

68740-9

68740-9

NO. 68740-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of

BENJAMIN LEE SMALLS,

Petitioner.



STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. ISSUES PRESENTED

1. Petitioner Smalls shot and killed Stephen Kirk in 2002. Due to the eyewitnesses' fear of Smalls, the State was unable to amass sufficient evidence to charge him with the homicide until 2008. In November of 2008, Smalls pled guilty to second degree murder and second degree assault. Because the assault charge was filed outside the statutory charging period, the State concedes that the judgment and sentence is facially invalid as to that count.

2. A claim of involuntary plea is subject to the one-year time limit for collateral attacks. Smalls concedes that his petition was not timely filed within one year of his judgment becoming final. A facially invalid judgment cannot be used as a "gateway" to reach substantive claims that are otherwise time barred. Should this Court refuse to address Smalls's time-barred claim that his plea was involuntary, and find that the remedy for his facially invalid judgment is correction of the error that rendered it facially invalid? In other words, should this Court remand for dismissal of the assault charge and for correction of Smalls's sentence for second degree murder?

B. STATEMENT OF THE CASE

Benjamin Smalls is restrained pursuant to Judgment and Sentence in King County Superior Court No. 08-1-02482-9 SEA. Appendix A.

On September 13, 2002, Stephen Kirk was standing on a street corner in Seattle, talking to his friend Toni King, when he was shot and killed. Appendix B (pg. B3). Two employees of a nearby auto detail shop heard gunshots and saw a man quickly enter an older Chevy Blazer, which was driven away by a female. Id. (pgs. B3-B4). One of the employees noted the license plate number as 800 MOG. Id. (pg. B4). A passerby also heard gunshots and observed a man flee in an older brown SUV. Id. He recounted the license plate of the SUV as including the numbers "800." Id.

The license plate 800 MOG was registered to a black Nissan. Appendix B (pg. B4). The police then determined that 800 MQG was registered to a Chevy Blazer. Id. The police traced the registration of "800 MQG" to Jonnetta Glover, petitioner Smalls's girlfriend. Id.

Both Toni King and Jonnetta Glover repeatedly refused to cooperate with the police investigation. Appendix B (pgs. B3-B6).

The women stated that they were afraid that Smalls or his associates would kill them if they assisted the police. Id.

Ultimately, in early 2008, the police were able to fully interview Toni King. Appendix B (pg. B5). She told police how she knew Smalls well and had been in a dispute with him a week before the homicide. Id. Smalls had opened and drank from a bottle of beer that King had purchased for her boyfriend. Id. Unhappy that he had done so, King threw some of the beer on Smalls. Id.

At the time of the shooting, King saw Smalls approaching on the street and she asked him if they were "cool." Appendix B (pg. B6). Smalls said, "Shut up bitch I should have socked you in your face," in an angry manner. Id. Victim Kirk stood up for King, telling Smalls that he would not talk that way if King's deceased ex-boyfriend were alive. Id. Smalls pulled out a gun and shot Kirk. Id.

Also in early 2008, Jonnetta Glover finally cooperated with being interviewed by police. Appendix B (pg. B4). She confirmed that she saw Smalls shoot Kirk and that she drove him away in her Blazer. Id.

After the homicide, Smalls told his friend Cedric Alderman that he "had" to shoot Kirk because Kirk "was trying to call down my

name.” Appendix B (pg. B6). Smalls told Alderman that he was not a “sucka” and that he “had to do what [he] had to do.” Id.

In March of 2008, shortly after the police interviewed Glover and King, the State charged Smalls with second degree murder with a firearm enhancement. Appendix B (pgs. B1-B2). At the time, Smalls also had felony domestic violence assault charges pending against him in King County, under cause number 06-1-12112-7 SEA. Appendix C.

In April of 2008, the State amended the information in the homicide case to reflect an added charge of second degree assault with a firearm enhancement, naming Toni King as the victim. Appendix D. On November 14, 2008, Smalls pled guilty to second degree murder with a firearm enhancement and to second degree assault. Appendix E. In exchange for the plea, the State agreed to dismiss the firearm enhancement on the assault charge, as well as to dismiss the unrelated domestic violence case altogether. Id. (pgs. E4, E12). In his plea statement, Smalls admitted that he intentionally shot Kirk and caused his death. Id. (pg. E9).

Prior to being sentenced, Smalls unsuccessfully attempted to withdraw his guilty plea, claiming that he was not competent. Appendix F (pg. F2).

Smalls was sentenced on September 25, 2009 to a total of 418 months. Appendix A (pg. A4). He received the low end of the standard range for the second degree murder conviction, and his sentence for the second degree assault charge was ordered to run concurrently. Id.

Smalls appealed, claiming that his plea was involuntary because of post-plea changes in the law to the length of community custody authorized for his crimes. Appendix F (pg. F1). Smalls also raised a number of challenges to his conviction in a statement of additional grounds. Appendix F (pgs. F3-F4). He claimed that he did not sign a speedy trial waiver—a claim belied by the record. Id. (pg. F4). He claimed that his plea was involuntary, arguing that there was an insufficient factual basis, and that it was not in his own handwriting. Id. Smalls also claimed his counsel was ineffective for various reasons. Id.

This Court affirmed Smalls's conviction and sentence in an unpublished opinion. Appendix F. The mandate issued on March 18, 2011. Id. Over one year later, in April of 2012, Smalls filed an untimely CrR 7.8 motion for relief from judgment in the King County Superior Court. It was transferred to this Court as a personal restraint petition.

C. ARGUMENT

1. THE JUDGMENT AND SENTENCE IS FACIALLY INVALID AS TO THE SECOND DEGREE ASSAULT CHARGE.

No petition collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1). A judgment becomes final on the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction. RCW 10.73.090(3).

In the present case, the judgment became final on March 18, 2011, when this Court issued its mandate. Appendix F. This personal restraint petition was filed in April of 2012, more than one year later. As such, it is presumptively untimely and cannot be brought unless one of the statutory exceptions found in RCW 10.73.090 and 10.73.100 applies.

One such statutory exception to the one-year time limit is when a judgment is invalid on its face. RCW 10.73.090(1). A judgment is "valid on its face" unless it evidences an error without further elaboration. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). Moreover, not all errors on the face of the

judgment render it invalid; a judgment is invalid only if the court has actually exceeded its authority in entering the judgment. In re Pers. Restraint of Coats, 173 Wn.2d 123, 143, 267 P.3d 324 (2011).

For a judgment to be facially invalid, a petitioner must show more than simply a legal error. In re Pers. Restraint of Scott, 173 Wn.2d 911, 916, 271 P.3d 218 (2012). See also In re Pers. Restraint of McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009) (the error must be more than a "technical misstatement" having no actual effect on the petitioner's rights). "[T]he general rule is that a judgment and sentence is not valid on its face if the trial judge actually exercised authority (statutory or otherwise) it did not have." Scott, 173 Wn.2d at 917.

