

71865-7

71865-7

NO. 71865-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN KIRK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
SUPERIOR COURT
KING COUNTY

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A. INTRODUCTION.

John Kirk asked to represent himself in his criminal case because his court-appointed attorney was overburdened. The judge told him he was charged with a class C felony with a maximum sentence of five years and the prosecutor agreed. Mr. Kirk waived his right to counsel under this mistaken impression, when he was actually charged with a class A felony that carried a mandatory sentence of life in prison with the possibility of earlier release only under strict community custody terms. Mr. Kirk struggled to represent himself and repeatedly asked for standby counsel but the court denied his requests.

At sentencing, the court included a 1996 federal conviction in Mr. Kirk's offender score, over Mr. Kirk's objection, even though this federal offense did not require specific intent unlike the purported Washington equivalent. Additionally, based on the years that passed in which Mr. Kirk was not convicted of other offenses, the federal conviction could not count in his offender score. Mr. Kirk is entitled to reversal of his conviction and his unlawful sentence.

B. ASSIGNMENTS OF ERROR.

1. Mr. Kirk did not knowingly, intelligently, and voluntarily waive counsel as required by the Sixth Amendment and article I, section 22.

2. Mr. Kirk was denied his right to meaningfully represent himself under the Sixth Amendment and article I, section 22 due to the court's denial of his requests for technical assistance.

3. The court erroneously increased Mr. Kirk's punishment based on an out-of-state conviction that was not proven to be legally or factually comparable to a Washington offense.

4. The court erroneously used a prior conviction in Mr. Kirk's offender score that washed out of his criminal history.

5. The court impermissibly based its sentence on allegations raised only at sentencing regarding uncharged and unrelated offenses.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When a person charged with a crime waives the right to counsel, the State bears the burden of proving the waiver was knowingly, voluntarily, and intelligently entered at a time the accused person understood the penalty he faced if convicted. The judge incorrectly told Mr. Kirk that he faced a far lower maximum sentence

of five years if convicted although he actually faced life in prison. Has the State proved that Mr. Kirk knowingly, intelligently, and voluntarily waived his right to counsel when the court affirmatively misled him about the sentencing consequences of a conviction?

2. Although appointing standby counsel is not mandatory, it typically occurs in order for a jailed *pro se* litigant to meaningfully access the courts. Mr. Kirk repeatedly asked the court for technical assistance from standby counsel but the court refused. Did the court's denial of Mr. Kirk's requests for the assistance of standby counsel impede his ability to effectively represent himself?

3. An out-of-state conviction is not comparable to a Washington offense if it does not require that the perpetrator act with specific intent when the potentially comparable Washington offense requires specific intent. The court increased Mr. Kirk's offender score based on a federal conviction for unlawful possession of an unregistered firearm or device without any intent requirement when the purportedly similar Washington offense requires the specific intent to use such a device unlawfully. May a court include an out-of-state offense in a person's offender score when it has a broader intent requirement?

4. Any prior conviction for the equivalent of a class C felony “washes out” of a person’s offender score if more than five years passed since release from confinement without new criminal convictions. Mr. Kirk’s federal conviction was entered in 1997, he served a 47-month sentence, and there was no evidence that he committed any new law violations after his release. Did the court improperly include a potential class C felony in Mr. Kirk’s offender score when more than five years passed when he was in the community without new law violations?

D. STATEMENT OF THE CASE.

An undercover police officer engaged John Kirk in an email conversation that led to an arranged rendezvous with a fictitious underage girl. CP 98, 202. The officer initiated the email conversation after seeing a Craigslist ad Mr. Kirk posted seeking companionship with someone 18 years old or older. CP 202. Mr. Kirk was charged with attempted rape of a child in the second degree based on his conversations with the undercover officer and his appearance at the hotel where he had arranged to meet the underage, albeit fictitious, girl. CP 98.

Mr. Kirk originally pled guilty to a different charge, attempted promoting commercial sexual abuse of a minor, but withdrew his plea

based on an error in his offender score. 1RP 4; CP 78. When months of delay occurred before he was allowed to withdraw his plea, Mr. Kirk asked to represent himself. 1RP 16-17; CP 137-38. He told the court that his attorney was well-intentioned but overburdened. 1RP 20.

At the hearing on whether Mr. Kirk would be permitted to waive counsel, the judge asked:

THE COURT: What are the current charges?

MS. PETERSEN [the prosecutor]: Attempted rape of a child in the second degree.

THE COURT: And that's a Class C felony?

MS. PETERSEN: It is a Class C felony, Your Honor.

1RP 16. After verifying the charge with the prosecutor and defense counsel, and ascertaining it was unlikely that the charge would be amended, the judge addressed Mr. Kirk on the nature of the charge and the penalty he faced:

THE COURT: Do you understand you're charged with the crime of attempted rape of a child in the second degree, the maximum penalty for which is five years in prison and a \$10,000 fine.

MR. KIRK: Yes I do, sir.

1RP 17-18. The judge continued by asking Mr. Kirk whether he understood he needed to follow court rules, and that self-representation was "a bad decision." 1RP 18-23.

The judge also told him that he had no constitutional right to standby counsel. 1RP 21. Mr. Kirk asked the court to consider appointing standby counsel on a limited basis because he thought he might need some assistance and it could save time. 1RP 21. The judge told him, “You can ask [for standby counsel] but I’ve already told you you’re not entitled to it.” 1RP 21.

The judge conferred with the prosecutor to see if she was satisfied with the colloquy. The prosecutor responded that “the State is [satisfied], Your Honor.” 1RP 23. The judge refused to appoint standby counsel, saying “He’s gonna have to represent himself.” 1RP 24.

Mr. Kirk made a number of additional requests for standby counsel, seeking help with serving subpoenas, obtaining documents related to the charges, and interviewing witnesses. *See* 1RP 28-29, 51; 2RP 116-17; CP 114-18, 164-66, 229-30. He was housed at the King County jail which did not have a law library, but the judge told him he could access Westlaw. 1RP 22. He had difficulty finding an investigator until the court told him there was only one investigator who would work with a *pro se* litigant and gave him this investigator’s name. 1RP 30. This investigator was only appointed for a short time. 1RP 40, 47;

2RP 7. The court refused his multiple requests for standby counsel. CP 111, 173; 1RP 51; 1RP 22, 28-29; 2RP 116-17.

On the eve of trial, when Mr. Kirk became frustrated with his inability to present his intended defense, he said the court was “tying my hands for my defense” and asked to change his plea to guilty. 2RP 108. He agreed to a bench trial so he would retain his right to appeal. 2RP 108-09; CP 200. He emphasized that he felt forced to give up his trial because he had been denied standby counsel “to help me with technical aspects.” 2RP 111-12. He repeated, “This is a very technical aspect and I do request on the record, for the record, help” from standby counsel. 2RP 117. The judge responded that she was bound by a prior ruling from Judge Rogers denying standby counsel. 2RP 117. Mr. Kirk explained that he felt “forced” to waive a jury trial but this was a voluntary decision due to the court’s rulings. 2RP 119-20.

The prosecutor and Mr. Kirk presented opening statements to the court as part of a bench trial. 2RP 122-41. After a lunch recess, the parties agreed to stipulate to the facts. 2RP 142-45; CP 201-06. The court found him guilty based on the stipulated facts. CP 206.

At his sentencing hearing, the prosecution asked the court to calculate Mr. Kirk’s offender score as “1” based on a federal conviction

entered in 1997 for possessing a destructive device. 1RP 55, 66. The prosecutor conceded that Mr. Kirk's related federal conviction for conspiracy to possess a destructive device was the same criminal conduct as the possession charge and it would not separately count in his offender score. Supp. CP __, sub. no. 173 (State's presentence report at 5 n.2).¹ Mr. Kirk objected to the comparability of the federal offense because it did not have the same specific intent to use the device as required by the purportedly comparable Washington offense, RCW 70.74.180. 2RP 63. The court ruled that the federal offense was sufficiently comparable to RCW 70.74.180 and included it in Mr. Kirk's offender score.

In a presentencing memorandum, the prosecutor asked the court to punish Mr. Kirk for conduct that occurred in the 1970s and was unrelated to the charged offense. App. A at 4-5. At the sentencing hearing, Mr. Kirk's adult daughters asked the court to give Mr. Kirk the maximum possible punishment due to his conduct toward them when they were children. 1RP 56-59. Even though these allegations were not

¹ Because one page of this document includes a social security number that the parties agree should have been redacted prior to filing in superior court under GR 31(2), the parties are in the process of replacing the original copy with a redacted version in superior court. For the Court's convenience, the relevant

related to the charged offense, the court noted that “these prior victims” show that Mr. Kirk should be punished for as long as possible. 1RP 71. The court imposed a minimum term of 85 months and a maximum term of life in prison, which was the high end of the standard range. CP 208, 211.

Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. When the judge vastly understated the sentence Mr. Kirk faced if convicted at the time Mr. Kirk asked to represent himself, Mr. Kirk did not knowingly, voluntarily, and intelligently waive counsel.

a. The right to counsel may be waived only when the defendant clearly understands the possible penalties he faces if convicted.

A valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused knowingly, intelligently, and voluntarily waives the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Silva*, 108 Wn.App. 536, 539, 31 P.3d 729 (2001); U.S. Const.

pages are attached as Appendix A, consistent with the parties’ agreement that the social security number is redacted.

amend. 6; Const. art. I, § 22. The validity of a waiver is measured by the defendant's understanding *at the time* he waives his right to counsel. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994).

For a waiver of counsel to be knowing and intelligent, “a criminal defendant must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation.” *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987); *see also United States v. Gerritsen*, 571 F.3d 1001, 1007 (9th Cir. 2009) (“[t]he defendant *must* be aware of the nature of the charges and the possible penalties” to validly waive counsel (emphasis added)).

It is “only the rare case in which an adequate waiver will be found on the record in the absence of a specific inquiry by the trial judge,” regarding the essential components of a valid waiver of counsel. *Gerritsen*, 571 F.3d at 1008. The “essential components” that must plainly appear in the record are “an understanding of the charges, the possible penalties, and the dangers of self-representation.” *Balough*, 820 F.2d at 1488.

It is the judge's role to “make certain” the waiver of counsel is knowingly and intelligently made by conducting “a penetrating and

comprehensive examination of all the circumstances.” *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948). To ensure that a defendant “truly appreciates the dangers and disadvantages of self-representation,” he or she must waive counsel “with an apprehension of the nature of the charges, the statutory offenses included within them, [and] the *range of allowable punishments thereunder*.” *United States v. Moskovits*, 86 F.3d 1303, 1306 (3rd Cir. 1996) (quoting, *inter alia*, *Faretta*, 422 U.S. at 835 and *Von Moltke*, 332 U.S. at 724; emphasis added in *Moskovits*).

