

No. 85377-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE PERSONAL RESTRAINT PETITION OF:

JOSE TOLEDO-SOTELO,

PETITIONER.

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ON COLLATERAL ATTACK FROM THE  
KING COUNTY SUPERIOR COURT / NO. 00-1-05743-8 KNT  
THE HONORABLE GEORGE T. MATTSON, JUDGE

ORDER DISMISSING PERSONAL RESTRAINT PETITION  
CAO NO. 65460-8-1 / NOVEMBER 8, 2010

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PETITIONER'S REPLY TO THE STATE'S RESPONSE  
RE: MOTION FOR DISCRETIONARY REVIEW

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JOSE TOLEDO-SOTELO DOC#311886  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326-9723

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STATE OF WASHINGTON  
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A. PETITIONER'S REPLY TO THE STATE'S RESPONSE

On March 25, 2011, this Court requested the State to file a response addressing whether petitioner's sentence was correctly calculated. On April 13, 2011, the State responded.

The State's response, while crafty, is meritless, misrepresents the facts and Mr. Toledo-Sotelo's understanding of the plea agreement. The State admits the "seriousness level and offender score is not properly reflected," on the plea agreement or judgment and sentence, but nevertheless maintains the "standard range is correct" because Mr. Toledo-Sotelo's "bail jumping conviction provides a fourth point in the offender score." Therefore, according to the State "the range of punishment considered by the court at sentencing was correct," even though the calculations were not. State's Response, pg. 5. Because the mistake is in the offender score alone, and not the standard range, the error is "a technical misstatement that had no actual effect on the rights of the defendant." State's Response, pgs. 5-6 (citing In re Personal Restraint of McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009)). As demonstrated below, the State's argument is meritless.

Mr. Toledo-Sotelo's judgment and sentence is invalid. The State's assertion that the bail jumping offense provided a fourth point is false. While Mr. Toledo-Sotelo was sentenced on the same day for the sex offenses and the bail jumping, the bail

jumping offense was not included in the offender score, and most importantly it was not considered as prior criminal history and thus not a fourth point. See APPENDIX A - PLEA AGREEMENT & SCORING FORM & PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY. In fact, the judgment for the bail jumping offense occurred after the sentence for the two sex offenses, and was properly not included in the calculation of the offender score -- because it technically did not exist at the time of sentencing, which is why the prosecution's understanding of Mr. Toledo-Sotelo's standard range "assumed no prior felony convictions." Id. APPENDIX A.

Pursuant to the plea agreement Mr. Toledo-Sotelo's understanding was that his offender score was three and the bail jumping was not included as a point. The plea agreement, scoring form and prosecutor's understanding of Mr. Toledo-Sotelo's criminal history clearly reflects this fact. Id. APPENDIX A.

The issue is not whether there was a "technical mistake" as the State claims, but whether Mr. Toledo-Sotelo's plea was knowingly, voluntarily and intelligently entered. Where a guilty plea is based on misinformation regarding a direct consequence of the plea, including a miscalculated offender score resulting in a standard range, whether too high or too low, than that anticipated by the parties when negotiating the plea, the defendant may withdraw the plea based on involuntariness. State v. McDermond, 112 Wn.Ap. 373 (2002); State v. Mendoza, 157 Wn.2d

582 (2006); State v. Walsh, 143 Wn.2d 1 (2001); State v. Moon, 108 Wn.App. 59 (2001)(guilty plea is involuntary if made without knowing direct consequences; sentence range is a direct consequence).

Here, as the State admits, Mr. Toledo-Sotelo's judgment and sentence shows an error -- the crime seriousness level (12), offender score (3), and standard range sentence of 72-96 months is incorrect. This fact cannot be disputed. The State claims the bail jumping provides a fourth point, but the State's criminal history understanding and judgment and sentence fails to include it. Mr. Toledo-Sotelo was advised that he had an offender score of three -- adding the bail jumping offense as a fourth point is a direct consequence not included in his plea negotiation process. Id. APPENDIX A. Because the seriousness level his higher (12) and the offender score is lower (3), but it is alleged to be higher based on a bail jumping offense not included, Mr. Toledo-Sotelo was not properly advised of the consequences of his plea. An offender score of (3) at seriousness level (10) yields a "67-89" month standard range. If the range was really "72-96" months based on an additional point, that point should have been included. The fact that it was not reflects a clear problem because an offender score of (3) does not correctly yield a "72-96" month sentence. For this reason alone, the judgment has a facial defect which demonstrates Mr. Toledo-Sotelo was misinformed. And because

he was misinformed of a direct consequence, his plea was involuntarily made and he should be allowed to withdraw it.

B. CONCLUSION

Based on the foregoing reasons, this Court should grant review, grant the petition and allow Mr. Toledo-Sotelo to withdraw his guilty plea. Additionally, this Court should declare whether the language of RCW 9.94A.589 requires the trial court to conduct a same criminal conduct analysis as part of legally and correctly computing a convicted defendant's offender score and sentence.

DATED this 4th day of May, 2011.

Respectfully Submitted,



Jose Toledo-Sotelo #311886  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326-9723

# APPENDIX

A

Appendix A

FELONY PLEA AGREEMENT

Date of Crime: 4/25/95 - 8/31/96

Date: 10/16/07

Defendant: José Toledo-Sotelo Cause No: 00-1-05743-8 SEA/KNT

The State of Washington and the defendant enter into this PLEA AGREEMENT which is accepted only by a guilty plea. This agreement may be withdrawn at any time prior to entry of the guilty plea. The PLEA AGREEMENT is as follows:

On Plea To: As charged in Count(s) III + IV, IV 56 of the  original  2<sup>nd</sup> amended information.