The types of errors that have been found to render a judgment facially invalid all go to the court's inherent authority to impose the sentence that it did. See e.g., In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000) (charge was filed after the statute of limitations had run); Thompson, 141 Wn.2d 712 (defendant was charged with an offense that was not a crime at the time of its commission); In re Pers. Restraint of Carrier, 173 Wn.2d 791, 272 P.3d 209 (2012) (imposition of a life sentence based upon a prior conviction that had previously been dismissed); In re Pers.

Restraint of West, 154 Wn.2d 204, 110 P.3d 1122 (2005) (sentence improperly denied defendant a reduction for earned early release); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) (sentence included juvenile convictions that had previously "washed out").

In sum, when the court imposes a sentence or a condition of sentence for which it lacks authority, such an improper exercise of authority, as reflected on the judgment and sentence, renders the judgment facially invalid.

Here, Smalls was first charged with second degree assault five and a half years after the date of the offense. Appendix D (pg. D3). The State is limited to a charging period of three years for second degree assault. RCW 9A.04.080. As such, the trial court lacked authority to sentence Smalls for the assault, and the judgment and sentence is invalid on its face. Stoudmire, 141 Wn.2d at 355. As discussed below, this Court should remand the matter for dismissal of the assault charge and correction of the sentence for the remaining second degree murder conviction.

2. SMALLS'S CLAIM THAT HIS PLEA WAS INVOLUNTARY IS TIME BARRED AND THIS COURT SHOULD REMAND SOLELY FOR CORRECTION OF THE ERROR THAT RENDERED HIS JUDGMENT FACIALLY INVALID.

Smalls contends that he is entitled to two different remedies, based on two very different claims. First, Smalls argues that because the court lacked authority to enter sentence on the assault charge, his judgment and sentence is invalid on its face.¹ Pers. Restraint Petition at pg. 7-10. Smalls contends that due to the facial invalidity of his judgment, he is entitled to have the assault charge "dismissed." Pers. Restraint Petition at 11. For reasons discussed more thoroughly below, the State agrees with this remedy.

However, Smalls also raises a separate claim that his plea was involuntary. A claim that a plea was not voluntarily entered does not fall within any of the statutory exceptions to the one-year time limit for collateral attacks. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002). Thus, Smalls was

¹ Smalls also claims that the error renders his judgment "void," but he cites to no persuasive or controlling authority for such a proposition, and he appears to conflate the concepts of a "void" judgment and a judgment that is facially invalid. Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain a personal restraint petitioner's burden of proof. In re Pers. Restraint of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

required to have brought that claim within one year from the date of final judgment or else it is waived. Smalls's argument, that a facial invalidity in his judgment waives the time bar for all claims, is unwarranted.

RCW 10.73.090(1) sets out two "preconditions" for application of the one-year time bar: a facially valid judgment, and that the judgment was rendered by a court of competent jurisdiction. These two "preconditions" are "additional, discrete 'exceptions' to the time bar," considered in addition to the exceptions found in RCW 10.73.100. Coats, 173 Wn.2d at 169 (Stephens, J., concurring) (citing Stoudmire, 141 Wn.2d at 346).

By their terms, RCW 10.73.090 and RCW 10.73.100 do not confer any substantive rights. They are merely procedural rules designed to deal with the flow of post-conviction claims for relief. Both statutes simply establish the types of claims that can be considered after the one-year time limit has passed. Coats, 173 Wn.2d at 161-62 (Madsen, C.J., concurring).

There is no basis upon which to conclude that the statutory exception for a facially invalid judgment becomes a "gateway" to revive time-barred claims. Because a facially invalid judgment and sentence is itself an exception to the one-year time limit, when a

petitioner successfully brings a claim of a facial invalidity, his remedy is limited to correction of the error that rendered his judgment facially invalid. An invalid judgment cannot be used as super exception to the time bar, entitling a petitioner to review of substantive claims that are otherwise waived.

In Coats, the two concurring opinions both disagreed with the majority's conclusion that the judgment was facially valid. However, all nine justices disagreed with the petitioner's argument "that once the one-year time bar of RCW 10.73.090(1) is avoided as to one claim, it is automatically avoided as to all claims asserted by the petitioner." Coats, 173 Wn.2d at 175 (Madsen, C.J., concurring). The majority found that, "A claim that the judgment is not valid on its face may not be used to make an end run around the time limit and a personal restraint petition." Coats, 173 Wn.2d at 141. Justice Stephens stated in her concurrence, "The remedy for an invalid judgment and sentence is correction of the error that renders the judgment and sentence facially invalid, not opening the door to other time-barred claims." Coats, 173 Wn.2d at 164 (Stephens, J., concurring).

The remedy for Smalls's facial invalidity claim is correction of the error that renders his judgment facially invalid—dismissal of the

assault charge and a correction of his sentence on the remaining murder conviction. Indeed, that is the relief that the courts have previously granted in cases with a facially invalid judgment.

In Stoudmire, the petitioner raised numerous challenges to his convictions in two different cause numbers. Id. at 347. The court analyzed whether the petitioner's untimely claims fell within any of the exceptions found in RCW 10.73.090 or RCW 10.73.100. The court ultimately dismissed some of the claims which fell under exceptions listed in RCW 10.73.100 because they were "mixed" with claims that did not fall under any of the 10.73.100 exceptions, including a challenge to the sufficiency of the guilty plea.²

Stoudmire, 141 Wn.2d at 350.

The court did examine the claims which fell under the exceptions in RCW 10.73.090 pertaining to whether the court lacked jurisdiction or whether the judgment was facially invalid.

The court noted:

If petitioner can show that his claims meet the conditions set forth in RCW 10.73.090(1), they are not time-barred, and this court may consider them.

Stoudmire, 141 Wn.2d at 351.

² RCW 10.73.100 indicates that the one-year time bar does not apply to a petition based **solely** on one or more of the exceptions that follow.

Ultimately, the court found two of Stoudmire's claims to fall within the exceptions in RCW 10.73.090(1) and considered them. First, like here, the court found that the judgment was facially invalid because the statute of limitations had expired before the State filed two of the charges; it remanded for dismissal of those counts. Stoudmire, 141 Wn.2d at 355. Secondly, the court found that two of the other sentences were facially invalid because they exceeded the statutory maximum sentence. Id. at 356.