In *Moskovits*, the defendant received a 15-year sentence after trial, but the court granted his motion for a new trial as well as his motion to represent himself. 86 F.3d at 1305. The court entered into a “lengthy and detailed colloquy” with the defendant about the dangers and disadvantages of self-representation but did not mention the possibility that punishment could increase after a new trial. *Id.* at 1306.

When considering the validity of the waiver of counsel on appeal, the court refused to assume that information presented during the course of the first trial’s sentencing hearing sufficiently informed the defendant of the possible punishment he faced if convicted after a second trial. *Id.* at 1307. Because a court must “indulge every

reasonable presumption against waiver of fundamental constitutional rights,” it refused to impute some understanding of the sentencing consequences to the defendant and held that the waiver was inadequate. *Id.* at 1308-09 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938)).

Similarly, in *Silva*, the defendant demonstrated his understanding of the nature of the charges and their gravity. 108 Wn.App. at 540. He was familiar with trial practice and he showed “exceptional skill” in his pretrial motions. *Id.* at 540-41. But at the time Mr. Silva waived counsel, he was not informed of the possible punishment he faced. *Id.* at 541. This Court explained:

even the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision. Silva was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel.

Id. Although Mr. Silva received information about the standard sentencing range, he was not informed that the judge had authority to enter consecutive terms or otherwise impose an exceptional sentence. The waiver of counsel was otherwise adequate, but the court’s failure to explain the maximum possible penalties he faced undermined the

validity of the waiver of counsel. *Id.*; see also *United States v. Erskine*, 355 F.3d 1161, 1168 (9th Cir. 2004) (“*Faretta* waiver is valid only if the court also ascertained that he understood the possible penalties he faced”).

“On appeal, the government carries the burden of establishing the legality of the waiver.” *Erskine*, 355 F.3d 1167. The “government has a heavy burden and that we must indulge in all reasonable presumptions against waiver.” *United States v. Forrester*, 512 F.3d 500, 507 (9th Cir. 2008); see *Patterson v. Illinois*, 487 U.S. 285, 298, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (“we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him [to] waive his right to counsel at trial.”). The judge and prosecutor affirmatively misrepresented to Mr. Kirk the potential penalty he faced if convicted at the time he waived counsel, and therefore his waiver of counsel was constitutionally invalid.

b. Mr. Kirk received inaccurate information of the possible penalty at the time he waived his right to counsel.

Mr. Kirk asked to represent himself because his appointed counsel was overburdened. 1RP 20. The judge asked the prosecutor

what Mr. Kirk was charged with, and the prosecutor responded, “attempted rape of a child in the second degree.” 1RP 16. The judge asked the prosecutor, “That’s a class C felony?” *Id.* The prosecutor responded, “It is a class C felony, Your Honor.” *Id.*

Yet attempted rape of a child in the second degree is a class A felony, not class C. RCW 9A.44.076(2). No one corrected the judge or prosecutor and no one told Mr. Kirk the accurate class of felony in which the charged offense was assigned. 1RP 16.

Next, the judge asked Mr. Kirk if he understood that the charged crime of attempted rape in the second degree had “a maximum penalty of five years in prison and \$10,000 fine.” 1RP 17. Mr. Kirk responded, “Yes.” *Id.* There was no further discussion of the potential sentencing risk Mr. Kirk faced if convicted. The prosecution told the court it was satisfied with the court’s colloquy. 1RP 23.

But contrary to the court’s explanation to Mr. Kirk of the sentencing stakes, the maximum penalty for this class A felony is life in prison. RCW 9A.20.021(1)(1). It is a strike-eligible most serious offense. RCW 9.94A.030(32)(a). The possibility of life in prison is not merely available, it is the mandatory term. RCW 9.94A.507. Upon conviction for attempted rape of a child in the second degree, any

offender must receive an indeterminate sentence with the maximum of life in prison and, if ever released from prison, he must remain subject to “restrictive” community custody conditions. *State v. Slattum*, 173 Wn.App. 640, 653-54, 295 P.3d 788, *rev. denied*, 178 Wn.2d 1010 (2013); RCW 9.94A.507(3).

Although legally eligible for release after serving the minimum term, a person sentenced under this scheme has no right to release or liberty interest in release. *Rummel v. Estelle*, 445 U.S. 263, 294, 100 S.Ct. 1133, 1150, 63 L.Ed. 2d 382 (1980) (Powell, J., dissenting). Parole would be “an act of executive grace” and therefore, under the Eighth Amendment, his sentence must be viewed as a term of life imprisonment. *Id.* at 294.

Mr. Kirk also filed a “waiver of counsel” form on the same day as the in-court colloquy. CP 95. On this form, he left blank the line asking him to state the penalty the court could impose if found guilty, underscoring his lack of independent understanding of the sentence he would receive if convicted. *Id.*

Mr. Kirk waived his right to counsel premised on the court’s affirmative misrepresentation and vast understatement of the sentencing consequences he faced if convicted.

c. *This plainly incorrect information understating the sentence Mr. Kirk faced undermines the validity of the waiver of counsel.*

Affirmative misadvice about sentencing consequences at the time a person waives counsel undermines the validity of the waiver of counsel. *Silva*, 108 Wn.App. at 541-42.

In *Silva*, the court did not inform the experienced *pro se* litigant of the maximum penalty he faced if convicted. The State argued he knew enough to decide whether to waive counsel because he was advised of the standard range on all charges, the prosecutor recommended a standard range sentence, and he received a standard range term. *Id.* at 541. This Court rejected the State's argument and ruled accurate information about the maximum penalty "was essential to assess the risk of proceeding without the assistance of counsel and *Silva* did not have the benefit of it." *Id.* at 542. It remanded the case for a new trial based on this error. Unlike *Silva*, Mr. Kirk was affirmatively told by the judge that he faced a far lower maximum possible punishment than he actually did.

Similarly, in *Erskine*, the defendant thought he faced a one-year maximum sentence when he waived his right to counsel, but he learned during trial that he faced five years as a maximum. 355 F.3d at 1166-

65. The *Erskine* Court ruled that under the Sixth Amendment, a defendant is entitled to know the precise “stakes” in play at the time he chooses self-representation and this error made the waiver invalid. *Id.*

The defendant was also misadvised of his potential penalty in *United States v. Forrester*, 512 F.3d 500, 505 (9th Cir. 2008). The court told the defendant he faced “a mandatory minimum of ten years in jail and possibly up to life,” but he actually faced no mandatory minimum and a maximum of 20 years in prison, which was increased to 30 years based on later filed charges. *Id.* at 505 & n.2. The prosecution claimed that *overstating* the penalties cannot be a Sixth Amendment violation, reasoning that lower penalties would make it more likely that a person would waive his right to counsel. *Id.* at 507.

The Ninth Circuit rejected this argument. First, it reasoned that “it is not clear how a defendant’s decision to waive his right to counsel may be affected by incorrect information about his potential sentence” and courts are not free to speculate how a litigant would be affected had he received accurate information about the sentencing stakes. *Id.* at 507. Second, it ruled that this argument is “in essence a harmless error claim.” *Id.* at 508. Appellate courts have “repeatedly rejected” the prosecution’s contention that “even though Forrester was unaware of

the actual penalty he faced, there was no harm because he would have waived counsel even if he had been properly informed.” *Id.* (citing related cases). The *Forrester* Court concluded:

It is thus irrelevant whether the district court over-stated or understated Forrester's potential penalty. By *materially misstating the applicable sentence*, the court failed to fulfill its obligation to “insure that [the defendant] understands ... the possible penalties,” and Forrester’s waiver was therefore not knowing and intelligent.

Id. at 508 (emphasis added, quoting *Erksine*).

By telling Mr. Kirk he faced a maximum sentence of five years in prison when in fact he would receive a mandatory sentence of life in prison, with eligibility for release under restrictive community custody terms at the discretion of the parole board, he was not adequately informed of the essential requirements for a knowing, intelligent, and voluntary waiver of counsel. 1RP 16, 17.

d. The inadequate waiver of counsel is structural error requiring reversal.

Harmless error analysis is inapplicable where the deprivation of the right to counsel is at issue. *Silva*, 108 Wn.App. at 542. Due to the lack of record establishing a knowing, voluntary, and intelligent waiver of counsel, reversal and remand for a new trial are required. *Id.*

On remand, Mr. Kirk should be placed in the same position he was before he invalidly waived counsel. *See State v. Harrison*, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003). He should be permitted to re-argue the legal issues he brought before the trial court as a *pro se* litigant, because he was deprived of his right to counsel at the time he made these *pro se* arguments.

e. If Mr. Kirk elects to represent himself on remand, the court may not prohibit him from effective representation by denying him access to necessary assistance.

The right of self-representation necessarily includes the right to prepare a defense. *Milton v. Morris*, 767 F.2d 1443, 1446 (9th Cir. 1985); *State v. Silva*, 107 Wn.App. 605, 618, P.3d 729 (2001) (hereinafter *Silva I*); U.S. Const. amend. 6, 14; Wash. Const. art. I, § 22. It includes access to legal resources and a confidential relationship with standby counsel if one is appointed. *Milton*, 767 F.2d at 1446; *Silva I*, 107 Wn.App. at 618-21. Denying a *pro se* defendant access to legal materials or otherwise unreasonably interfering with the preparation of his defense may violate the defendant's rights to due process, self-representation and a fair trial. *See United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Bynum*, 566 F.2d 914, 918 (5th Cir.), *cert. denied*, 439 U.S. 840 (1978); *Silva I*,

107 Wn.App. at 620-21. In addition, the state constitution's right of self-representation is a substantive right that includes the right to resources necessary to prepare defense. *Silva I*, 107 Wn.App. at 620-21.

Standby counsel is not mandatory, but may be appointed even over the defendant's objection "to explain court rulings and requirements to the defendant and to assure a defendant lacking in legal knowledge does not interfere with the administration of justice." *State v. McDonald*, 143 Wn.2d 506, 511-12, 22 P.3d 791 (2001) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177-78, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

Mr. Kirk repeatedly asked the court to appoint standby counsel to aid him with the technical aspects of self-representation. 1RP 24-25, 28-29, 51; 2RP 116-17; CP 114-18; CP 164-66; CP 229-30. He had minimal access to legal resources because he was housed in the King County jail, which has no law library for inmates. 1RP 22. There is only one licensed investigator in the county who will assist *pro se* litigants. 1RP 30. Mr. Kirk struggled to obtain permission and funding to have this investigator assist him or to obtain records. 1RP 40, 47; 2RP 7, 57-59; CP 182; Supp. CP __, sub. nos. 116, 118, 119, 140, 146. His pleadings are handwritten and some are illegible due to poor

photocopying. *See* CP 112-21. All telephone calls made from the jail are recorded and preserved for the authorities to review. *See State v. Haq*, 166 Wn.App. 221, 260, 268 P.3d 997 (2012).

