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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY CS
DEPUTY

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

81110-5

IN RE THE PERSONAL RESTRAINT
PETITION OF:

DOUGLAS TOBIN,

Petitioner.

NO. 36202-3

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should this petition be dismissed as time-barred pursuant to RCW

10.73.090?

2. Has petitioner failed to show that the scrivener's error on petitioner's

judgment and sentence exempts him from the time-bar provisions of RCW

10.73.090?

B. STATUS OF PETITIONER:

Petitioner, DOUGLAS TOBIN, is presently restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 02-1-01499-4. (Judgment and Sentence, Appendix A).

1 On April 25, 2003, as part of a negotiated plea agreement, petitioner plead guilty to
2 one count of first degree unlawful possession of a firearm. (Statement of Defendant of
3 Plea of Guilty, Appendix B). Petitioner agreed to a sentence of 116 months on this case
4 (02-1-01499-4), to run consecutive to a 52-month sentence on cause number 02-1-05810-0.
5 (Findings and Conclusions, Appendix C). The court sentenced the defendant on December
6 15, 2003, to a total of 168 months -- 116 months on this case (cause number 02-1-014799-
7 4), consecutive to a 52-month sentence on cause number 02-1-05810-0. (App. A).

8
9 Paragraph 4.5 of the Judgment and Sentence provides as follows:

10 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

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

13 116 months on Count I months on Count _____
14 _____ months on Count _____ months on Count _____
15 _____ months on Count _____ months on Count _____

16 **Actual numbers of months of total confinement ordered is:** 168

17 **CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.589. All counts shall be served
18 concurrently, except for the portion of those counts for which there is a special finding of a firearm
19 or other deadly weapon as set forth above at Section 2.3, and except for the following counts which
20 shall be served consecutively: Consecutive to 02-1-05810-0

21 (App. A).

22 Petitioner did not file a direct appeal. This is petitioner's first petition and it is
23 timely. The State has no information to dispute petitioner's claim of indigence.

24 C. ARGUMENT:

- 25 1. THIS COURT SHOULD DISMISS THE PETITION AS TIME-
BARRED PURSUANT TO RCW 10.73.090.

Personal restraint procedure came from the State's habeas corpus remedy, which is
guaranteed by article 4, § 4 of the state constitution. In re Hagler, 97 Wn.2d 818, 823, 650
P.2d 1103 (1982). 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

1 petition for a writ of habeas corpus, is not a substitute for an appeal. Id. at 824.
2 “Collateral relief undermines the principles of finality of litigation, degrades the
3 prominence of the trial, and sometimes costs society the right to punish admitted
4 offenders.” Id. (citing Engle v. Issac, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783
5 (1982)). These costs are significant and require that collateral relief be limited in state as
6 well as federal courts. Id.

7
8 Because of the costs and risks involved, there is a time limit in which to file a
9 collateral attack. The statute that sets out the time limit provides:

10 No petition or motion for collateral attack on a judgment and sentence in a
11 criminal case may be filed more than one year after the judgment becomes
12 final if the judgment and sentence is valid on its face and was rendered by a
13 court of competent jurisdiction.

14 RCW 10.73.090(1). In addition to the exceptions listed within that statute, there are other
15 specific exceptions to the one-year time limit for collateral attack, none of which are
16 applicable here.¹ The petitioner bears the burden of proving that his petition falls within

17 ¹ The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based
solely on one or more of the following grounds:

- 18 (1) Newly discovered evidence, if the defendant acted with reasonable diligence in
19 discovering the evidence and filing the petition or motion;
20 (2) The statute that the defendant was convicted of violating was unconstitutional on
its face or as applied to the defendant’s conduct;
21 (3) The conviction was barred by double jeopardy under Amendment V of the United
States Constitution or Article I, Section 9 of the State Constitution;
22 (4) The defendant pled not guilty and the evidence introduced at trial was insufficient
to support the conviction;
23 (5) The sentence imposed was in excess of the court’s jurisdiction; or
24 (6) There has been a significant change in the law, whether substantive or procedural,
25 which is material to the conviction, sentence, or other order entered in a criminal
or civil proceeding instituted by the state or local government, and either the
legislature has expressly provided that the change in the law is to be applied
retroactively, or a court, in interpreting a change in the law that lacks express
legislative intent regarding retroactive application, determines that sufficient
reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100.