The remedy that the court then provided was remand for dismissal of the charges that had been filed outside the statute of limitations and correction of the remaining erroneous sentences. Stoudmire, 141 Wn.2d at 356. Importantly, the court did not find that the facial invalidity provided the petitioner with a mechanism for raising his time-barred claim of an involuntary plea. In other words, the court did not allow the petitioner to circumvent the time bar by bootstrapping an involuntary plea claim onto his claims which fell within RCW 10.73.090's exception for claims of facial invalidity.

In Goodwin, the court found that the petitioner's untimely claim that his offender score included "washed out" juvenile convictions was not time barred because it rendered his judgment

facially invalid. 146 Wn.2d at 866-67. The court went on to remand for resentencing without the washed-out convictions. Id. at 877-88.

In West, the judge wrote on the judgment and sentence that the petitioner had agreed to a sentence that did not include any earned early release. 154 Wn.2d at 208. The Washington Supreme Court determined that the judgment was facially invalid because the sentencing court had no statutory authority to deny earned early release credit. Id. at 214-15. In determining the appropriate remedy, the court explained:

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

Id. at 215 (citing State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980)). The court thus remanded for correction of the invalid judgment and sentence in the form of deletion of the handwritten notation. West, 154 Wn.2d at 215.

Additionally, the court has recently reiterated, "When a judgment and sentence is facially invalid, the proper remedy is remand for correction of the error." In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008).

These decisions illustrate that a petitioner may not obtain relief on a time-barred claim (such as the involuntariness of his plea) by trying to bootstrap the untimely claim to one that involves facial validity. To allow this would allow a defendant to accomplish indirectly what the law does not allow him to do directly. It would pose a significant threat to the finality of criminal judgments and should be rejected.

Moreover, it is not unfair to impose strict procedural default rules with respect to collateral attacks. Relief by way of a personal restraint petition is extraordinary. Coats, 173 Wn.2d at 132. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." In re Pers. Restraint of Hagler, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982) (citing Engle v. Isaac, 456 U.S. 107, 127-28, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). The public interest in the finality of judgments, especially those based on guilty pleas, must be protected. Procedural default rules, such as the time bar found in RCW 10.73.090, are important in an adversary justice system which relies on the parties to raise and litigate any significant issues, doing so in the appropriate manner and at the appropriate time.

Limiting a defendant's ability to collaterally attack the voluntariness of his plea to a timely-filed petition is appropriate given the critical importance of finality in guilty plea cases. When a case is resolved by way of a plea the evidence is generally not preserved and there is no sworn trial testimony of witnesses which can be memorialized for later use. A defendant should not be encouraged to wait until the evidence in his case is destroyed and then file a collateral attack claiming that his plea was involuntary.³

In support of his argument that he should be entitled to withdraw his plea, Smalls cites to In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) and In re Pers. Restraint of Bradley, 165 Wn.2d 934, 205 P.3d 123 (2009). Neither case supports his claimed relief.

Unlike this case, Isadore involved a timely-filed petition. Isadore, 151 Wn.2d at 297; see also Coats, 173 Wn.2d at 141 (noting that the petitioner in Isadore raised a timely challenge to the voluntariness of his plea).

³ As it had promised to do as part of the plea agreement in this case, the State dismissed Smalls's pending domestic violence felony assault charges with prejudice. Appendix C (pg. C5). Accordingly, the State authorized the destruction of the evidence in the case. Id. (pgs. C6-C7).

Additionally, the court has since clarified that Bradley is isolated in its application. In Bradley, the court reached the merits of the petitioner's argument about the voluntariness of his plea only because the parties agreed that it should. See Coats, 173 Wn.2d at 137-38 ("Bradley did not consider, and therefore, did not establish whether an error on the face of the judgment and sentence in fact acted to waive the time bar"); Coats, 173 Wn.2d at 171 (Stephens, J., concurring) ("the issue of the appropriate remedy for a facial invalidity simply was not before the court in Bradley"). Here, it is the State's position that Smalls's involuntary plea claim is time barred and should not be considered by this Court.

In sum, if Smalls had raised the issue relating to the voluntariness of his plea in a timely manner, he may well have obtained relief. However, he failed to do so.

The Legislature has chosen to impose a strict time limit on collateral attacks. An important policy reason for such a rule is to protect the integrity of judgments, both within the law itself and in the public's perception. Moreover, our state Supreme Court has held that the one-year time bar is constitutional and does not deny equal protection. In re Pers. Restraint of Runyan, 121 Wn.2d 432,

853 P.2d 424 (1993). In so holding, the court found that the time limit is "a reasonable means for controlling the flow of postconviction collateral relief petitions." Id. at 449. This Court should abide by the Legislature's judgment, and deny review of Smalls's claim as it relates to the voluntariness of his plea.

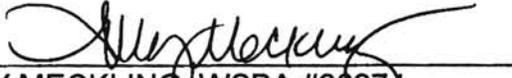
D. CONCLUSION

For the above-stated reasons, the State respectfully asks this Court to remand the matter for dismissal of the second degree assault charge and correction of Smalls's sentence for second degree murder.

DATED this 28 day of August, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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APPENDIX A

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PRESENTENCING STATEMENT AND INFORMATION ATTACHED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

BENJAMIN LEE SMALLS

Defendant,

No. 08-1-02482-9 SEA

**JUDGMENT AND SENTENCE
FELONY**

I. HEARING

1.1 The defendant, the defendant's lawyer, CRAIG McDONALD, TERI ROGERS KEMP, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Debra Kelley (mother of defendant)
deputy H. Tanquesia Smalls (grooming defendant)

II. FINDINGS

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

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 11/12/2008 by plea of:

Count No.: I Crime: MURDER IN THE SECOND DEGREE
RCW 9A.32.050(1)(A)(B) Crime Code: 00147
Date of Crime: 09/13/2002 Incident No. _____

Count No.: II Crime: ASSAULT IN THE SECOND DEGREE
RCW 9A.36.021(1)(C) Crime Code: 01018
Date of Crime: 09/13/2002 Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: _____ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

[] Additional current offenses are attached in Appendix A



SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) I RCW 9.94A.510(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) Domestic violence offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

Criminal history is attached in Appendix B.

One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	9	XIV	298 TO 397	60 MONTHS	358 TO 457 MONTHS	LIFE AND/OR \$50,000
Count II	9	IV	63 TO 84		63 TO 84 MONTHS	10 YEARS AND/OR \$25,000
Count						
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) FIREARM ENHANCEMENT IN COUNT II

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 - Date to be set.
 - Defendant waives presence at future restitution hearing(s).
 - Restitution is not ordered. *for SUGGEST*
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee; DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs; Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived; (RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____.

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600⁰⁰. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived ~~except with respect to restitution.~~

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [] immediately; [] (Date): _____ by _____ m.

358 months/days on count I; _____ months/days on count _____; _____ months/day on count _____

84 months/days on count II; _____ months/days on count _____; _____ months/day on count _____

The above terms for counts I & II are consecutive / concurrent.