Due to the difficulty in obtaining critical information, such as serving a subpoena for records, Mr. Kirk asked for standby counsel to assist him with the technical complexities of preparing his case. CP 163-66. He repeated this request regularly and explained that he needed technical assistance in order to represent himself. CP 111-12; 1RP 22, 28, 51; 2RP 111-12. But the court refused every request. After refusing Mr. Kirk's initial requests, the court refused his later motions to reconsider simply because the request had already been denied, even though his continued requests for standby demonstrated his continuing need for assistance to effectively prepare his case. CP 111, 173, 200.

The court's refusal to provide him the assistance of standby counsel, while the State maintains a jail system that makes it difficult for a *pro se* litigant to access necessary tools of preparation, denied Mr. Kirk his right to meaningfully represent himself had he validly elected to do so. Upon remand, the court should allow him standby counsel's assistance should he validly waive his right to counsel.

2. The court impermissibly increased Mr. Kirk’s sentence based on a broadly defined federal offense that was not comparable to a Washington offense.

a. The prosecution was required to prove the 1996 federal conviction was comparable to a Washington offense.

The State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. 14; Const. art. I, § 3. “It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.” *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Furthermore, “fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.” *Ford*, 137 Wn.2d at 481.

A foreign conviction for a crime that is *not* comparable to a Washington felony may not be included in the offender score and increase a person’s sentence. *State v. Thomas*, 135 Wn.App. 474, 477, 144 P.3d 1178 (2006); *see also In re Pers. Restraint of Lavery*, 154

Wn.2d 249, 258, 111 P.3d 837 (2005) (conviction for foreign crime that is broader than analogous Washington statute may not be counted as a “strike” for purposes of sentencing).

To determine whether a prior out-of-state conviction may be included in a defendant’s offender score, the sentencing court must compare the elements of the foreign crime with the elements of the similar Washington crime. If the statutory elements of a foreign conviction are broader than the elements of a similar Washington statute, “the foreign conviction cannot truly be said to be comparable.” *Lavery*, 154 Wn.2d at 258.

A sentencing court may not consider the underlying facts of a prior conviction to determine whether the defendant *could have* been convicted under the narrower Washington statute. *Descamps v. United States*, _ U.S. _, 133 S.Ct. 2276, 2281-82, 186 L.Ed. 2d 438 (2013); *Lavery*, 154 Wn.2d at 256-57; *State v. Ortega*, 120 Wn.App. 165, 174, 84 P.3d 935 (2004).

In *Lavery*, the defendant had a prior conviction for federal bank robbery, which is a general intent crime. 154 Wn.2d at 255. But the potentially comparable Washington offense of second degree robbery “requires specific intent to steal as an essential, nonstatutory element.”

Id. at 256. Consequently, the Washington offense is narrower, and a person could be convicted of the federal bank robbery without having been guilty of the potentially comparable state offense. *Id.* These offense “are not legally comparable.” *Id.*

b. Mr. Kirk correctly objected to the legal comparability of the federal offense because it lacks a specific intent requirement.

The prosecution alleged Mr. Kirk’s 1996 conviction for possession of an unregistered firearm under 26 U.S.C. § 5861(d) was comparable to RCW 70.74.180, possession of prohibited explosive device. App. A at 5-6.²

The federal statute under which Mr. Kirk was convicted, 26 U.S.C. § 5861(d), states that “It shall be unlawful for any person: . . . (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” A “firearm” is defined to include “a destructive device.” 26 U.S.C. § 5845(a)(8).

² RCW 70.74.180 provides:

Any person who has in his or her possession or control any shell, bomb, or similar device, charged or filled with one or more explosives, intending to use it or cause it to be used for an unlawful purpose, is guilty of a class A felony, and upon conviction shall be punished by imprisonment in a state prison for a term of not more than twenty years.

This offense has no intent requirement, unlike RCW 70.74.180's explicit requirement of the specific intent "to use [the explosive device] or cause it to be used for an unlawful purpose."

Some federal cases have found the prosecution must prove the accused person knowingly possesses the firearm or device. *See United States v. Corso*, 20 F.3d 521, 525-26 (2nd Cir. 1994). But there is no question that "specific intent . . . is not a necessary element of a substantive violation of the Firearms Act." *United States v. Burkhalter*, 583 F.2d 389, 391 (8th Cir. 1978); *see United States v. Freed*, 401 U.S. 601, 607, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971) (in prosecution under 26 U.S.C. § 5861(d), "[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered. . . . the only knowledge required to be proved was knowledge that the instrument possessed was a firearm.").

Because the federal offense does not require the intent to use a firearm or destructive device for an unlawful purpose, an essential element of RCW 70.74.180, the federal offense is broader than the purportedly comparable Washington crime and may not be included in the offender score. *Lavery*, 154 Wn.2d at 256.

Indeed, Mr. Kirk made this argument to the trial court, explaining that the offenses were not comparable “on the element of intent.” 1RP 63. But the court included it in his offender score, ruling it was “satisfied” the federal conviction was comparable without further explanation. 1RP 67-68. The court incorrectly ignored the significantly broader sweep of the federal law under which Mr. Kirk was convicted.

c. The federal conspiracy statute is broader than Washington’s conspiracy law.

The trial court counted Mr. Kirk’s two concurrent federal convictions for conspiracy to possess an unregistered firearm and possession of an unregistered firearm as the same criminal conduct. CP 208; App. A at 5 n.2. Although it was not counted in Mr. Kirk’s offender score, this conspiracy offense is not comparable to a Washington offense due to the difference between state and federal conspiracy law, even if the underlying unregistered firearm possession offense was comparable. It should be stricken from Mr. Kirk’s criminal history.

Washington does not permit one conspirator to be liable for the acts of another absent proof the defendant knowingly aided in a specific offense. *State v. Stein*, 144 Wn.2d 236, 244-46, 27 P.3d 184 (2001). On

the other hand, the general federal conspiracy statute attributes the overt act of one member of the conspiracy to all members, without regard to whether the accused knowingly aided in a certain crime. *Id.* at 243-44. Washington courts reject the *Pinkerton* doctrine on which the general federal conspiracy law is based. *Id.* (citing *Pinkerton v. United States*, 328 U. S. 664, 647, 66 S.Ct. 1180, 90 L.Ed.2d 1489 (1946)). Given the lack of intent requirement in the unregistered firearm possession statute, coupled with the broader general foreseeability requirement of federal conspiracy law, this offense could not count as a conviction in Mr. Kirk's offender score, even if the court had not ruled that it was the same criminal conduct as the underlying federal conviction. CP 208.

d. The prosecution did not establish that Mr. Kirk was convicted of factually and legally comparable offenses.

In rare cases, the prosecution could prove that a conviction obtained under another jurisdiction's more broadly defined law rested on facts proved beyond a reasonable doubt that would have resulted in a conviction under the narrower Washington offense. *Lavery*, 154 Wn.2d at 258. Only rare circumstances would permit this inquiry because the accused person had no incentive to contest facts that would prove the

broader offense but not a narrower crime. *Id.* In Mr. Kirk’s case, the prosecution offered no basis for factual comparability.

The only evidence the prosecution offered to show the basis of Mr. Kirk’s prior convictions was the original indictment and final sentencing order. But the sentencing order shows Mr. Kirk pled guilty to two counts, count 7 of the “second superceding indictment” and count 1 of the “third superceding indictment.” App. A at 9. The prosecution did not submit these documents to establish the charged allegations. The bare factual record did not prove Mr. Kirk was convicted of factually comparable conduct for these legally broader offenses.

e. Any class C felony conviction from 1996 would have washed out.

Prior class C felonies wash out “if, since the last date of release from confinement ... or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(b). A federal offense that is exclusively prosecuted under federal jurisdiction may be classified as a class C felony under RCW 9.94A.525(3). When there is a potentially comparable offense that is

not exclusively prosecuted by federal jurisdiction, this catchall does not apply. But even if the court could treat the federal conviction as a class C felony under RCW 9.94A.525(3), more than five years passed in which Mr. Kirk was not convicted of additional offenses and therefore it may not increase his offender score. RCW 9.94A.525(2)(b).

Mr. Kirk was sentenced in 1997 to 46 months of incarceration based on charges that occurred in 1996, and he was in custody at the time he was sentenced. Supp. CP __, sub. no. 173 (State's presentence report, Ex. A.). He had no subsequent convictions. CP 208, 214. Even if he started serving his sentence on the date it was imposed and was in prison the entire 46 months without early release, he would have completed the term in 2000 or 2001 at the latest. Since the charged incident occurred in 2011, more than five years passed since the date of release from confinement and this conviction may not be included in his offender score under RCW 9.94A.525(2)(c).

f. Resentencing under a reduced offender score is required.

Based on the legal incomparability of the federal offense of possessing an unregistered firearm, this offense may not be included in Mr. Kirk's offender score, nor may the conviction for conspiracy to

possess an unregistered firearm. These offenses should be stricken and Mr. Kirk resentenced with an offender score of “0.”

g. On remand for resentencing, the State should not be permitted to offer arguments about uncharged offenses as a means of urging the maximum sentence.

Under the real facts doctrine, the sentencing court cannot consider facts not proven at trial or facts probative of a more serious crime. *State v. Quiros*, 78 Wn.App. 134, 138-39, 896 P.2d 91, *rev. denied*, 127 Wn.2d 1024 (1995); RCW 9.94A.530(2)³ This doctrine protects the defendant from the court’s “consideration of unreliable or inaccurate information,” akin to the evidentiary and proof constraints of the Sixth and Fourteenth Amendments. *State v. Morreira*, 107 Wn.App. 450, 456-57, 27 P.3d 639 (2001); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

An offender’s sentence may be based only on the current crime of which he is convicted, his criminal history, and the circumstances surrounding the crime. *State v. Houf*, 120 Wn.2d 327, 333, 841 P.2d 42

³ RCW 9.94A.530(2) provides in pertinent part:
In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537

(1992). A defendant may not be punished for uncharged crimes. *State v. McAlpin*, 108 Wn.2d 458, 466, 740 P.2d 824 (1987).