1 an exception to the one-year time limit. Shumway v. Payne, 136 Wn.2d 383, 399-400,
2 964 P.2d 349 (1998). To meet that burden of proof, the petitioner must state the
3 applicable exception within the petition. In re Stoudmire, 145 Wn.2d 258, 36 P.2d 1005
4 (2001)(“Stoudmire II”). The State, in responding to a petition, should not have to guess
5 which exception the petitioner thinks applies, nor should the State have to prove the
6 exceptions that do not apply.

7
8 The judgment in this case became final on January 23, 2004, the day it was filed
9 with the clerk of the court. RCW 10.73.090(3)(a). Petitioner could have filed a timely
10 petition within one year of that date. Any first-time petition filed after January 23, 2005
11 would have to satisfy the requirements of RCW 10.73.100, or fall under an exception in
12 RCW 10.73.090. Petitioner filed this petition on April 5, 2007 -- over two years too late.

- 13 a. The error in petitioner’s judgment does not constitute a facial
14 invalidity that exempts petitioner from the one-year time bar.

15 Petitioner claims that he is exempt from the time bar because his judgment is
16 facially invalid. Specifically, petitioner claims that the court’s sentence exceeds the
17 statutory maximum for his offense and, thus, creates a facially invalid judgment under
18 RCW 10.73.090(1). Under this statute, the “facial invalidity” inquiry is directed to the
19 judgment and sentence itself. “Invalid on its face” means the judgment and sentence
20 evidences the invalidity without further elaboration. In re PRP of Goodwin, 146 Wn.2d
21 861, 866, 50 P.3d 618 (2002). The State agrees that the judgment contains an error. But
22 the error is nothing more than a clerical error. The error does not open the door for
23 petitioner to raise substantive claims that are otherwise time-barred. The proper remedy is
24 to remand this case for correction of the judgment and sentence.
25

1 Courts finding facial invalidity have typically granted remedies directly related to
2 the invalidity. In re PRP of Goodwin, 146 Wn.2d at 866-67, 877 (defendant's offender
3 score was improperly calculated because his juvenile offenses had washed out; remedy was
4 remand for resentencing); In re PRP of Thompson, 141 Wn.2d 712, 719, 725, 10 P.3d 380
5 (2000)(judgment and sentence was invalid on its face because it showed that defendant
6 was charged with a crime that did not exist until two years after the offense was
7 committed; remedy was dismissal of charge without prejudice).

8 For example, in In re PRP of Mayer, 128 Wn. App. 694, 117 P.3d 353 (2005), the
9 defendant claimed his plea to second degree murder was involuntary because a scrivener's
10 error in the plea documents and judgment and sentence listed the crime as first degree
11 murder, thus making the documents facially invalid. Mayer, 128 Wn. App. at 700. The
12 court held that the error did not render the plea invalid:

14 [Petitioner's] claim that the citation error made his plea involuntary
15 amounts to a conclusory allegation of prejudice insufficient to warrant
relief in a personal restraint petition.

16 Mayer, 128 Wn. App. at 701 (citing In re PRP of Cook, 114 Wn.2d 802, 813-14, 792 P.2d
17 506 (1990)). The court held that the proper remedy was remand for correction of the
18 scrivener's error. Mayer, 128 Wn. App. at 702.

19 Similarly, in In re PRP of West, 154 Wn.2d 204, 110 P.3d 1122 (2005), the
20 sentencing judge made a handwritten notation on West's judgment and sentence explaining
21 that West stipulated to ten years flat time with no earned early release.² West, 154 Wn.2d
22 at 206. West filed an untimely personal restraint petition claiming that the handwritten
23

24 _____
25 ² West was originally charged with an offense that would have constituted her third strike. West
plea bargained for a reduction of the charge in exchange for her agreement to serve 10 years flat
time. West, 154 Wn.2d at 206.