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) _____

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: 60 MONTHS IN COURT I FOR SEVERAL
ARMED WITH A FIREARM

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 418 months.

Credit is given for 575 days served [] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6).

4.5 NO CONTACT: For the maximum term of Life years, defendant shall have no contact with TOM ANTONIETTE KING, JONETA KARIENE GUNTER, CHRIS McColey, ANTHONY JAMES

→ 4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

[] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [] COMMUNITY PLACEMENT pursuant to RCW 9.94A.700, for qualifying crimes committed before 7-1-2000, is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] APPENDIX H for Community Placement conditions is attached and incorporated herein.

(b) [] COMMUNITY CUSTODY pursuant to RCW 9.94.710 for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. APPENDIX H for Community Custody Conditions and APPENDIX J for sex offender registration is attached and incorporated herein.

- (c) **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 for qualifying crimes committed after 6-30-2000 is ordered for the following established range:
- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
 - Serious Violent Offense, RCW 9.94A.030(37) - ~~36 to~~ 48 months
 - Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
 - Crime Against Person, RCW 9.94A.411 - 9 to 18 months
 - Felony Violation of RCW 69.50/52 - 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.

APPENDIX H for Community Custody conditions is attached and incorporated herein.

APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. Appendix H for Community Custody Conditions is attached and incorporated herein.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows: TO THE STATE'S PRE-SENTENCE REPORT WHICH HAS BEEN FILED

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: September 25, 2009

Gregory Cannon
 JUDGE
 Print Name: GREGORY CANNON

Presented by:

[Signature]
 Deputy Prosecuting Attorney, WSBA# 16982
 Print Name: JAMES VALENTI

Approved as to form:

[Signature]
 Attorney for Defendant, WSBA # 9308
 Print Name: CATIE MADONARDI

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	No. 08-1-02482-9 SEA
Plaintiff,)	
	)	JUDGMENT AND SENTENCE,
vs.	)	(FELONY) - APPENDIX B,
	)	CRIMINAL HISTORY
BENJAMIN LEE SMALLS)	
)	
Defendant,)	

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
ATTEMPT TO ELUDE (CLASS C)	05/30/2003	ADULT	021072174	KING CO
VUCSA (CLASS C)	05/30/2003	ADULT	021072174	KING CO
VUCSA (CLASS C)	09/04/2003	ADULT	031068957	KING CO
MALICIOUS MISCHIEF 2 (CLASS C)	11/10/2003	ADULT	031078553	KING CO

[] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: September 25, 2009 
 JUDGE, KING COUNTY SUPERIOR COURT

97-B-07029.7 Robbery 1st (CLASS A) 4-1-98 King Co Juv. 80-100 wks JRA
 00-8-03919.2 Unlawful Poss. Firearm (CLASS C) 10-18-2000 King. Juv. 60 days - 12 mos. Con.
 00-8-03919.2 VUCSA Poss (CLASS C) 10-18-2000 King. Juv. - " - Sep.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 08-1-02482-9 SEA
)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
BENJAMIN LEE SMALLS	)	AND COUNSELING
)	
Defendant,)	
)	

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

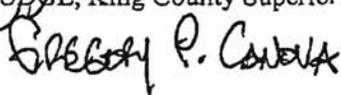
(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: September 25, 2009



JUDGE, King County Superior Court


SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	No. 08-1-02482-9 SEA
Plaintiff,)	
	)	JUDGMENT AND SENTENCE
vs.	)	APPENDIX H
	)	COMMUNITY PLACEMENT OR
BENJAMIN LEE SMALLS	)	COMMUNITY CUSTODY
)	
Defendant,)	

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community service;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location;
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
- 7) Notify community corrections officer of any change in address or employment; and
- 8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: Toni Anderson King, Barbara Kavanagh, Chris McCoy, AILIND JONES
- Defendant shall remain within outside of a specified geographical boundary, to wit: _____
- The defendant shall participate in the following crime-related treatment or counseling services: _____
- The defendant shall comply with the following crime-related prohibitions: _____
- _____

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: September 25, 2009

Azz P. Cannon
 JUDGE
Gregory Canada

BEST AVAILABLE IMAGE POSSIBLE

FINGERPRINTS



RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: [Signature]
DEFENDANT'S ADDRESS: Doc

BENJAMIN LEE SMALLS

DATED: 9/25/09
[Signature]
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK
BY: [Signature]
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

OFFENDER IDENTIFICATION

S.I.D. NO.
DOB: SEPTEMBER 21, 1983
SEX: M
RACE: B

CLERK
BY: _____
DEPUTY CLERK



APPENDIX B

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WARRANT ISSUED
CHARGE COUNTY \$200.00

FILED

08 MAR -3 PM 4:06

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
	Plaintiff,)
v.	)	No. 08-1-02482-9 SEA
)	
BENJAMIN LEE SMALLS,	)	INFORMATION
)	
)	
)	
	Defendant.)

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse BENJAMIN LEE SMALLS of the crime of **Murder in the Second Degree**, committed as follows:

That the defendant BENJAMIN LEE SMALLS in King County, Washington, on or about September 13, 2002, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Stephen Kirk, a human being, who was not a participant in said crime, and who died on or about September 13, 2002;

Contrary to RCW 9A.32.050(1)(a) and (b), and against the peace and dignity of the State of Washington.

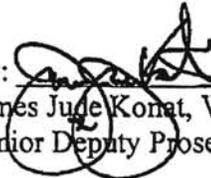
And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant BENJAMIN LEE SMALLS

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at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
James Jude Konat, WSBA #16082
Senior Deputy Prosecuting Attorney

CAUSE NO. _____



**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	02-414780
UNIT FILE NUMBER	H02-300

That Russ Weklych is a Detective with the Seattle Police Department and has reviewed the investigation conducted in Seattle Police Department Case Number 02-414780;

There is probable cause to believe that Benjamin Lee Smalls 9-21-1983 committed the crime(s) of Murder and Assault.

This belief is predicated on the following facts and circumstances:

That 9-13-2002 at approximately 6 PM victim Stephen Darrell Kirk was standing in the vicinity of the Auto Fitness Detail shop located at 7216 Rainier Ave S in the City of Seattle County of King in the State of Washington. The Detail Shop is located on the northeast corner of Rainier Ave S and S Garden Street. Rainier Ave S runs in a north and south direction and S Garden Street runs in an east and west direction. Stephen Kirk, street name "Bingo" was on the corner of Rainier Ave S and S Garden talking with his friend Toni Antoinette King FB 6-1-1980. King has the street name "Toni Girl." Toni Antoinette King and Stephen Darrel Kirk have known each other for approximately ten years. Witness Cedrick Benard Alderman MB 11-20-1978 was standing in the parking lot of the Auto Fitness Detail shop.