Before Mr. Kirk's sentencing hearing, the prosecution submitted a presentencing report that detailed uncharged allegations from "the 1970s" and urged the court to consider these uncharged allegations as a basis to increase Mr. Kirk's sentence. App. A at 4-5. At the sentencing hearing, court heard vehement and emotionally charged arguments seeking the maximum punishment for Mr. Kirk from people who had no involvement in the charged crime but who had been victims of offenses by Mr. Kirk committed many years ago. They strenuously urged the court to condemn Mr. Kirk as an irredeemable offender and asked for the maximum possible sentence. The court imposed the maximum possible sentence after hearing these pleas for punishment from people who had no connection to the crime charged.

RCW 9.94A.500(1) requires the court to "allow argument" at a sentencing hearing from the victim or victim's representative. It permits the victim of the crime charged to speak at sentencing, not a victim of an unrelated allegation. RCW 9.94A.030(53) (defining "victim" for RCW ch. 9.94A as a person injured "as a direct result of the crime charged). While this statute does not prohibit the court from permitting

other people to make arguments at sentencing, it underscores that the court's focus at sentencing is on "the crime charged" and not unrelated allegations from years ago.

These serious allegations about unrelated offenses undoubtedly influenced the judge and resulted in the imposition of the maximum available prison term. The instant offense was largely manufactured by the police, who snared Mr. Kirk in a police-arranged sting operation for which there was no actual victim. Hearing from people who harbored strong feelings against Mr. Kirk for reasons unrelated to the offense for which the court was sentencing Mr. Kirk is contrary to the requirements of the Sentencing Reform Act and should not be repeated after his case is remanded, should there be another sentencing hearing.

F. CONCLUSION

Mr. Kirk's conviction should be reversed due to the invalidity of his waiver of counsel and the court's refusal to allow him to have standby counsel's assistance. If another sentencing hearing occurs, the federal offenses may not be included in Mr. Kirk's offender score and the court should render a sentence based only on competent argument and evidence that is premised on the offense of conviction.

DATED this 30th day of January 2015.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
	)	No. 11-1-00319-8 SEA
vs.)	
	)	STATE'S PRESENTENCE REPORT
JOHN LLOYD KIRK,)	
)	
	)	Defendant.
)	
)	

I. INTRODUCTION

On March 3, 2014, Defendant and the State entered a stipulated facts bench trial before the Honorable Laura Inveen. The court subsequently found Defendant guilty as charged of Attempted Rape of a Child in the Second Degree. The sentencing hearing is scheduled for March 28, 2014, at 1:30 PM before Judge Inveen.

II. FACTS

In January 2011, Detective Tye Holand of the Seattle Police Department was assigned to the police department's Internet Crimes Against Children Unit (hereinafter "ICAC"). ICAC is a national network of 61 coordinated local task forces and nearly 3,000 local and regional affiliated agencies engaged in both proactive and reactive investigations, forensic examinations, effective

1 prosecutions and community education. The purpose of ICAC is to actively protect children who
2 use the Internet by proactively investigating the online sexual exploitation of children by predators.

3 On January 19, 2011, Det. Holand began an online undercover operation targeting people
4 involved in the sexual exploitation of children. Following his training and experience, Det. Holand
5 observed an advertisement (hereinafter "ad") placed on the website Craigslist, which is a popular
6 website that hosts classified ads ranging from users who are looking for jobs and housing to
7 romantic trysts. Det. Holand viewed the website's "Personals" page and viewed an ad titled
8 "DADDY LOOKING FOR HIS LITTLE GIRL." Det. Holand noted that the author of the ad, who
9 was later identified as the defendant, was looking for sexual relations with a younger adult female,
10 although 18-years of age or older. The defendant stated he was a 70-year-old male.

11 While working in his undercover capacity, Det. Holand responded to the ad. Det. Holand
12 identified himself by the fictitious name of Beau Roberts. Det. Holand inquired whether the
13 defendant's age preference was true and wrote that he had a "young daughter that loves to play with
14 older men." Det. Holand further wrote, "She wants to learn as much as she can. This is real and not
15 bullshit but she is under 18. She is very experienced though." Within an hour, the defendant
16 responded by writing the following:

17 "Please please tell me more. Under 18 by how much? We would need to meet before
18 anything could or would develop. But Yes. I am real and very interested. If this is an offer to
teach I am applying for the position. Discretion is a must. Can you send a pic?"

19 Det. Holand proceeded to respond to the defendant's inquiries by informing the defendant that his
20 daughter "Jen" was 13-years-old. Det. Holand said his daughter was "very sexual and her
21 preference is older men." Det. Holand even sent the defendant a picture of "Jen" posing with her
22 clothes on in front of a fireplace.¹

23
24 ¹ The image that Det. Holand sent was of a known female who gave her informed consent for

1 Because of the defendant's suggestion to meet ahead of time, Det. Holand arranged to meet
2 the defendant at an Arby's restaurant in South Seattle. It was agreed that "Jen" would not be coming
3 along because the defendant wanted to just meet with her father (Det. Holand) first. The very next
4 day, on January 20, 2011, Det. Holand, who was still in his undercover capacity, and the defendant
5 met at Arby's. The meeting lasted approximately 20 minutes. The defendant confirmed and
6 adamantly stated that he did not have any objections to having sex with a 13-year-old girl. In fact,
7 the defendant stated that he was very excited about the opportunity. The defendant stated that he
8 would bring condoms and sex toys for his time with "Jen." The defendant also sent Det. Holand
9 some training material on tantric sex that he wanted "Jen" to see before they met.

10 Det. Holand, AKA "Beau Roberts," and the defendant continued to email each other and
11 finally set up a plan for the defendant to meet and have sex with "Jen" on January 25, 2011. The
12 Edgewater Hotel on the waterfront in downtown Seattle was the established meeting location. The
13 defendant understood that "Jen" would be waiting for him in room #102. Det. Holand put together
14 a team of other detectives in his unit to assist in the surveillance and takedown operation.
15 Detectives Garry Jackson and Ian Polhemus were briefed on the operation.

16 At approximately 8:21 AM on January 25, 2011, the defendant knocked on the door to room
17 #102 at the Edgewater Hotel. Det. Holand, still operating in his undercover capacity, opened the
18 door and greeted the defendant. Det. Holand invited the defendant inside the room. The defendant
19 entered in to the room carrying a large backpack. However, instead of finding "Jen" in the room the
20 defendant was greeted by Detectives Jackson and Polhemus, who arrested him without incident.

21 The detectives advised the defendant that he was being both audio recorded and videotaped.
22 Det. Polhemus read the defendant his Miranda rights. The defendant stated that he understood his
23

24 this image to be used in these types of investigations.

1 rights. When asked why he came to the room, the defendant admitted that he arrived at the location
2 with the understanding that he was going to have a "liaison" with a 13-year-old girl. A search of the
3 defendant's backpack and a manila folder yielded the following evidence: computer printouts with
4 reference material to the female reproductive system and sex including handwritten notes, a
5 lavender colored vibrator, a micro-needle skin roller, a number of boxed condoms, four condoms
6 that were packaged to look like lollipops, several containers of gel or lubricant, several colored
7 feather boas, several packages of rubber gloves, and a pregnancy pillow.

8 The defendant's appetite for having sexual contact with young girls dates back to the 1970s
9 when he raped and molested his own two daughters. Ms. Sonya Sawyer, the defendant's oldest
10 daughter who is now 48-year-old, remembers that the abuse started when she was very young. It
11 stopped when she was 13-year-old. The defendant routinely stuck his fingers and tongue inside her
12 private part. She remembers it happening almost every day during the evening. The defendant
13 taught her to look at pornographic magazines and about sex. He said he was teaching her.
14 Sometimes the defendant would take her on rides in his van and he would drive to remote locations.
15 He would make his oldest daughter sit on him and move around. The defendant called the abuse
16 "our little secret."

17 Ms. Sherri Dameron, the younger daughter who is now 47-years-old, also remembers the
18 abuse. It started with touching. It happened in all three houses she lived in with her father while
19 she was growing up. The touching progressed to touching underneath the clothes. Ms. Dameron
20 recalls the "father-daughter" days they had together. She hated them. The defendant would take
21 her to a fun place like the airport or a store and buy something nice for her. He would then drive her
22 to a secluded location, often by the airport, and touch her. She remembers his hands on her vagina
23 and him licking his fingers. The defendant told her that this what men like and that "it's part of
24

1 loving and all young women are supposed to enjoy it.” The defendant had this daughter perform
2 oral sex on him. Ms. Dameron recalls that the hardest part was knowing her sister was going
3 through the same thing and not being able to do anything to stop it. Finally though, Ms. Dameron
4 mustered enough courage, and told her sister-in-law about what was happening to her. The
5 authorities were alerted and the sexual abuse finally stopped.

6 In 1980, the defendant pled guilty to an amended information charging Count I: Indecent
7 Liberties (conduct with Ms. Dameron) and Count II: Statutory Rape in the Third Degree (conduct
8 with Ms. Sawyer). However, these charges vacated from Defendant’s criminal history and therefore
9 do not score.

10 **III. OFFENDER SCORE, STANDARD RANGE, AND STATE'S SENTENCING**
11 **RECOMMENDATION**

12 **A. Defendant has an offender score of 1.**

13 Defendant was charged and convicted of possessing two pipe bombs, which were
14 considered to be destructive devices to be used as weapons. *See Exhibit A.* Defendant has the
15 following two federal convictions on his record: (1) Conspiracy to Make Destructive Devices in
16 violation of 18 USC § 371 (date of violation: 7/27/96) and (2) Possession of a Destructive
17 Device in violation of 26 USC § 5861(d) and 5871 (date of violation 6/14/96). On July 25, 1997,
18 Defendant was sentenced for these convictions.² Defendant faced a prison sentence of 46
19 months. Following release from imprisonment, Defendant was sentenced to 3 years of
20 supervised probation. *See Exhibit A.*

21 The State has computed Defendant’s score under the direction of RCW 9.94A.525(3),
22 which says the following:

23 _____
24 ² The State is conceding that the convictions constitute the same criminal conduct because the documentation
provided by the US District Court – Western District of WA is insufficient to argue otherwise.

1 "...Federal convictions for offenses shall be classified according to the comparable
2 offense definitions and sentences provided by Washington law. If there is no clearly
3 comparable offense under Washington law or the offense is one that is usually considered
subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony
equivalent if it was a felony under the relevant federal statute."