1 notation rendered the judgment and sentence facially invalid because it was not within the
2 court's power to prohibit the accumulation of earned early release. West, 154 Wn.2d at
3 207. The Supreme Court determined that the trial court had no authority to control early
4 release, that the court's notation on the judgment and sentence thus rendered the judgment
5 facially invalid, and that imposition of a sentence not authorized by the Sentencing Reform
6 Act was a fundamental defect which justified collateral relief. West, 154 Wn.2d at 213. In
7 determining what remedy was appropriate, the court explained:

8 This court has been clear that the imposition of an unauthorized sentence
9 does not require vacation of the entire judgment or granting of a new trial.
10 The error is grounds for reversing only the erroneous portion of the
11 sentence imposed.

12 West, 154 Wn.2d at 215 (citing State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980));
13 see also, Goodwin, 146 Wn.2d at 877 ("Correcting an erroneous sentence in excess of
14 statutory authority does not affect the finality of that portion of the judgment and sentence
15 that was correct and valid when imposed."). The court in West thus remanded to trial court
16 for correction of the invalid judgment and sentence in the form of deletion of the
17 handwritten notation. West, 154 Wn.2d at 215.

18 Like the above cases, the remedy in this case should be limited to fixing the
19 invalidity. The court imposed consecutive sentences of 116 months on this case and 52
20 months on cause number 02-1-05810-0, for a total of 168 months on *both* counts. For
21 reasons unknown, the court listed the *total* sentence of 168 months as the "actual number
22 of months of total confinement" on this cause number. (App. A). This results in a
23 sentence that appears to exceed the statutory maximum. But the sentence on *this* case (02-
24 1-01499-4) is clearly intended to be a 116-month sentence, which does not exceed the 120-

1 month statutory maximum.³ Thus, the error in the judgment was nothing more than a
2 clerical mistake. A clerical mistake is one that, when amended, would correctly convey the
3 intention of the court based on other evidence. State v. Priest, 100 Wn. App. 451, 455, 997
4 P.2d 452 (2000). This court should remand this case for correction of the judgment and
5 sentence to reflect that the "actual number of months of total confinement" on this cause
6 number is 116 months. This court should refuse to consider the merits of petitioner's time-
7 barred claims because the clerical error does not exempt the petitioner from the one-year
8 time bar. Should this court disagree with the State's procedural argument, the State
9 reserves the right to respond to the merits of petitioner's claim.

10 D. CONCLUSION:

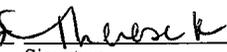
11 For the foregoing reasons, the State respectfully requests this court remand this
12 case for correction of the clerical error, but otherwise dismiss petitioner's claims as time-
13 barred pursuant to RCW 10.73.090.

14 DATED: July 17, 2007.

15 GERALD A. HORNE
16 Pierce County
17 Prosecuting Attorney

18 
ALICIA BURTON
19 Deputy Prosecuting Attorney
WSB #29285

20 Certificate of Service:
21 The undersigned certifies that on this day she delivered by U.S. mail
22 to petitioner true and correct copies of the document to which this certificate
23 is attached. This statement is certified to be true and correct under
24 penalty of perjury of the laws of the State of Washington.
25 Signed at Tacoma, Washington, on the date below.

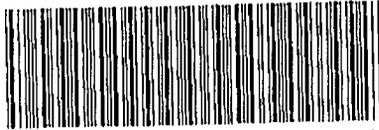
26 7-17-07 
Date Signature

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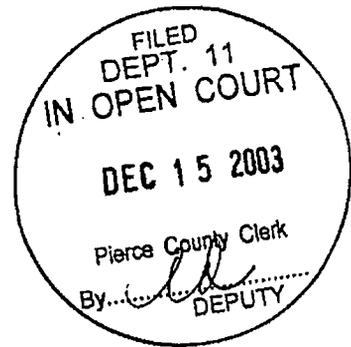
³ Unlawful possession of a firearm in the first degree is a class B felony subject to a maximum penalty of 10 years in prison. RCW 9A.10.040(1)(b); RCW 9A.20.021(1)(b).

APPENDIX “A”

Judgment and Sentence



02-1-01499-4 20171467 JDSWCD 12-16-03



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 02-1-01499-4

DEC 15 2003

vs.

DOUGLAS JOHN MARTIN TOBIN,

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).