With Special Finding(s):  deadly weapon - firearm, RCW 9.94A.510(3);  deadly weapon other than firearm, RCW 9.94A.510(4);  sexual motivation, RCW 9.94A.835;  protected zone, RCW 69.50.435;  domestic violence, RCW 10.99.020;  other \_\_\_\_\_; for count(s): \_\_\_\_\_

DISMISS: Upon disposition of Count(s) III, IV, IV 56, the State moves to dismiss Count(s): I, II

REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES: In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing:

- The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary.
- The facts set forth in  Appendix C;  \_\_\_\_\_

RESTITUTION: Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and

- agrees to pay restitution in the specific amount of \$ \_\_\_\_\_
- agrees to pay restitution as set forth in  Appendix C;  \_\_\_\_\_

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

CRIMINAL HISTORY AND OFFENDER SCORE:

a.  The defendant agrees to the foregoing Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A) and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). The State makes the sentencing recommendation set forth in the State's sentence recommendation.

b.  The defendant disputes the Prosecutor's Statement of the Defendant's Criminal History, as follows:

- (1) Conviction: \_\_\_\_\_ Basis: \_\_\_\_\_
- (2) Conviction: \_\_\_\_\_ Basis: \_\_\_\_\_

c. The State's recommendation may change if the score used by the court at sentencing differs from that set out in Appendix A.

Maximum on Count(s) III, IV is not more than life years each and \$ 50,000 fine each.  
Maximum on Count(s) \_\_\_\_\_ is not more than \_\_\_\_\_ years each and \$ \_\_\_\_\_ fine each.

Mandatory Minimum Term(s) pursuant to RCW 9.94A.540 only: \_\_\_\_\_

Mandatory weapon sentence enhancement for Count(s) \_\_\_\_\_ is \_\_\_\_\_ months each; for Count(s) \_\_\_\_\_ is \_\_\_\_\_ months each. This/these additional term(s) must be served consecutively to each other and to any other term and without any earned early release.

The State's recommendation will increase in severity if additional criminal convictions are found or if the defendant commits any new charged or uncharged crimes, fails to appear for sentencing or violates the conditions of release. #25115

José Toledo-Sotelo  
Defendant  
[Signature]  
Attorney for Defendant  
#37425

[Signature]  
Deputy Prosecuting Attorney  
[Signature]  
Judge, King County Superior Court

**APPENDIX B TO PLEA AGREEMENT  
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY  
(SENTENCING REFORM ACT)**

This criminal history compiled on: 18-Sep-00

Date of O = Offense C = Conviction S = Sentence	Crime	Place of Conviction	Case Number	Disposition	Score or No Score	Point Given
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Defendant: Toledo-Sotelo, Jose Cause Number: 00-1-05743-8KNT Current Offense Incident Date: 4/24/95 thru 8/31/96

ADULT FELONIES:	
<input checked="" type="checkbox"/>	NONE KNOWN; RECOMMENDATION AND STANDARD RANGE ASSUMES NO PRIOR FELONY CONVICTIONS.
<input type="checkbox"/>	CRIMINAL HISTORY NOT KNOWN AND NOT RECEIVED AT THIS TIME.

ADULT MISDEMEANORS:							

WASIS/NCIC: 10/25/99

Prepared by:

King County Prosecutor's Office

# GENERAL SCORING FORM

## Violent Sex Offenses

Use this form only for the following offenses: Child Molestation 1, Indecent Liberties (with forcible compulsion), Rape of a Child 1 and 2, Rape 2.

OFFENDER'S NAME <i>Toledo-Sotelo, Jose</i>	OFFENDER'S DOB <i>1-27-66</i>	STATE ID#
JUDGE	CAUSE# <i>00-1-05743-8 KUT</i>	FBI ID#

**ADULT HISTORY:** (If the prior offense was committed before 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed after 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of sex offense convictions ..... x 3 = \_\_\_\_\_  
 Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_  
 Enter number of other felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of sex offense adjudications ..... x 3 = \_\_\_\_\_  
 Enter number of other serious violent and violent felony adjudications ..... x 2 = \_\_\_\_\_  
 Enter number of other felony adjudications ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Those offenses not encompassing the same criminal conduct)

Enter number of other sex offense convictions *other Ct - this cause* ..... 1 x 3 = 3  
 Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_  
 Enter number of other felony convictions ..... x 1 = \_\_\_\_\_

**STATUS AT TIME OF CURRENT OFFENSES:**

If on community placement at time of current offense, add 1 point ..... + 1 = \_\_\_\_\_

Total the last column to get the Offender Score.  
 (Round down to the nearest whole number)

**STANDARD RANGE CALCULATION\***

<i>ROC 10 - 2 CTS</i>	<i>XII</i>	<i>3</i>	TO	<i>120</i>	TO	<i>160</i>
CURRENT OFFENSE BEING SCORED	SERIOUSNESS LEVEL	OFFENDER SCORE		LOW STANDARD SENTENCE RANGE		HIGH STANDARD SENTENCE RANGE

- \* Multiply the range by .75 if the current offense is an attempt, conspiracy, or solicitation.
- \* If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-16 or III-17 to calculate the enhanced sentence.
- \* If no prior sex offense conviction and sentence is less than eleven years, the Special Sex Offender Sentencing Alternative is an option.