Also present in the immediate area were several employees and patrons of the Auto Fitness Detail shop. These witnesses include Auto Fitness shop owner Herman Hudson 2-3-1956 and Anthony Jones 1-1-1953.

This homicide occurred on 9-13-2002. At that time and in the months and years afterward Detectives had an extremely difficult time locating witnesses and interviewing them. When critical witnesses were identified and then contacted they took measures to avoid Detectives and not cooperate with this investigation. Detectives persisted and were eventually able to identify Jonnetta Karlene Glover 2-24-1979 and Toni Antoinette King as eyewitnesses to this homicide. Both were extremely reluctant to cooperate with Police and also extremely reluctant to give statements on what they observed. They both expressed extreme concern for their safety and the safety of their families due to their fear of suspect Benjamin Lee Smalls. Both eventually did give taped statements of their observations, which are detailed in this certification. Smalls goes by street names of "Little Ben, Little Book and Bookman." Cedrick Bernard Alderman is also an eyewitness. He was interviewed on 9-25-2002. Alderman is currently in custody at the Sheridan Federal prison in Sheridan Oregon.

Witness Herman Hudson said he was standing on the corner of Rainier Ave. So. & So. Garden. Hudson heard two gunshots, "Pop Pop" And saw "Bingo" running down the street (Garden). Hudson then heard a third shot, "Pop." Hudson then saw another, "dude" run down the hill. Hudson described him as black male with dark complexion 5'11" to 6'0", with a small Afro. The guy ran to a two-tone, older two-door Blazer tan and brown. The Blazer was facing east on Garden parked on the south side of the street. The driver was a black female who also had a dark complexion. Hudson said he had never seen the black male or black female before. Hudson said he went into the parking lot of the detail shop where "Bingo" told Hudson he got shot. Hudson said, "Bingo was in the detail shop earlier to talk about his girlfriend's car getting detailed.



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	02-414780
UNIT FILE NUMBER	H02-300

There was a dispute over the girlfriend's car. Hudson got the license number of the Blazer as 800 MOG (WA).

Witness Anthony Jones said he was detailing a car in the parking lot of the detail shop. Jones said he heard, "Pop Pop." "Bingo" came into the parking lot and said to call 911. Jones saw the gunshot wounds to Bingo's body. Jones said he saw a black male get into a brown "Bronco type" vehicle. A black female in her twenties was driving the car. Jones described the black female as 5'2, 118-120 LB. Jones said the black male was hurriedly walking down the hill before getting into the car. Jones said the car was idling with the engine running. The car sped off eastbound up the hill.

A third witness named Chris McCoy was riding a motorcycle east on Garden. McCoy was riding his motorcycle when he heard three shots. He observed a black male getting into a brown older SUV. McCoy turned up the hill on Garden Street and became aware the same SUV was tailgating him. McCoy states he observed part of the license plate, which was "800."

Detectives ran DOL registration for license 800 MOG, which came back registered to a Nissan. Detectives ran the plate 800 MQG (WA) which came back to a Chevrolet Blazer which is an SUV. The registration came back to J. K. Glover at 406 N 39 Ave in Yakima, WA. The legal owner is Washington Cars located at 15031 B Military Rd So. Tukwila, WA. Detective Weklych located information in the Seattle Police Department computer systems for a Jonnetta K. Glover black female date of birth 2-24-79.

Detectives Suguro and Weklych contacted Greg Stotsemberg, owner of Washington Cars Inc. at 14141 Tukwila International Blvd. Tukwila, WA 98168 with a phone number of 241-7145. Stotsemberg said J.K. Glover is Jonnetta Glover. Glover has purchased vehicles from Stotsemberg for five to six years. Stotsemberg viewed a Police identification photo of Jonnetta Glover and confirmed J.K. Glover is in fact Jonnetta Karlene Glover 2-24-1979. Stotsemberg confirmed Jonnetta Glover bought a 1985 Chevrolet Blazer with a Washington license plate of 800MQG.

Detectives had made several attempts from January 2006 until January 2008 to interview Glover. She repeatedly stymied Detectives efforts. Glover was extremely reluctant to talk with or cooperate with Detectives. She stated many times to Detectives she was afraid Benjamin Smalls would kill her, her child or some other member of her family if she cooperated with Police. Detectives had a face-to-face interview with Jonnetta Karlene Glover on January 15, 2008.

As stated, at the time of this homicide Jonnetta Karlene Glover was the girlfriend of Benjamin Lee Smalls. Glover confirmed to Detectives that she was the registered owner of the 1985 Chevrolet Blazer 800MQG. She later sold that vehicle to a long time friend named Matt Blazeovich. Glover states she and Smalls were living together in Tukwila at the time. On 9-13-2002 she and Smalls decided to drive to the area of the Auto Fitness Detail shop to buy marijuana. Prior to leaving the residence Smalls armed himself with a handgun, which Glover states, "Was his." Glover states Benjamin Smalls would keep the handgun either "under his pillow or on his person in his pocket." Glover states she was driving and Smalls was in the right front passenger seat. When they arrived in the area she parked the Blazer on the southeast corner of S Garden and Rainier Ave S. She states she remained in the Blazer while Smalls exited and



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DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	02-414780
UNIT FILE NUMBER	H02-300

walked north across the street toward the detail shop. Glover states she "noticed a whole bunch of people" standing around. She states she only recognized one person whom she knows as "T.G., Toni Girl." Glover is shown a Police identification photo of Toni Antoinette King FB 6-1-1980 and positively identifies King as Toni Girl.

Glover states she was still seated in her vehicle and observed Kirk "run up" on Smalls. She states Kirk had nothing in his hands and did not touch Smalls. She states Smalls pulled the handgun "out of his pocket and killed...shot him." Glover says Kirk was "a couple of feet" from Smalls when Smalls shot him. She further states Smalls pulled the handgun from his right pocket just prior to shooting Kirk. Glover states Smalls fired with his right arm up and extended out from his body and fired three to four times. Glover had the window down on her side of the vehicle. She observed Kirk run toward the Detail shop holding his stomach yelling, "I'm shot, I'm shot!" Glover states Smalls came back to her car getting in the passenger side telling her "Let's leave, we have to leave." Glover states during the ride back to her house she kept asking Smalls why he killed that man. She states Smalls told her he did it because the man "would bully him." She states Smalls showed no regret or remorse. Glover states during the ride back to her residence in Tukwila Smalls threatened to kill her if she "told anyone about what happened." Glover states she "believed him" and again told Detectives she was afraid he would carry that out if she talked to Police. During all of Detectives contacts with Glover she repeatedly told Detectives she was afraid Benjamin Smalls would kill her now or in the future if he found out she had told Police what she observed on 9-13-2002.