DEFENDANT TO REMAIN IN PIERCE COUNTY JAIL UNTIL 1/24/03

02-1-01499-4

[] 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: 12-15-03

By direction of the Honorable

John A. McCarthy
JUDGE JOHN A. MCCARTHY
KEVIN STOCK
CLERK
By: *Klaus Ladensuz*
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date 12-15-03 *Klaus Ladensuz* Deputy

STATE OF WASHINGTON

ss:

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.

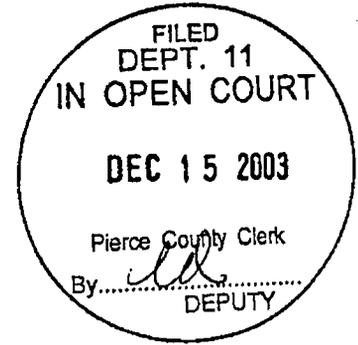
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk

By: _____ Deputy

mmk





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 02-1-01499-4

vs.

JUDGMENT AND SENTENCE (JS) 12 15 2003

DOUGLAS JOHN MARTIN TOBIN

Defendant.

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

SID: UNKNOWN

DOB: 4/27/52

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 by [X] plea [] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME	INCIDENT NO.
I	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (GGG66)	9.41.040(1)(a)	3/18/2002	00011

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):

02-1-05810-0
02-1-01274-3

02-9-15010-1

02-1-01499-4

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	ASLT 2	11/19/76		2/3/76	ADULT	NV
2	BURG 1	11/19/76		2/3/76	ADULT	NV
3	MANSLAUGHTER 1	1/21/88		8/15/86	ADULT	V
4	THEFT 1	CURRENT		6/9/01	ADULT	NV
5	35 FISH AND WILDLIFE VIOLATIONS	CURRENT		6/9/01	ADULT	NV

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

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	38	VII	87-116 MOS	NONE	87-116 MOS	10 YRS

* (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) 0 2-1-057/8 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: N/A

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 _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

02-1-01499-4

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: _____

\$ _____ 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 RCW

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: _____

\$ 610.00 TOTAL RCW 9.94A.760

[X] 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.

[X] is scheduled for 1/23/04 @ 1:30

[] RESTITUTION. Order Attached

[X] Restitution ordered above shall be paid jointly and severally with:

	NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
21	RJN			
22				
23				

[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.

02-1-01499-4

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 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:

Empty rectangular box for additional information.

4.4(a) BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

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

116 months on Count I _____ months on Count _____
_____ months on Count _____ months on Count _____
_____ months on Count _____ months on Count _____

Actual number of months of total confinement ordered is: 168

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: CONSECUTIVE TO 02-1-05810-0

02-1-01499-4

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

Confinement shall commence immediately unless otherwise set forth here:

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: ~~zero~~ 621 days

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[] COMMUNITY CUSTODY is ordered as follows:

Count _____ for a range from: _____ to _____ Months;

Count _____ for a range from: _____ to _____ Months;

Count _____ for a range from: _____ to _____ Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[] The defendant shall not consume any alcohol.

[] Defendant shall have no contact with: _____

[] Defendant shall remain [] within [] outside of a specified geographical boundary, to wit:

[] The defendant shall participate in the following crime-related treatment or counseling services: _____

[] The defendant shall undergo an evaluation for treatment for [] domestic violence [] substance abuse

[] mental health [] anger management and fully comply with all recommended treatment.

02-1-01499-4

[] The defendant shall comply with the following crime-related prohibitions: _____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.7 [] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

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.

02-1-01499-4

3.6 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 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: 12-15-03

JUDGE

Print name

John A. McCarthy
JOHN A. MCCARTHY

Deputy Prosecuting Attorney

Print name:

WSB #

[Signature]
[Signature]

Attorney for Defendant

Print name:

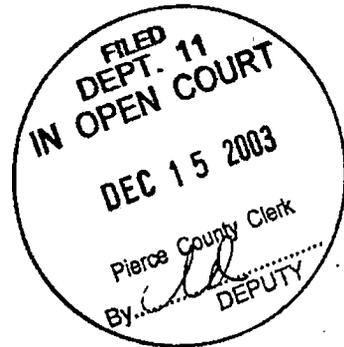
WSB #

[Signature]
Allen Ressler
5330

Defendant

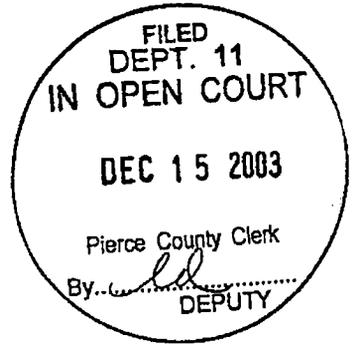
Print name:

Douglas John Tobin



02-1-01499-4

IDENTIFICATION OF DEFENDANT



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

Date of Birth 4/27/52

FBI No. UNKNOWN

Local ID No. UNKNOWN

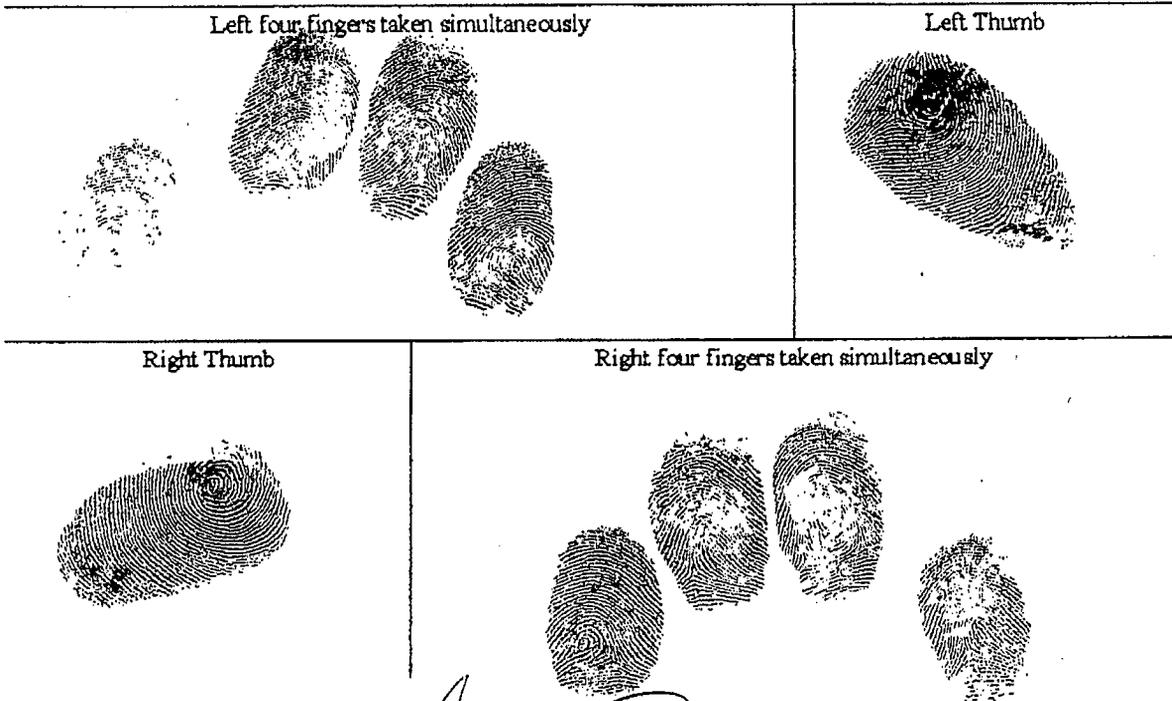
PCN No. UNKNOWN

Other

Alias name, SSN, DOB:

Race: [] Asian/Pacific Islander [] Black/African-American [] Caucasian [] Hispanic [X] Male [X] Native American [] Other: [X] Non-Hispanic [] 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

Signature of Douglas John Martin Tobin

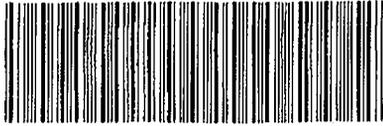
Dated: 12-15-03 DOUGLAS JOHN MARTIN TOBIN

DEFENDANT'S SIGNATURE:

DEFENDANT'S ADDRESS:

APPENDIX "B"

Statement of Defendant on Plea of Guilty



02-1-01499-4 18830990 STTDFG 04-28-03



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

Cause No. ~~02-1-01499-4~~ ⁰²⁻¹⁻⁰¹⁴⁹⁹⁻⁴

Doug Toher vs.

Defendant.