4 Here, there is a comparable offense definition and sentence provided by Washington Law: RCW
5 70.74.180. *See Exhibit B.* Like the aforementioned federal statutes which are cited in *Exhibit A*,
6 this Washington statute prohibits a person from possessing any bomb or similar device charged or
7 filled with one or more explosive intending to use it or cause it to be used for an unlawful
8 purpose. This offense constitutes a class A felony under Washington Law. According to RCW
9 9.94A.525(2)(a), "Class A [] convictions shall always be included in the offender score." In
10 other words, Defendant's federal convictions will never "washout" under Washington law.

11 **B. Defendant's standard range should be 64.5 – 85.5 months based on the crime**
12 **of Attempted Rape of a Child in the Second Degree, which is a class XI**
13 **offense. The State is recommending 85.5 months for the term of**
confinement.

14 Defendant faces a standard range sentence of 64.5 – 85.5 months because this is an
15 "attempt" crime. Defendant also faces an indeterminate sentence. The State is recommending a
16 high end sentence of 85.5 months. Defendant has been in custody since January 20, 2011, or
17 approximately 38 months. Defendant will receive credit for time served for this time.

18 The State is recommending a high range sentence because of the disturbing and serious
19 nature of this charge. Defendant fully intended to have sex with a 13-year-old girl. If there had
20 been a real-life 13-year-old girl at that hotel room, then Defendant would have had sex with her.
21 Defendant would have used the condoms, rubber gloves, sex toys, feather boas, diagrams, etc. on
22 the girl. Although they do not count towards his criminal history, Defendant has been convicted
23 of child sex offenses in the past. Defendant was convicted of crimes related to having sex with
24 his own daughters, who were around the same age as the fictitious victim in this case. In this

1 case, Defendant's pedophilic tendencies resurfaced or perhaps never went away. Despite his
2 age, Defendant has unequivocally proven that he remains a danger and continued threat to
3 vulnerable minor girls.

4 In addition to confinement, the State is recommending that Defendant undergo an
5 updated sexual deviancy evaluation. Defendant should follow all recommended treatment.
6 Defendant should have no contact with minors. Defendant should register as a sex offender and
7 should be under DOC supervision for a period of 36 months following release.

8 **IV. CONCLUSION**

9 The State simply asks this Court to impose upon Defendant a punishment commensurate
10 with his actions and consistent with the purpose set forth in the SRA. For the foregoing reasons,
11 the State respectfully requests this Court impose a sentence of 85.5 total months of confinement.

12
13 DATED this 24th day of March, 2014.

14
15 DANIEL T. SATTERBERG
16 King County Prosecuting Attorney

17 By: Benjamin C. Gau
18 Benjamin Gau, WSBA #41815
19 Deputy Prosecuting Attorney
20
21
22
23
24

Exhibit A

Defendant: JOHN LLOYD KIRK
Case Number: CR96-500C

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IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of FORTY-SIX (46) MONTHS

The court makes the following recommendations to the Bureau of Prisons: that defendant be incarcerated at FCI Sheridan.

~~XXX~~ The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district, at a.m.\p.m. on as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons, before 2 p.m. on as notified by the United States Marshal. as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

United States Marshal

By: _____
Deputy Marshal

Defendant: JOHN LLOYD KIRK
Case Number: CR96-500C

Judgment--Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with the additional conditions on the attached page (if indicated below):

SEE ATTACHED

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal his < 1 1 > aracteristics, and shall permit the probation officer to make such notifications and to confirm the defe..... compliance with such notification requirement.

Defendant: JOHN LLOYD KIRK
Case Number: CR96-500C

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ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall submit to a search of his person, residence, office, property, or vehicle conducted in a reasonable manner and at a reasonable time by a probation officer.
2. The defendant shall provide his probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of his Federal Income Tax Returns.

Defendant: JOHN LLOYD KIRK
 Case Number: CR96-500C

Judgment--Page 5 of 6

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS:	\$200	\$0	\$0

___ If applicable, restitution amount ordered pursuant to plea agreement \$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of \$ _____.
 The defendant shall pay interest on any fine of more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

___ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

- ___ The interest requirement is waived.
- ___ The interest requirement is modified as follows:

RESTITUTION

___ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

___ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

<u>Name of Payee</u>	<u>*Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order or Percentage of Payment</u>
----------------------	------------------------------	--------------------------------------	--

Totals: \$ _____ \$ _____

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994

Defendant: JOHN LLOYD KIRK
 Case Number: CR96-500C

Judgment--Page 6 of 6

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A XXX in full immediately; or
- B _____ \$ _____ immediately, balance due (in accordance with C, D, or E); or
- C _____ not later than _____; or
- D _____ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or
- E _____ in _____ (e.g., equal, weekly, monthly, quarterly) installments of \$ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

PLEASE MAKE CHECKS PAYABLE TO THE CLERK OF THE COURT

- ___ The defendant shall pay the cost of prosecution.
- ___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

Presented to the Court by the foreman of the Grand Jury in open Court, in the presence of the Grand Jury and FILED in the U.S. DISTRICT COURT at Seattle, Washington.

August 7th 19 96
BRUCE RIFKIN, Clerk
By Lowell Stewart Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN IRVIN PITNER,
MARLIN LANE MACK,
GARY MARVIN KUEHNOEL,
FREDERICK BENJAMIN FISHER,
JOHN LLOYD KIRK,
JUDY CAROL KIRK,
RICHARD FRANK BURTON, JR.
TRACY LEE BROWN,
a/k/a WILLIAM SMITH,
a/k/a WILLIAM STANTON, and
THEODORE R. CARTER, JR.,

Defendants.

No. CR96 500C

INDICTMENT

The Grand Jury charges that:

COUNT I
(Conspiracy to Make and Possess Destructive Devices)

Beginning on or about June 28, 1995, and continuing until July 27, 1996, at Bellingham, within the Western District of Washington and elsewhere, JOHN IRVIN PITNER, MARLIN LANE MACK, GARY MARVIN KUEHNOEL, FREDERICK BENJAMIN FISHER, JOHN LLOYD KIRK, JUDY CAROL KIRK, RICHARD FRANK BURTON, JR., TRACY LEE BROWN, a/k/a WILLIAM SMITH, a/k/a WILLIAM STANTON, and THEODORE R. CARTER, JR.,

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Seattle, Washington 98104
(206) 553-7970

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1 did knowingly and intentionally combine, conspire, and agree with
2 one another and with others unknown to commit an offense against
3 the United States, that is, to make and possess destructive
4 devices in violation of Title 26, United States Code,
5 Section 5861(d) and (f).

6 OBJECT OF THE CONSPIRACY

7 1. The object of the conspiracy was that the members of the
8 conspiracy would make and possess destructive devices to be used
9 as weapons, including but not limited to, pipe bombs.

10 MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

11 The defendants used the following means, among others, to
12 effect the object of the conspiracy:

13 2. It was part of the conspiracy that JOHN IRVIN PITNER,
14 MARLIN LANE MACK, GARY MARVIN KUEHNOEL, FREDERICK BENJAMIN FISHER
15 and THEODORE R. CARTER, JR., were members of the Washington State
16 Militia located in Bellingham, Washington.

17 3. It was part of the conspiracy that JOHN LLOYD KIRK, JUDY
18 CAROL KIRK, RICHARD FRANK BURTON, JR., and TRACY LEE BROWN, were
19 members of a Seattle area group referred to by JOHN IRVIN PITNER
20 as "Freemen."

21 4. It was part of the conspiracy that one or more of the
22 defendants would meet to discuss the making of destructive
23 devices.

24 5. It was part of the conspiracy that JOHN IRVIN PITNER
25 taught FREDERICK BENJAMIN FISHER, MARLIN LANE MACK and others to
26 construct a destructive device.

1 12. On or about May 19, 1996, MARLIN LANE MACK, GARY MARVIN
2 KUEHNOEL, RICHARD FRANK BURTON, JR., JOHN LLOYD KIRK and TRACY LEE
3 BROWN met at GARY MARVIN KUEHNOEL'S residence and discussed making
4 destructive devices.

5 13. On or about June 14, 1996, JOHN LLOYD KIRK and RICHARD
6 FRANK BURTON, JR., made and possessed unregistered destructive
7 devices, that is, two pipe bombs.

8 14. On or about June 15, 1996, JUDY CAROL KIRK and JOHN
9 LLOYD KIRK made and possessed an unregistered destructive device,
10 that is, a pipe bomb.

11 15. On or about June 15, 1996, MARLIN LANE MACK made and
12 possessed unregistered destructive devices, that is, two pipe
13 bombs.

14 16. On or about June 27, 1996, TRACY LEE BROWN and JOHN
15 LLOYD KIRK provided two lists of chemicals to be purchased for the
16 making of destructive devices.

17 17. On or about June 27, 1996, TRACY LEE BROWN provided \$100
18 for the purchase of chemicals for the making of destructive
19 devices.

20 18. On or about July 6, 1996, MARLIN LANE MACK possessed
21 unregistered destructive devices, that is, two pipe bombs.

22 19. On a date unknown, JOHN LLOYD KIRK, RICHARD FRANK
23 BURTON, JR., and TRACY LEE BROWN agreed to meet in Bellingham on
24 July 27, 1996, to instruct MARLIN LANE MACK and GARY MARVIN
25 KUEHNOEL in the making of destructive devices.

26 20. On or about July 27, 1996, JOHN LLOYD KIRK and RICHARD
27 FRANK BURTON, JR., met in Bellingham to instruct MARLIN LANE MACK,
28

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1 GARY MARVIN KUEHNOEL and FREDERICK BENJAMIN FISHER in the making
2 of destructive devices.

3 All in violation of Title 18, United States Code,
4 Section 371.

5 **COUNT II**
6 (Making and Possession of Unregistered Destructive Devices)

7 On or about June 14, 1996, at Bellingham, within the Western
8 District of Washington, JOHN LLOYD KIRK and RICHARD FRANK BURTON,
9 JR., did knowingly make and possess destructive devices, that is,
10 two pipe bombs, which were not registered to them in the National
11 Firearms Registration and Transfer Record, as required by Chapter
12 53, Title 26, United States Code.

13 The Grand Jury further charges that this offense was
14 committed in furtherance of the conspiracy alleged in Count I of
15 this Indictment.

16 All in violation of Title 26, United States Code, Sections
17 5861(d) and (f) and 5871; and Title 18, United States Code,
18 Section 2.

19 **COUNT III**
20 (Making and Possession of an Unregistered Destructive Device)

21 On or about June 15, 1996, at Seattle, within the Western
22 District of Washington, JUDY CAROL KIRK and JOHN LLOYD KIRK did
23 knowingly make and possess a destructive device, that is, one pipe
24 bomb, which was not registered to them in the National Firearms
25 Registration and Transfer Record, as required by Chapter 53,
26 Title 26, United States Code.