Toni Antoinette King was interviewed on January 23, 2008. At the time of this homicide Toni Antoinette King was an acquaintance to Smalls. One week prior to this homicide Toni Antoinette King and Smalls were involved in a minor confrontation. One week prior to this homicide Toni Antoinette King was with a friend seated in a vehicle at another location in the City of Seattle. Numerous other people were around the vehicle including Benjamin Smalls. Toni Antoinette King had an unopened bottle of liquor in the car. Benjamin Smalls reached in and took the bottle, opened it and drank from it. Toni Antoinette King had bought the bottle for her boyfriend and was afraid he would be angry if she returned to his location with an opened bottle. Toni Antoinette King demanded Benjamin Smalls buy another bottle for her. He refused and heated words were exchanged. Toni Antoinette King threw soda from a soda can, not the can itself, onto Smalls, which made his clothing and person wet. Smalls yelled "Bitch I'm going to get you!" as Toni Antoinette King sped away in the vehicle. After this incident with the soda Toni Antoinette King had heard from others Smalls was making physical threats against her and she was afraid Smalls was going to hurt her or beat her up on sight.

As she and Stephen Kirk were standing on the corner Toni Antoinette King noticed a tan Blazer type SUV parked on the south east corner of Rainier Ave S and S Garden Street. The Blazer was parked on the corner and it was facing in and eastbound direction. Toni Antoinette King noticed two people who were known to her. Toni Antoinette King noted Jonnetta Glover was in the driver seat and Benjamin Smalls was crossing over in front of the vehicle. Toni Antoinette King said it "appeared he had just gotten out of the passenger side." Toni Antoinette King has known both Glover and Smalls "since high school" and she very well knows both. Toni Antoinette King observed Smalls walk east bound on S Garden Street toward a group of people who were on the north side of S Garden just east of the Auto Fitness shop. Toni Antoinette King noticed Smalls look in her direction. Because of the confrontation with Smalls one week earlier King



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

INCIDENT NUMBER	02-414780
UNIT FILE NUMBER	H02-300

approached Smalls saying "Look are we cool, is everything all right?" Smalls replied "Shut up bitch I should have socked you in your face" in an angry manner. As Toni Antoinette King attempted to mollify Smalls Stephen Kirk walked up behind King. Kirk had heard Smalls remark and told Smalls "If Tim was alive you wouldn't be saying that so if you want to do something hit me." (Timothy Wayne Jones was the deceased boyfriend of King.) Smalls did not reply and Kirk began to walk away. Toni Antoinette King began to again talk to Smalls to attempt to placate him because of the soda incident. King states she suddenly heard five shots and saw a gun in Benjamin Smalls's right hand. Toni Antoinette King states Smalls was pointing the gun at Stephen Kirk. King estimates that Kirk was approximately 12 feet away from Smalls when he was shot and had his back to Smalls at the time. King saw that Stephen Kirk had been hit as she saw him lean toward his right side and saw blood on his shirt. King states she looked directly at Benjamin Smalls who was approximately three feet away and who still had the gun in his hand. Toni Antoinette King says she feared at that moment Benjamin Smalls was going to shoot and kill her. King turned and ran to assist Stephen Kirk who had collapsed in the parking lot of the Auto Fitness Detail shop. King heard Stephen Kirk saying "Let me go, let me go, I'm tired." She assisted him until paramedics arrived. Toni Antoinette King states she observed a wound on Kirk's back torso and a wound on the front torso. King observed Benjamin Smalls run to the SUV driven by Jonnetta Glover. She observed Glover and Smalls drive away from the scene eastbound on S Garden Street.

Toni Antoinette King was shown a Police montage numbered 43429. Benjamin Smalls is in the bottom row right position six. Toni Antoinette King positively identified Benjamin Smalls as the man who shot and killed Stephen Kirk. King also looked at a Police identification photo of Jonnetta Glover and positively identified her as the driver of the SUV.

During Detective's contacts with Toni Antoinette King she repeatedly told Detectives her reluctance to cooperate was founded in her fear of Benjamin Smalls. Toni Antoinette King told Detectives she fears Benjamin Smalls or his associates will kill her if they find out she has cooperated with Police.

On 9-25-2002 Detectives interviewed Cedrick Alderman 11-20-1978 and took a taped statement from him. Alderman was at the Detail shop when this incident occurred. He states he observed "Lil Ben and Toni Girl" near the Detail shop. Alderman states he observed and heard Lil Ben and Toni Girl in an argument. Alderman heard "bitch and all, cuss words." Alderman saw "Bingo walk up pointing his finger at Lil Ben. Bingo was calling him Lil nigga's and bitches. Lil Ben was like "Man you got me fucked up, this neighborhood of mine." Alderman heard Bingo say, "Leave my home girl alone before I have your head." Alderman says Lil Ben turned away from Kirk and suddenly turned back with a gun in his hand. Lil Ben, Benjamin Smalls, started shooting at Kirk. Alderman turned and ran for cover. Alderman states ran for cover and out of the immediate area. Alderman told Detectives he talked to Benjamin Smalls by phone "later that night." Alderman told Detectives Smalls told him "Man I'm cool, you know, I just had to shoot that nigga. Man you know what I'm saying, he was trying to call down my name, you know what I'm saying, I aint no sucka you know I just had to do what I had to do."

During the interview in 2002 Alderman was shown Police montage 43429. Alderman positively identified the photo in the lower row, far right as Lil Ben, Benjamin Smalls, the man he observed shoot Stephen "Bingo" Kirk.



SEATTLE
POLICE
DEPARTMENT

**CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE**

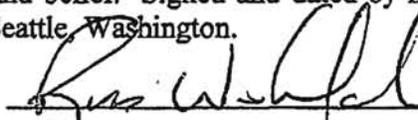
INCIDENT NUMBER	02-414780
UNIT FILE NUMBER	H02-300

On 2-26-2008 Detectives traveled to Sheridan Oregon and interviewed Cedrick Alderman who is currently in custody in the Sheridan Federal Prison. Alderman confirmed he was present at the homicide of Stephen Kirk and verified he did recall the details in his statement. Alderman is eligible for release in September of 2008.

Benjamin Lee Smalls entered King County Work Release on 2-05-08 on an original charge of Assault 2. On 2-28-2008 Detectives went to King County Work Release in downtown Seattle and checked out Smalls for interview. Smalls was brought to the Seattle Police Department homicide office where he was interviewed after he was quoted Miranda and waived. Benjamin Lee Smalls admitted knowing Toni Girl, Jonnetta Glover and Matt Blazeovich. As Detectives continued the interview and mentioned the victims name and street name Smalls requested an attorney and the interview was terminated. Smalls was booked to King County Jail on Murder and Assault charges.