STATEMENT OF DEFENDANT ON
PLEA OF GUILTY
USE FOR NON-VIOLENT CRIMES
COMMITTED AFTER 7-1-00

APR 23 2003

1. My true name is: Doug Toher

2. My age is: 49 DOB: _____

3. I went through the 245 College

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is: Alan Desola WSBA#: 5330/13720

(b) I have received a copy of and I am charged in _____ Information with the crime(s) of:

Count I: Unlawful Possession of Firearm

Elements: In the State of WA. The defendant knowingly kept unlawfully possessed a firearm after having previously been convicted of a felony.

Count II: This occurred in Pierce County WA. DW 3/18/02

Elements: In the State of WA.

(c) _____ Additional counts are addressed in Attachment 4(d).

5. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	COMMUNITY CUSTODY RANGE	MAXIMUM TERM AND FINE
1	<u>94</u>	<u>87-116</u>	<u>—</u>	<u>87-116</u>		<u>10yrs \$20,000</u>
2						

* (V) VUCSA in protected zone, (JP) Juvenile present

(b) The standard sentence range is based on the crime charged and **my criminal history**. Criminal history includes other current offenses, prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere. The parties stipulate the standard range is correct and may be relied upon.

(c) The prosecuting attorney's **statement of my criminal history** is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions prior to being sentenced.

(d) 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 upon 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, even if the result is a mandatory sentence of life imprisonment without the possibility of parole.

(e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a **victim's compensation fund assessment**. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees, the costs of incarceration, and other legal financial obligations.

(f) In addition to sentencing me to confinement, the judge may order me to serve up to one year of **community custody** if the total period of confinement ordered is not more than 12 months. If the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the community custody range established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.728 (formerly RCW 9.94A.150) is longer, that will be the term of my community custody. If I have been convicted of a crime that is not listed in the chart and my sentence is more than 12 months, I will be placed on community custody for the period of earned release.

OFFENSE TYPE	COMMUNITY CUSTODY RANGE
Crimes Against Persons as defined by RCW 9.94A.411 (formerly .440(2))	9 to 18 months or up to the period of earned release, whichever is longer
Offenses under Chapter 69.50 or 69.52 RCW (Not sentenced under RCW 9.94A.505 (formerly .120(6)))	9 to 12 months or up to the period of earned release, whichever is longer

During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions.

(g) The prosecuting attorney will make the following **recommendation to the judge**; The State and the defendant will jointly make this recommendation. *116 MONTHS DOC, 500 CURA, 110 COSTS CAUSE # 02-1-05810 + # 02-1-01236-3 TO RUN CONSECUTIVE TO THIS CAUSE #.*

(h) **The judge does not have to follow anyone's recommendation as to sentence.** The judge must impose a sentence within the standard range of actual confinement and community custody unless the judge finds substantial and compelling reasons not to do so. If the judge goes outside the standard range of actual confinement and community custody, either the State or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(i) **If I am not a citizen of the United States**, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. I am am not a United States citizen.

(j) I understand that **I may not possess, own, or have under my control any firearm** unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.

(k) **Public assistance** will be suspended during any period of imprisonment.

(l) I understand that I will be required to have a biological sample collected for purposes of DNA identification analysis. For offenses committed on or after July 1, 2002, I will be assessed a \$100 DNA collection fee.

NOTIFICATION RELATING TO SPECIFIC CRIMES: IF ANY OF THE FOLLOWING PARAGRAPHS

DO NOT APPLY, THEY SHOULD BE STRICKEN.

(m) The judge may sentence me as a **first-time offender** instead of giving me a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days confinement, and up to two years of community custody, plus all of the conditions described in paragraph 5(f). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.

(n) If this is a crime of **domestic violence** and I, or the victim of the offense has a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(o) If this crime involves a **sexual offense, prostitution, or a drug offense** associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.