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1 The Grand Jury further charges that this offense was
2 committed in furtherance of the conspiracy alleged in Count I of
3 this Indictment.

4 All in violation of Title 26, United States Code,
5 Sections 5861(d) and (f) and 5871; and Title 18, United States
6 Code, Section 2.

7 **COUNT IV**
8 (Making and Possession of Unregistered Destructive Devices)

9 On or about June 15, 1996, at Bellingham, within the Western
10 District of Washington, MARLIN LANE MACK did knowingly make
11 and possess destructive devices, that is, two pipe bombs,
12 which were not registered to him in the National Firearms
13 Registration and Transfer Record, as required by Chapter 53,
14 Title 26, United States Code.

15 The Grand Jury further charges that this offense was
16 committed in furtherance of the conspiracy alleged in Count I of
17 this Indictment.

18 All in violation of Title 26, United States Code,
19 Sections 5861(d) and (f) and 5871.

20 **COUNT V**
21 (Making and Possession of Unregistered Destructive Devices)

22 On or about July 6, 1996, at Bellingham, within the Western
23 District of Washington, MARLIN LANE MACK did knowingly make and
24 possess destructive devices, that is, two pipe bombs, which were
25 not registered to him in the National Firearms Registration
26 and Transfer Record, as required by Chapter 53, Title 26,
27 United States Code.

1 The Grand Jury further charges that this offense was
2 committed in furtherance of the conspiracy alleged in Count I of
3 this Indictment.

4 All in violation of Title 26, United States Code,
5 Sections 5861(d) and (f) and 5871.

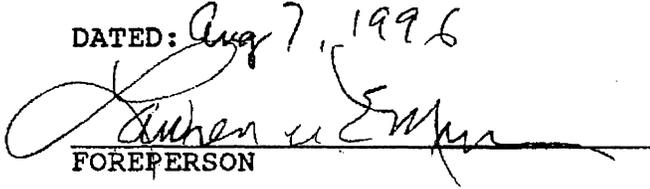
6 **COUNT VI**
7 (Possession and Transfer of Machineguns)

8 On or about July 11, 1996, at Bellingham, within the Western
9 District of Washington, GARY MARVIN KUEHNOEL did knowingly possess
10 and transfer two machineguns, that is, one (1) Olympic Arms (SGW),
11 model CAR-AR, caliber .223 rifle, serial number Z4564; and
12 one (1) Colt AR-15 A2, model HBAR SPORTER, caliber .223 rifle,
13 serial number SP229788.

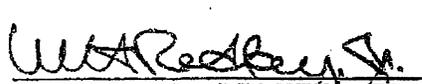
14 All in violation of Title 18, United States Code,
15 Sections 922(o) and 924(a)(2).

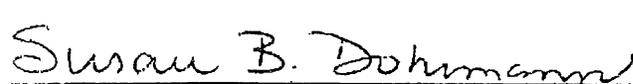
16 A TRUE BILL:

17 DATED: Aug 7, 1996

18 
19 FOREPERSON

20 
21 KATRINA C. PFLAUMER
22 United States Attorney

23 
24 WILLIAM H. REDKEY, JR.
25 Assistant United States Attorney

26 
27 SUSAN B. DOHRMANN
28 Assistant United States Attorney

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Seattle, Washington 98104
(206) 553-7970

FILED _____ ENTERED _____
LODGED _____ RECEIVED

JUL 26 1996

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8	UNITED STATES OF AMERICA,	)	MAGISTRATE'S DOCKET NO.
		)	CASE NO. 96-281m
9	Plaintiff,)	
		)	COMPLAINT for VIOLATION
10	v.	)	U.S.C. Title 18
		)	Section 371 and 2; and
11	JOHN IRVIN PITNER,	)	U.S.C. Title 26 Sections
	MARLIN LANE MACK,	)	5861 and 5871;
12	GARY MARVIN KUEHNOEL,	)	U.S.C. Title 18
	FREDERICK BENJAMIN FISHER,	)	Section 922(o)
13	JOHN LLOYD KIRK,)	
	JUDY CAROL KIRK,)	
14	RICHARD FRANK BURTON,)	
	WILLIAM SMITH,)	
15	a/k/a WILLIAM STANTON,)	
)	
16	Defendants.)	

BEFORE David E. Wilson, United States Magistrate Judge
United States Courthouse, 1010 Fifth Avenue, Seattle, Washington

The undersigned complainant being duly sworn states:

COUNT I
(conspiracy to make and possess destructive devices)

Beginning on a date unknown but no later than February 27,
1996, and continuing until the present, at Bellingham, within the
Western District of Washington and elsewhere, JOHN IRVIN PITNER,
MARLIN LANE MACK, GARY MARVIN KUEHNOEL, FREDERICK BENJAMIN FISHER,
JOHN LLOYD KIRK, JUDY CAROL KIRK, RICHARD FRANK BURTON, and
WILLIAM SMITH, a/k/a WILLIAM STANTON, did knowingly and

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1 intentionally combine, conspire, and agree with one another and
2 with others unknown to commit an offense against the United
3 States, that is, to make and possess destructive devices in
4 violation of Title 26, United States Code, Sections 5861(d) and
5 (f), and Title 18, United States Code, Section 2.

6 OBJECT OF THE CONSPIRACY

7 1. It was the object of the conspiracy that the members of
8 the conspiracy would make and possess destructive devices to be
9 used as weapons, including but not limited to, pipe-bombs, with
10 which to arm themselves for what they believed would be an
11 eventual confrontation with the United States government or the
12 United Nations.

13 MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

14 The defendants used the following means, among others, to
15 effect the conspiracy:

16 2. It was part of the conspiracy that JOHN IRVIN PITNER,
17 MARLIN LANE MACK, GARY MARVIN KUEHNOEL, and FREDERICK BENJAMIN
18 FISHER were members of the Washington State Militia located in
19 Bellingham, Washington.

20 3. It was part of the conspiracy that JOHN LLOYD KIRK, JUDY
21 CAROL KIRK, RICHARD FRANK BURTON, and WILLIAM SMITH, a/k/a WILLIAM
22 STANTON were members of a Seattle area group referred to by JOHN
23 PITNER as "Freemen".

24 4. It was part of the conspiracy that one or more of the
25 defendants would meet and discuss the making of destructive
26 devices.

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1 12. On or about June 15, 1996, MARLIN LANE MACK made and
2 possessed unregistered destructive devices, that is, two pipe-
3 bombs.

4 13. On or about June 27, 1996, WILLIAM SMITH and JOHN LLOYD
5 KIRK, provided two lists of chemicals to be purchased for the
6 making of destructive devices.

7 14. On or about June 27, 1996, WILLIAM SMITH provided \$100
8 for the purchase of chemicals for the making of destructive
9 devices.

10 15. On or about July 6, 1996, MARLIN LANE MACK possessed an
11 unregistered destructive devices, that is, two pipe-bombs.

12 16. On or about July 27, 1996, JOHN LLOYD KIRK, RICHARD
13 FRANK BURTON, and WILLIAM SMITH, planned to meet in Bellingham to
14 instruct MARLIN LANE MACK, GARY MARVIN KUEHNOEL, and FREDERICK
15 BENJAMIN FISHER in the making of destructive devices.

16 All in violation of Title 18, United States Code, Section 371
17 and Section 2.

18 **COUNT II**

19 (making and possession of unregistered destructive devices)

20 On or about June 14, 1996, at Bellingham, within the Western
21 District of Washington, JOHN LLOYD KIRK and RICHARD FRANK BURTON,
22 did knowingly make and possess destructive devices, that is, two
23 pipe-bombs, which were not registered to them in the National
24 Firearms Registration and Transfer Record, as required by Chapter
25 53, Title 26, United States Code.

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(206) 553-7970

1 All in violation of Title 26, United States Code, Sections
2 5861(d) and (f) and 5871; and Title 18, United States Code,
3 Section 2.

4 **COUNT III**

(making and possession of unregistered destructive devices)

5 On or about June 15, 1996, at Seattle, within the Western
6 District of Washington, JUDY CAROL KIRK and JOHN LLOYD KIRK did
7 knowingly make and possess a destructive device, that is, one
8 pipe-bomb, which was not registered to them in the National
9 Firearms Registration and Transfer Record, as required by Chapter
10 53, Title 26, United States Code.

11 All in violation of Title 26, United States Code, Sections
12 5861(d) and (f) and 5871; and Title 18, United States Code,
13 Section 2.

14 **COUNT IV**

(making and possession of unregistered destructive devices)

15 On or about June 15, 1996, at Bellingham, within the Western
16 District of Washington, MARLIN LANE MACK, did knowingly make and
17 possess destructive devices, that is, two pipe-bombs, which were
18 not registered to him in the National Firearms Registration and
19 Transfer Record, as required by Chapter 53, Title 26, United
20 States Code.

21 All in violation of Title 26, United States Code, Sections
22 5861(d) and (f) and 5871.

23 **COUNT V**

(making and possession of unregistered destructive devices)

24 On or about July 6, 1996, at Bellingham, within the Western
25 District of Washington, MARLIN LANE MACK, did knowingly make and
26

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(206) 553-7970

1 possess destructive devices, that is, two pipe-bombs, which were
2 not registered to him in the National Firearms Registration and
3 Transfer Record, as required by Chapter 53, Title 26, United
4 States Code.

5 All in violation of Title 26, United States Code, Sections
6 5861(d) and (f) and 5871.

7 **COUNT VI**
8 (possession and transfer of machinegun)

9 On or about July 11, 1996, at Bellingham, within the Western
10 District of Washington, GARY MARVIN KUEHNOEL, did knowingly
11 possess and transfer two machineguns, that is one (1) Olympic Arms
12 (SGW), model CAR-AR, caliber .223 rifle, serial number Z4564; and
13 one (1) Colt AR-15 A2, model HBAR SPORTER, caliber .223 rifle,
14 serial number SP229788.