This case continues to be investigated. Detectives have developed leads on additional witnesses who have been identified and were at this homicide. Detectives have been working to locate them.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to best of my knowledge and belief. Signed and dated by me this 3 day of MARCH, 2008, at Seattle, Washington.


Russ Wenzel 4525
 Russ Wenzel

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CAUSE NO. 08-1-02482-9 SEA

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Probable Cause written by Seattle Police Department Detective Russ Weklych for case number 02-414780 and signed on March 3, 2008.

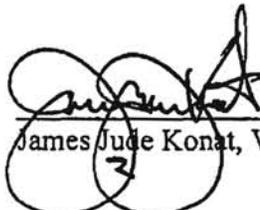
REQUEST FOR BAIL

The defendant was 19 years old when he killed Stephen Kirk in September of 2002. The five-year delay in filing this case can be attributed to this defendant threatening to kill the eye witness who drove him away from the scene just moments after this murder was committed.

Since the time of this crime the defendant has been charged with and convicted of a variety of Drug and Assault cases. He has an offender score of 8 and a pending D.V. Assault 2^o case at the Maleng Justice Center.

For all of these reasons the State requests that a warrant be issued for the defendant's arrest for Murder in the Second degree with a Firearm enhancement, and that bail be set at two million dollars. The State further requests that the defendant be precluded in writing from having any contact, directly or through third persons, with the witnesses in this case.

Signed this 3rd day of March, 2008.


James Jude Konat, WSBA #16082

APPENDIX C

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WARRANT ISSUED
CHARGE COUNTY \$200.00

06 NOV 14 PH 4: 10

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

No. 06-1-12112-7 KNT

BENJAMIN LEE SMALLS

INFORMATION

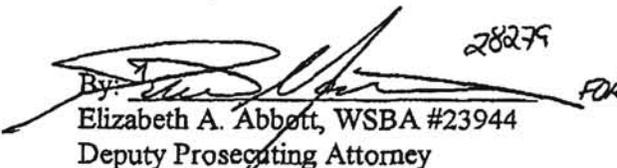
Defendant.

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse BENJAMIN LEE SMALLS of the crime of **Assault in the Second Degree - Domestic Violence**, committed as follows:

That the defendant BENJAMIN LEE SMALLS in King County, Washington on or about October 4, 2006, did intentionally assault another and thereby recklessly inflict substantial bodily harm upon Latasha King;

Contrary to RCW 9A.36.021(1)(a), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By:  28279 FOR
Elizabeth A. Abbott, WSBA #23944
Deputy Prosecuting Attorney

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06-1-12112-7 KNT ORIGINAL

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE:

That John Demarest is a Detective with the Federal Way Police Department and has reviewed the investigation conducted under Federal Way Police Department Case Number 06-15049.

There is probable cause to believe that Benjamin L. Smalls (09-21-83) committed the crime of Assault 2nd Degree (DV), RCW 9A.36.021.

This belief is predicated on the following facts and circumstances:

On 10-17-06, Officers A. Crispin and E. Davis of the Federal Police Department were dispatched to investigate a domestic violence assault report. The victim, Latasha L. King (12-21-79), was calling from an address in Tukwila to report that she had been assaulted by her ex-boyfriend, Benjamin L. Smalls at his residence located at 28805 28th Pl. S. #G in Federal Way, King County, Washington. Prior to contacting King, Officer Davis prepared a photo montage made up of King County booking photographs which included a photograph of Smalls, and five filler photographs.

When the Officers arrived they contacted King, who told them that on 10-14-06 at about 0210 hours, she was at the Denny's Restaurant on 4th Ave. in Seattle. King said that she ran into her ex-boyfriend Smalls whom she had been involved in a prior dating relationship for about one month. King said that Smalls told her she needed to get into his vehicle. King said that when she declined, Smalls grabbed her cellular phone from her and told her if she wanted her phone back, she would follow him to his apartment in Federal Way.

King said that she went to Smalls' apartment and went inside. King said that she asked for her cellular phone back and Smalls became upset and told her to go to the back bedroom. King said that when she refused, Smalls grabbed her by the arm and forced her to the bedroom and pushed her onto the bed. King said that when she tried to get up, Smalls pushed her back down causing her to fall over the bed. King said when she got up and sat on the bed, Smalls grabbed her by the shirt and struck her on the left side of her face with an ashtray. King said that the ashtray shattered, causing severe lacerations across her lip and above her left eye.

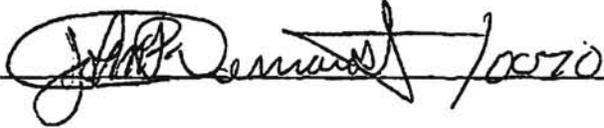
King said that when she was unable to stop the bleeding, Smalls took her to Highline Hospital in Tukwila. King said that she lied to the hospital staff as to how she received her injuries, because she feared retaliation from Smalls. King said that after being treated and released from the hospital, Smalls took her back to his apartment. King said that initially Smalls would not give her keys to her and she was unable to leave. King said that she slept at Smalls' apartment and woke at about 1500 hours the next day. King said that Smalls apologized and allowed her to leave. King told the Officers that it took twenty sutures to close the lacerations to her face.

Officer Crispin showed King the photo montage and she identified Smalls as the person that had assaulted her. Officer Crispin also took photographs of King's injuries. When I reviewed the photographs, I could see that King had received lacerations to her upper lip and near her left eye as well bruising around the eye which constituted significant, temporary disfigurement.

ORIGINAL

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 8th day of November, 2006 at Federal Way, Washington.

Signature of Assigned Detective:

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CAUSE NO. 06-1-12112-7 KNT

PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause signed by Detective John Demarest of the Federal Way Department of Public Safety regarding incident 06-15049.

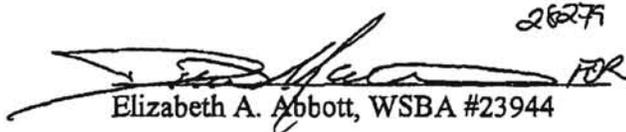
REQUEST FOR BAIL

There have been no prior judicial determinations regarding this incident.

The State requests that the court find probable cause and set bail in the amount of 50,000.00 based on the nature of the offense and the defendant's criminal history.

The defendant has previously been convicted of VUCSA (2002 x 2, 2003) Assault 4 (2003 x 3) Malicious Mischief 2 (2003), DUI (2003) Eluding (2002) No Valid Operator's License (2000); and convicted as a juvenile of: VUCSA (2000) UPFA (2000) and Robbery 1 (1997).

The State requests a No Contact Order issued for the protection of the victim.