(p) The judge may sentence me under the special **drug offender sentencing alternative (DOSA)** if I qualify under RCW 9.94A.660, formerly RCW 9.94A.120(6). This sentence could include a period of total confinement in a state facility for one-half of the midpoint of the standard range plus all of the conditions described in paragraph 5(f). During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose community custody of at least one-half of the midpoint of the standard range that must include appropriate substance abuse treatment, a condition not to use illegal controlled substances, and a requirement to submit to urinalysis or other testing to monitor that status. Additionally, the judge could prohibit me from using alcohol or controlled substances, require me to devote time to a specific employment or training, stay out of certain areas, pay thirty dollars per month to offset the cost of monitoring and require other conditions, including affirmative conditions. For offenses committed on or after June 8, 2000, if an offender receives a DOSA sentence and then fails to complete the drug offender sentencing alternative program or is administratively reclassified by the department of corrections, the offender shall be reclassified to serve the unexpired term of the sentence as ordered by the sentencing judge and shall then be subject to a range of community custody and early release as specified in section 5(f) of the plea form.

(q) If the judge finds that I have a **chemical dependency** that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.

(r) If this crime involves the manufacture, delivery, or unlawful possession with the intent to deliver methamphetamine or amphetamine or unlawful possession of pseudoephedrine or anhydrous ammonia with intent to manufacture methamphetamine, a **mandatory methamphetamine clean-up fine of \$3,000.00** will be assessed. RCW 69.50.401(a)(1)(ii) or RCW 69.50.440.

(s) **If this crime involves a motor vehicle**, my driver's license or privilege to drive will be suspended or revoked. If I have a driver's license, I must now surrender it to the judge.

(t) I understand that the offense(s) I am pleading guilty to include a **deadly weapon or firearm enhancement**. Deadly weapon or firearm enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon or firearm enhancements.

(u) I understand that the offenses I am pleading guilty to include both a conviction under RCW 9.41.040 for **unlawful possession of a firearm** in the first or second degree and one or more convictions for the felony crimes of **theft of a firearm or possession of a stolen firearm**. The sentences imposed for these crimes shall be served consecutively to each other. A consecutive sentence will also be imposed for each firearm unlawfully possessed.

(v) I understand that if I am pleading guilty to the crime of **unlawful practices in obtaining assistance** as defined in RCW 74.08.331, no assistance payment shall be made for at least 6 months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW 74.08.290.

(w) If this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits will be affected. 20 U.S.C. §1091(r) and 21 U.S.C. § 826a.

6. I UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
- (c) The right at trial to hear and question the witnesses who testify against me;
- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial as well as other pretrial motions such as speedy trial challenges and suppression issues.

7. I make this plea freely and voluntarily.

8. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:

On 3/18/02 in Pierce County, I unlawfully possessed a firearm after having been convicted of a ~~felony~~ felony, in PIERCE COUNTY WA.

If my statement is a Newton or Alfred Plea, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

12. I was given a copy and I read this plea statement. My lawyer read this plea statement to me. Also, my lawyer has explained to me, and we have fully discussed, all of the above paragraphs. If I have any more questions about it, I understand I can and need to ask the judge when I enter my plea of guilty.

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

Defendant

[Handwritten signature]
13720

Defendant's Lawyer, WSBA#

Approved for entry:

Prosecuting Attorney, WSBA#

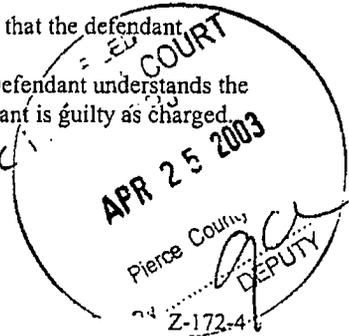
The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The court finds:

- (a) The defendant had previously read the entire statement above and the defendant understood it in full; or
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated this 25 day of April, 2003.

[Handwritten signature]
Judge



NOTIFICATION RELATING TO SPECIFIC CRIMES: IF ANY OF THE FOLLOWING PARAGRAPHS DO NOT APPLY, THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE.