15 All in violation of Title 18, United States Code, Section
16 922(o).

17 And the complainant states that this complaint is based on
18 the following information:

19 SEE ATTACHED AFFIDAVIT OF RAMON E. GARCIA
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) NO.
 v.)
)
 JOHN IRVIN PITNER,)
 MARLIN LANE MACK,) AFFIDAVIT OF
 GARY MARVIN KUEHNOEL,) RAMON E. GARCIA
 FREDERICK BENJAMIN FISHER,)
 JOHN LLOYD KIRK,)
 JUDY CAROL KIRK)
 RICHARD FRANK BURTON,)
 WILLIAM SMITH,)
 a/k/a WILLIAM STANTON,)
)
 Defendants.)
 _____)

A F F I D A V I T

STATE OF WASHINGTON)
)
 COUNTY OF KING) SS

RAMON E. GARCIA, being duly sworn, deposes and says:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI"), United States Department of Justice. I have been so employed for thirteen (13) years. As a Special Agent, I have participated in hundreds of investigations involving, but not limited to, racketeering, bank robbery, public corruption, narcotics, and fugitive matters. I am currently the

AFFIDAVIT OF RAMON E. GARCIA 1

Senior Resident Agent at the Bellingham, Washington, Resident Agency Office of the FBI.

INDIVIDUALS AGAINST WHOM ARREST WARRANTS ARE REQUESTED

2. I make this affidavit in support of a complaint filed naming JOHN IRVIN PITNER, MARLIN LANE MACK, GARY MARVIN KUEHNOEL, FREDERICK BENJAMIN FISHER, JOHN LLOYD KIRK, JUDY CAROL KIRK, RICHARD FRANK BURTON, and WILLIAM SMITH, a/k/a WILLIAM STANTON charging them with violations of Title 18, United States Code, Sections 371 (conspiracy); Title 18, United States Code, Section 922(o)(possession and transfer of a machinegun); Title 26, United States Code, Sections 5861(d) and (f)(possession and making of unregistered destructive devices); and Title 18, United States Code, Section 2; and in support of the issuance of arrest warrants for these individuals.

PLACES TO BE SEARCHED UNDER PROPOSED WARRANTS

3. I also make this affidavit in support of requests for search warrants at the following locations:

Residence of GARY MARVIN KUEHNOEL
4172 Squalicum Lake Road
Whatcom County, Washington

Residence of FREDERICK BENJAMIN FISHER
2719 Cedarwood Avenue
Bellingham, Washington

Residence of JOHN LLOYD KIRK and JUDY CAROL KIRK
3709 S. 126th Street
Seattle, Washington

Descriptions of each of these residences, and a statement of the evidence showing that each of these individuals resides at the listed addresses, are attached as Exhibit A of this affidavit

AFFIDAVIT OF RAMON E. GARCIA 2

which is incorporated herein by reference and of which this affidavit is a part.

4. For the reasons set forth in this affidavit, I submit that at each of these locations, there is probable cause to search for evidence of the kind described in Attachment B to the Application for Search Warrants, which is incorporated herein by reference, and of which this affidavit is a part. This property will constitute evidence of the commission of criminal offenses, including violations of Title 18, United States Code, Sections 371 (conspiracy); 922(o)(possession and transfer of machineguns); and Title 26, United States Code, Sections 5861(d) and (f)(possession and making of destructive devices), and contraband, the fruits of crime, or things criminally possessed; and property designed or intended for use or which is or has been used as a means of committing such offenses.

BASIS OF INFORMATION

5. Statements contained in this affidavit are in part based on my own personal investigation, on information provided by other Special Agents of the FBI and local law enforcement personnel in Bellingham and Seattle, Washington, and upon my experience and that of other FBI Special Agents.

6. In particular, I have received information from FBI Special Agent Michael German, who has worked in an undercover capacity in this investigation from March 1996 until the present. Using the alias Kevin Jackson, nickname "Rock", Special Agent German has participated in numerous consensually monitored

meetings and conversations with the defendants. Some of the meetings have been video-taped.

As detailed in this affidavit, Special Agent German was present on June 14, 1996, when JOHN LLOYD KIRK and RICHARD FRANK BURTON possessed two pipe-bombs, and on June 15, 1996, when JUDY CAROL KIRK possessed one pipe-bomb. On June 15, 1996, I retrieved two pipe-bombs made and delivered by MARLIN LANE MACK. On July 6, 1996, Special Agent German retrieved two pipe-bombs previously delivered by MARLIN LANE MACK in Bellingham. Special Agent German was present on July 11, 1996, when GARY MARVIN KUEHNOEL converted two firearms into machineguns.

THE CRIMINAL CONDUCT

7. I have learned in my investigation that MARLIN LANE MACK, GARY MARVIN KUEHNOEL, FREDERICK BENJAMIN FISHER and JOHN IRVIN PITNER are members of the Washington State Militia, operating in Bellingham, Washington. JOHN LLOYD KIRK, JUDY CAROL KIRK, RICHARD FRANK BURTON, and WILLIAM SMITH, a/k/a as WILLIAM STANTON, have been referred to as "Freemen" by JOHN PITNER, and are residents of the Seattle area. During the course of the investigation, Special Agent German has heard members of both groups express a shared concern about the activities of the federal Government and believe that they should prepare themselves to respond with military action to what they believe will be a confrontation with the federal Government or the United Nations.

8. On June 14, 1996, JOHN LLOYD KIRK and RICHARD FRANK BURTON delivered two pipe-bombs to Special Agent Michael German.

JOHN LLOYD KIRK had indicated to German prior to this delivery that he would provide a sample of C4 explosive, but unexpectedly delivered pipe-bombs instead. KIRK told German that he had left one of the pipe-bombs at home and that German could go to his residence and get the additional pipe-bomb from his wife, JUDY CAROL KIRK. KIRK also stated that his wife was sympathetic with his views.

On this same date, the pipe-bombs were disarmed by Bellingham Police Department Officers Dale H. Kuipers and Officer Gary Wilson, both of whom are hazardous device technicians with the police department. I was present during this disarming process. Officer Kuipers reported that there were two metal pipes of 1-1/2" by 1-1/4" nipples with end caps in place. There was also what appeared to be a length of cannon fuse protruding from one of the end caps. Additionally, there were two pill bottles also with lengths of cannon fuse protruding from the caps of the bottles. After entering the devices, Kuipers found that the cannon fuse had an ammunition shell casing attached to the end that was inside the device with the open end crimped and it appeared to Officer Kuipers that the shell casing had been dipped into wax. I could detect the smell of diesel fuel with respect to one of the pipe-bombs. This evidence has been sent to the FBI Laboratory in Washington, D.C. for analysis.

9. On June 15, 1996, JUDY CAROL KIRK, at the direction of her husband, JOHN LLOYD KIRK, delivered a pipe-bomb to German. JUDY CAROL KIRK retrieved the pipe-bomb from a barbecue at the

residence and told German that her husband had said not to drop it. JUDY CAROL KIRK also told German that the pipe-bomb would go off if it were dropped. This pipe-bomb was disarmed by members of the King County Police Department and sent to the FBI Laboratory in Washington, D.C. for analysis.

10. Prior to June 15, 1996, MARLIN LANE MACK arranged to make and provide pipe-bombs to Special Agent Michael German. On June 15, 1996, MARLIN LANE MACK placed two pipe-bombs at a location behind the Lakeway Inn in Bellingham as previously arranged with Special Agent German. I later retrieved these devices from the location where they had been left by MACK. MACK later explained to Special Agent German that he had ridden his bicycle to the designated delivery location so as to be sure he would not be stopped by the police and searched.

These devices have been sent to the FBI Laboratory in Washington, D.C. for analysis after they were disarmed.

11. On June 15, 1996, Officers Kuipers, Wilson, and Jensen disarmed the two pipe-bombs which I retrieved. These pipe-bombs were delivered on that date by MARLIN MACK. One pipe was approximately 6" in length and the other approximately 5". Each of the pipes had what appeared to be green cannon fuse protruding from one end. Inside each pipe there was a cardboard tube wrapped with green tape and sealed on each end. The green cannon fuse was set into one end of the tube and secured with tape. On cutting the tape from one end of the tube, the officers found a gray-black powder inside which resembled black rifle powder. The fuses

extended down into the powder at least one half of the way into the tube.

12. On July 6, 1996, at approximately 7:25 a.m., MARLIN LANE MACK was seen by law enforcement surveillance personnel riding his bicycle to the vicinity of the Haskell Business Center with a back-pack on his back. MACK rode on an access road until he reached a chained gate that allowed access to a wooded field. MACK entered the field and disappeared behind some trees. Approximately twelve minutes later, MACK reappeared and rode back in the direction from which he had come.

At approximately 7:50 a.m., Special Agent German drove to the area which MACK had just left. German got out of his vehicle and followed the same path as MACK. German went into the same field area as MACK had and recovered two pipe-bombs, which have also been sent to the FBI Laboratory for analysis.

These pipe-bombs were disarmed by Bellingham Police Officer Dale Kuipers and Gary Wilson. They observed that both of the pipes were approximately six inches long with end caps at both ends. Each of them had a length of what appeared to be cannon fuse protruding from one end through the end cap. After removing the end cap, the officers noted that inside each was a cardboard tube that had duct tape over both ends and the fuse came out of one end of the tube. The officers also noted that inside each tube was what appeared to be either smokeless or black powder. There was a wad of cotton in the end where the fuse was protruding from the tube.

AFFIDAVIT OF RAMON E. GARCIA 7

Officer Gary Wilson attended the Hazardous Devices School at the Redstone Arsenal, Huntsville, Alabama from February 14, 1992 through March 5, 1992, graduating as a Hazardous Devices Technician. Since 1986, Wilson has instructed a variety of local government and private agencies in the recognition and composition of hazardous devices.

With respect to the five devices I brought to his attention on June 14, 1996, which had been made and delivered by JOHN KIRK and RICHARD BURTON and included two devices constructed from metal pipe, Wilson stated that based on his experience two of the devices appeared to be what are commonly referred to as "pipe-bombs". The construction of the devices, that is, the use of metal pipe, the end-caps to contain both the filler and explosion until bursting, the filler, and the fuse, all indicate a pipe-bomb. Additionally, Wilson recalled that one of the fillers appeared to contain ammonium nitrate and smelled of diesel fuel. According to Wilson, ammonium nitrate and diesel fuel can be combined to create an explosive.

With respect to the two devices I brought to his attention on June 15, 1996, which had been made and delivered by MACK, Wilson again stated that based on his experience, the devices appeared to be what are commonly referred to as pipe-bombs. The construction of the devices, that is, the use of metal pipe, the end-caps to contain both the filler and explosion until bursting, the filler, and the fuse, all indicate a pipe-bomb. According to Wilson, the filler in these two devices appeared to

be black powder, an ingredient that would produce an effective explosion.

