-10-03



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

Darnell Crawford  
Defendant.

NO. 02-1-06037-6

ORDER ON OMNIBUS HEARING  
CHARGE: ROB/ASLT2

TRIAL DATE: 2-19-03

THIS MATTER having come before the court for an omnibus hearing, the State represented by:

K Oliver  
A Stenberg. The defendant is present and represented by:

IT IS ORDERED:

1. Regarding CUSTODIAL STATEMENTS by defendant:

- No custodial statements will be offered in the State's case in chief, or in rebuttal.
- The statements of defendant will be offered in the State's case in rebuttal only.
- The statements referred to in the State's discovery will be offered and:
  - May be admitted into evidence without a pre-trial hearing, by stipulation of the parties.
  - A pre-trial hearing shall be held and is estimated to require \_\_\_\_\_ (min/hr) and is set for \_\_\_\_\_.

2. Regarding SUPPRESSION OF PHYSICAL EVIDENCE OR IDENTIFICATION:

- No motion to suppress physical evidence or identification will be filed.
- Defendant's written motion to suppress will be filed by \_\_\_\_\_. The State's response will be filed by \_\_\_\_\_. The State will note a hearing to determine whether an evidentiary hearing will be required on defendant's motion to suppress.

3. If the defendant testifies at trial, the prior record of convictions contained in the State's discovery [ ] will [ ] will not be acknowledged by this with the following exceptions, if any

*WPK 1997  
Robt 1998  
PSP2 1998*

[ ] (No) prior convictions are known at this time; State will advise defendant promptly if it learns of prior convictions.

4. Respective counsel are ordered to exchange:

NAMES, ADDRESSES, AND CONTACT INFORMATION;

KNOWN CONVICTIONS AND CRIMINAL HISTORY INFORMATION OF WITNESSES;

WRITTEN OR RECORDED STATEMENTS AND THE SUBSTANCE OF ANY ORAL STATEMENTS OF

SUCH WITNESSES, including EXPERT REPORTS and TEST RESULTS, if any; and MAKE AVAILABLE

FOR INSPECTIONS ALL PHYSICAL AND DEMONSTRATIVE EVIDENCE by

*witness (1st sent 2/6/03. Other discovery provided as received)*

5. Defendant is ordered to state general nature of defense:

General Denial

[ ] Consent

[ ] Alibi

[ ] Diminished Capacity or Insanity; specify which

[ ] Self-defense

[ ] Other; specify \_\_\_\_\_

6 No additional motions are anticipated, except: \_\_\_\_\_

Affidavits and briefs of the moving party must be served and filed (with copy to criminal motion department)

by \_\_\_\_\_; Responsive brief by \_\_\_\_\_. The hearing will last about

\_\_\_\_\_ (min/hr).

7. The trial will be  jury [ ] non-jury, and will last about 4 days.

8. Other matters: \_\_\_\_\_

DONE IN OPEN COURT this 10<sup>th</sup> day of Feb, 2003.

APPROVED:

[Signature] 18252  
Deputy Prosecuting Attorney

[Signature] 28924  
Defense Attorney  
*(for Ann Stenberg)*

[Signature]  
JUDGE

I approve my attorney's actions as indicated by this Order and I specifically agree with the computation of time under Criminal Rule 3.3 (the 60-90 day trial rule).

[Signature]  
Defendant