- (k) This offense is a most serious offense, or strike, as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.
In addition, if this offense is (1) rape in the first degree, rape of a child in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or child molestation in the first degree, or (2) 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, with a finding of sexual motivation, or (3) any attempt to commit any of the crimes listed in this sentence, and I have at least one prior conviction for one of these listed crimes in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.
- (l) The judge may sentence me as a first-time offender instead of giving me a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days confinement, and up to two years community supervision if the crime was committed prior to July 1, 2000, or two years of community custody if the crime was committed on or after July 1, 2000, plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.
- (m) The judge may suspend execution of the standard range term of confinement under the special sex offender sentencing alternative (SSOSA) if I qualify under RCW 9.94A.120(8). If the judge suspends execution of the standard range term of confinement, I will be placed on community custody for the length of the suspended sentence or three years, whichever is greater; I will be ordered to serve up to 180 days of total confinement; I will be ordered to participate in sex offender treatment; and I will be subject to all of the conditions described in paragraph (e). Additionally, the judge could require me to devote time to a specific occupation and to pursue a prescribed course of study or occupational training. If a violation of the sentence occurs during community custody, the judge may revoke the suspended sentence.
- (n) Because this crime involves a sex offense or a kidnaping offense involving a minor, I will be required to register where I reside, study, or work. The specific current registration requirements are set forth in Attachment "A". These requirements may change at a later date. I will be responsible for learning about any changes in the registration requirements and for complying with the registration requirements.
- (o) If this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purpose of DNA identification analysis.
- (p) If this is a crime of domestic violence and if I, or the victim of the offense has a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

STATEMENT OF DEFENDANT
ON PLEA OF GUILTY - 5

APPENDIX “C”

Findings of Fact and Conclusions of Law re: Exceptional Sentence



02-1-01499-4 20171464 FNFL 12-16-03



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

STATE OF WASHINGTON,
Plaintiff,
vs.
DOUGLAS JOHN MARTIN TOBIN
Defendant.

CAUSE NO. 02-1-01499-4
FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

DEC 13 2003

THIS MATTER having come on before the Honorable JOHN A. MCCARTHY Judge of the above entitled court, for sentencing on the 15TH day of DECEMBER, 2003, the defendant, DOUGLAS JOHN MARTIN TOBIN, having been present and represented by attorney ALLEN RESSLER, and the State being represented by Deputy Prosecuting Attorney TOM MOORE, and the court having considered all argument from both parties and having considered all written reports presented, and deeming itself fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law beyond a reasonable doubt.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 1

FINDINGS OF FACT

I.

That the defendant pled guilty to UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE with a standard-range sentence of 87 TO 116 MONTHS in jail/prison.

II.

That the Prosecuting Attorney and the defense stipulate to an exceptional sentence 168 MONTHS the standard range as part of a plea bargain as allowed by State v. Hilyard, 63. Wn. App. 413 (1991).

III.

This sentence is a result of 52 Months on cause 02-1-05810-0 and 116 Months on this cause number to be served consecutively.

CONCLUSIONS OF LAW

I.

That an exceptional sentence above the standard range is permitted as part of a plea bargain under State v. Hilyard, 63 Wn. App. 413 (1991).

II.

That there is a factual basis to support the plea and the defendant understands the consequences of stipulating to an exceptional sentence.

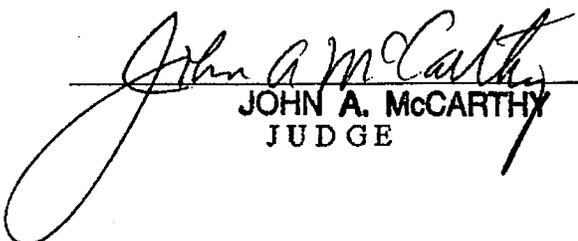
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 2

94-1-00192-2

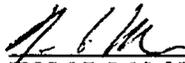
III.

That the defendant, DOUGLAS JOHN MARTIN TOBIN, should be sentenced to 168 MONTHS months in jail/prison with other conditions as set out in the Defendant's Statement on the plea of guilty.

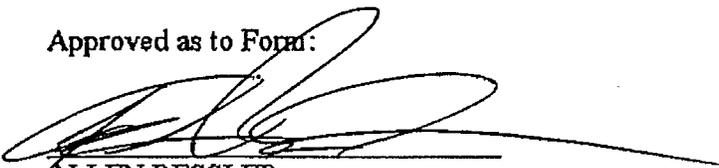
DONE IN OPEN COURT this 15th day of DEC., 2003.


JOHN A. McCARTHY
JUDGE

Presented by:


TOM L. MOORE
Deputy Prosecuting Attorney
WSBA #: 17542

Approved as to Form:


ALLEN RESSLER
Attorney for Defendant
WSBA #: 5330

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 3