With respect to the two devices brought to his attention on July 6, 1996, Wilson again stated that from his experience, the devices appeared to be what are commonly referred to as "pipe-bombs". The construction of the devices, that is, the use of metal pipe, the end-caps to contain both the filler and explosion until bursting, the filler, and the fuse, all indicate a pipe-bomb. According to Wilson, the filler in these two devices appeared to be either black powder or smokeless powder, either of which would produce an effective explosion.

13. On July 11, 1996, GARY MARVIN KUEHNOEL, converted two semi-automatic rifles into machine guns, that is, one (1) Olympic Arms (SGW), model CAR-AR, caliber .223 rifle, serial number Z4564 and one (1) Colt AR-15 A2, model HBAR SPORTER, caliber .223 rifle, serial number SP229788 into fully automatic weapons in the presence of Special Agent German. This conversion process occurred in Bellingham and was video taped. On July 12, 1996, the two rifles were test fired by FBI Special Agent Mark Nelson and both were found to function as automatic weapons. The weapons can be used as either semi-automatic or automatic weapons.

13. On June 27, 1996, WILLIAM SMITH, provided two lists of chemicals to be purchased by German for use at a bomb-making instruction session to be held in Bellingham scheduled for July 27, 1996. The lists were provided by WILLIAM SMITH and JOHN LLOYD KIRK and indicated that certain of the chemicals should not be

kept close together because of their potential for explosion in the event of any impact.

The purpose of the instruction session was for SMITH, KIRK and BURTON to train MARLIN MACK, GARY KUEHNOEL and FRED FISHER how to make destructive devices. According to Special Agent Douglas K. Krogh, Bureau of Alcohol, Tobacco, and Firearms, the chemicals on the list prepared by SMITH and KIRK are consistent with use in the making of destructive devices.

15. According to Special Agent Douglas K. Krogh, Bureau of Alcohol, Tobacco, and Firearms, there is no record in the National Firearms Registration and Transfer Record that any of the defendants named in the complaint are authorized to possess firearms or destructive devices according to the requirements in Chapter 53, Title 26, United States Code.

16. On July 23, 1996, Special Agent Michael German met with FREDERICK BENJAMIN FISHER at FISHER'S residence located at 2719 Cedarwood Avenue, Bellingham, Washington. At that time, FISHER showed German several firearms and stated that he was not allowed to have them because he is a convicted felon. FISHER also showed German one propane bottle which he retrieved from his basement stating that the propane bottle was to be used to make destructive devices. FISHER also told German that he had stored approximately 24 additional propane bottles at his home. On August 15, 1995, FISHER attended a militia meeting at the residence of JOHN IRVIN PITNER. At this meeting FISHER requested that more propane bottles to be used in making bombs be provided to him.

17. On May 31, 1996, MARLIN MACK told Special Agent Michael German that MACK could store the components for building pipe-bombs at FISHER'S shop. Based on my investigation, I believe that this shop is located at FISHER'S residence. According to the listing in the U.S. West telephone directory for Bellingham, Frederick Fisher Masonry is located at 2719 Cedarwood, the same address as FISHER'S residence.

18. On October 11, 1995, at a meeting of the Washington State Militia, FISHER distributed a manual on the construction of booby traps, firearms, and explosives using common ingredients.

19. On May 11, 1996, Special Agent German and MARLIN MACK went to FRED FISHER'S residence at 2719 Cedarwood to pick up a box of materials which FISHER wanted German to cache for him. Later in the day, German opened the box and observed a long metal pipe, a roll of cannon fuse, and two containers of what appeared to be rifle powder.

20. Shortly before Special Agent German observed GARY MARVIN KUEHNOEL convert two firearms into machineguns on July 11, 1996, he and KUEHNOEL went to KUEHNOEL'S residence at 4172 Squalicum Lake Road, Whatcom County, Washington. At that time, German observed KUEHNOEL use tools and equipment located in the garage at his residence in an effort to convert two other firearms into machineguns. KUEHNOEL, who wanted to do the conversions at his home, told German that he had done these conversions before and that he had all the tools at his residence to do the work.

21. On June 14, 1996, during a conversation about explosive materials/chemicals, JOHN LLOYD KIRK asked Special Agent German when German's place would be ready because he did not like to store this material at his home.

22. Based on the foregoing and my training and experience as an FBI Special Agent, and upon the experience and information of other Special Agents and police officers involved in this investigation, I believe there is probable cause to search the premises described in Attachment A for the following evidence:

Residence of FREDERICK BENJAMIN FISHER

a. components for the making of destructive devices, including metal pipe, propane bottles, chemicals, fuse, tape and any and all other materials related to the making of destructive devices; and

b. books/manuals and any and all documentation and records related to the making of destructive devices.

Residence of GARY MARVIN KUEHNOEL

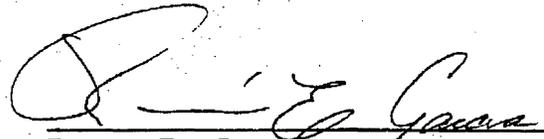
a. books/manuals and any and all documentation and records related to the conversion of firearms into automatic weapons/machineguns;

b. tools/equipment used to convert firearms into automatic weapons/machineguns, including drill presses, lathes, and gun smithing equipment; and any and all other materials used to convert firearms into automatic weapons/machineguns; and

c. automatic weapons

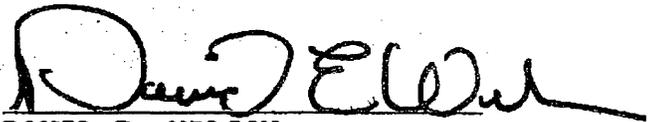
Residence of JOHN LLOYD KIRK and JUDY CAROL KIRK

- a. components for the making of destructive devices, including metal pipe, chemicals, fuse, tape, and any and all other materials related to the making of destructive devices; and
- b. books/manuals and any and all documentation and records related to the making of destructive devices.



Ramon E. Garcia
Special Agent, FBI

Complaint and affidavit sworn to before me and subscribed in my presence, July 26, 1996:



DAVID E. WILSON
United States Magistrate Judge

ATTACHMENT A

Residence of Frederick Benjamin Fisher

Frederick Benjamin Fisher resides at 2917 Cedarwood Avenue, Bellingham, Washington. Special Agent Michael German has been at Fisher's home located at this address when Fisher was present. Special Agent German has also seen the shed which is located on the property.

The residence is described as a one story, wood frame, single family residence, blue/gray in color with white trim, a brick front porch and brick chimney, and a white flag pole in the front yard. House numbers displayed in black on silver background are to the right of the front door; a gravel driveway is to the left of the residence with a two door detached garage to the left of the driveway. A metal gate on wheels crosses the driveway, latching to the garage, and blocking the entrance to the rear of the residence. There is a shed on the premises located in the backyard past the garage; there is a chain link fence separating the backyard from the driveway. The shed is a painted plywood-type structure; approximately 15'-20' in length; 10' deep; and 8'-9' high. There are double doors approximately 6' high which swing open; these doors face the house.

Residence of John Kirk and Judy Kirk

John Lloyd Kirk and Judy Kirk reside at 3709 South 126 Street, Seattle, Washington. Special Agent German has been at the Kirk's home when Judy Carol Kirk was present. *2/26/96*

The residence is described as a gray, two story, single family dwelling with white trim and a large front porch. The numbers "3709" are affixed above the front door entrance in black. To the right of the house and recessed back from the house on a driveway is located a small light tan utility shed with dark brown trim.

ATTACHMENT A (continued)

Residence of Gary Marvin Kuehnoel

Gary Marvin Kuehnoel resides at 4172 Squalicum Lake Road, Whatcom County, Washington. Special Agent Michael German has been at Kuehnoel's home located at this address when Kuehnoel was present.

The residence is described as a rural address of 20 acres containing several buildings including two residences located approximately one mile south of State Highway 542 (Mount Baker Highway) on Squalicum Lake Road on the left/east side of the road. The property is identified by a stand alone white concrete pillar to the right of a gravel driveway. The pillar is marked with the black digits "4172". From the right the first residence is a mobile home, white in color, with blue trim in which Gary Marvin Kuehnoel resides. The next building is a small wood shed, light brown in color with brown trim and a large television antenna attached. The second residence is a manufactured modular home, light brown in color with dark brown trim, situated near the center of the driveway. The next building is a small wood frame storage shed with weathered wood exterior. The largest building is at the rear of the other buildings at the end of the gravel driveway. It is a large three bay garage attached to a large wood storage shed with a metal roof which is attached to another small wood shed. The last building to the left is a weathered wood barn used for storage.

ATTACHEMENT B
ITEMS TO BE SEARCHED FOR AND SEIZED

Residence of FREDERICK BENJAMIN FISHER

a. components for the making of destructive devices, including metal pipe, propane bottles, chemicals, fuse, tape and any and all other materials related to the making of destructive devices; and

b. books/manuals and any and all documentation and records related to the making of destructive devices.

Residence of GARY MARVIN KUEHNOEL

a. books/manuals and any and all documentation and records related to the conversion of firearms into automatic weapons/machineguns;

b. tools/equipment used to convert firearms into automatic weapons/machineguns, including drill presses, lathes, and gun smithing equipment; and any and all other materials used to convert firearms into automatic weapons/machineguns; and

c. automatic weapons

Residence of JOHN LLOYD KIRK and JUDY CAROL KIRK

a. components for the making of destructive devices, including metal pipe, chemicals, fuse, tape, and any and all other materials related to the making of destructive devices; and

b. books/manuals and any and all documentation and records related to the making of destructive devices.

Exhibit B

WASHINGTON STATE LEGISLATURE

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[RCWs](#) > [Title 70](#) > [Chapter 70.74](#) > [Section 70.74.180](#)

[70.74.170](#) << [70.74.180](#) >> [70.74.191](#)

RCW 70.74.180

Explosive devices prohibited — Penalty.

Any person who has in his or her possession or control any shell, bomb, or similar device, charged or filled with one or more explosives, intending to use it or cause it to be used for an unlawful purpose, is guilty of a class A felony, and upon conviction shall be punished by imprisonment in a state prison for a term of not more than twenty years.

[2003 c 53 § 354; 1984 c 55 § 1; 1969 ex.s. c 137 § 21; 1931 c 111 § 18; RRS § 5440-18.]

Notes:

Intent -- Effective date -- 2003 c 53: See notes following RCW [2.48.180](#).

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- ★ TVW
- ★ Washington Courts
- ★ OFM Fiscal Note Website



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
	)	NO. 71865-7-I
v.)	
)	
JOHN KIRK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JOHN KIRK 351457 MONROE CORRECTIONAL COMPLEX PO BOX 888 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JANUARY, 2015.

X _____ 

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Seattle, WA 98101
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