Elizabeth A. Abbott, WSBA #23944

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2009 SEP 28 AM 9:56

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

COPY TO COUNTY JAIL SEP 28 2009
CERTIFIED COPY TO WARRANTS SEP 28 2009

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON,

NO. 06-1-12112-7 SEA

Plaintiff,
vs. Benjamin Swais
Defendant.

ORDER ON CRIMINAL MOTION

The above entitled court, having considered a MOTION TO DISMISS
WARRANT TO PLEA NEGOTIATIONS UNDER CAUSE # 08-102482-9
WHERE THE DEFENDANT PLEADED GUILTY TO MURDER 2nd D.F.A. AND AGREED

now, therefore, it is hereby

ORDERED that THIS MOTION SHALL BE DISMISSED WITH PREJUDICE

DATED this 25th day of September, 2009.

Presented By:

[Signature]
[Signature]
[Signature]
FOR DEFENDANT 9338

[Signature]
JUDGE GREGORY P. CANOVA

Approved: _____ WSBA# _____

No CO-Δ Dismissed

FILED
KING COUNTY, WASHINGTON
DEC 03 2009
SUPERIOR COURT CLERK

**DESTRUCTION/RELEASE AUTHORIZATION FORM FOR
PLAINTIFF'S EXHIBITS**

Cause Number: 06-1-12112-7 SEA

Defendant: Smalls

Charge: Robbery 2
Unlawful Imprisonment
Assault 2

Sentence: Dismissed Sentence Date: 11-14-08

Appeal/Date of Mandate: N/A

AUTHORIZATION

- Destruction of plaintiff's exhibits authorized
- Release of plaintiff's exhibits to _____ Police Department (police case number _____) is authorized; destruction of remaining plaintiff's exhibits (not submitted by police department) is authorized.
- Release/Destruction of exhibits **NOT APPROVED**

Date: 12-2-09

By: Erin Ehlert WSBA 26340
Senior Deputy Prosecuting Attorney

SCOMIS Code: CRRSP

FILED
KING COUNTY, WASHINGTON

DEC 15 2009

SEA
SUPERIOR COURT CLERK

FILED
KING COUNTY WASHINGTON

DEC 15 2009

SUPERIOR COURT CLERK

SCOMIS Code: EXD

Destruction Authorization Form

Case# 06-1-12112-7 SEA Case Name STATE OF WASHINGTON VS SMALLS

#PLTF Exhibits 14 #DEFT Exhibits 1 #OTH Exhibits

Designations/ Box Loc CDB ENV 15 GUN FE
Quantity MON NAR JEW SS OTH

Resolution Code DSM Date 11/14/08

Stipulation: Yes X No

PLTF Disposition Notice Yes X N/A X OTH Disposition Notice Yes N/A X

DEFT Disposition Notice Yes N/A X File Exhibit Conversion Notice(s) Yes N/A X

Charge/Cause Consolidated Yes No X W/Case #

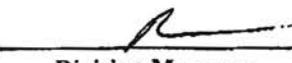
Robbery 2
Unlawful Imprisonment
Assault 2

Sentence Dismissed

Judgement Date 11/14/08 Appeal Date Mandate Date

Researched By  Date 11-16-09
Exhibit Staff Member

Reviewed By  Date 11-16-09
Exhibit Room Lead

Authorized By  Date 12/1/09
Division Manager

APPENDIX D

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FILED
KING COUNTY, WASHINGTON

APR 25 2008

CRIMINAL PRESIDING

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

BENJAMIN LEE SMALLS,

Defendant.

No. 08-1-02482-9 SEA

AMENDED INFORMATION

COUNT I

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse BENJAMIN LEE SMALLS of the crime of **Murder in the Second Degree**, committed as follows:

That the defendant BENJAMIN LEE SMALLS in King County, Washington, on or about September 13, 2002, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Stephen Kirk, a human being, who was not a participant in said crime, and who died on or about September 13, 2002;

Contrary to RCW 9A.32.050(1)(a) and (b), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant BENJAMIN LEE SMALLS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

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COUNT II

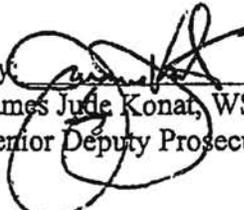
And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse BENJAMIN LEE SMALLS of the crime of **Assault in the Second Degree**, a crime of the same or similar character as another crime charged herein, and committed as follows:

That the defendant BENJAMIN LEE SMALLS in King County, Washington, on or about September 13, 2002, did intentionally assault Toni Antoinette King with a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of Washington.

And I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant BENJAMIN LEE SMALLS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.533(3).

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
James Jude Konat, WSBA #16082
Senior Deputy Prosecuting Attorney

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APPENDIX E

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FILED
2008 NOV 14 PM 3:14
KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 08.1.02482.9 SEA

vs.

BENJAMIN LEE SMALLS

STATEMENT OF DEFENDANT ON
PLEA OF GUILTY TO FELONY
NON-SEX OFFENSE (STTDFG)

Defendant.

1. My true name is BENJAMIN LEE SMALLS

2. My date of birth is 9/21/83

3. I went through the 11th grade.

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer; if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is TERI ROBERTS KEMP

(b) I am charged with the crime(s) of MURDER IN THE SECOND DEGREE w/ A FELONY; ASSAULT IN THE SECOND DEGREE
The elements of this crime(s) are set forth in the information/ FIRST amended information, which is incorporated by reference and which I have reviewed with my lawyer.

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5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to testify and to hear and question the witnesses who testify against me;

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me;

(e) The right to be presumed innocent until the charge is proven beyond a reasonable doubt or I enter a plea of guilty;

(f) The right to appeal a determination of guilt after a trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA(S), I UNDERSTAND THAT:

(a) The crime(s) with which I am charged carries a sentence(s) of:

Count No.	Standard Range	Enhancement That Will Be Added to Standard Range	Maximum Term and Fine
I	298 - 397	60 MONTH	LIFE years \$50,000.00
II	63 - 84	0	10 years \$25,000.00
			_____ years \$

The crime of MURDER IN THE SECOND DEGREE; ASSAULT IN THE SECOND DEGREE is a most serious offense as defined by RCW 9.94A.030, and if I have at least two prior convictions on separate occasions whether in this

1 state, in federal court, or elsewhere, of most serious crimes, I may be found to be a Persistent
2 Offender. If I am found to be a Persistent Offender, the Court must impose the mandatory sentence
3 of life imprisonment without the possibility of early release of any kind. RCW 9.94A.570. [If not
4 applicable, this paragraph should be stricken and initialed by the defendant and the judge
5 .]

6 (b) The standard sentence range is based on the crime charged and my criminal history.
7 Criminal history includes prior convictions and juvenile adjudications or convictions, whether in
8 this state, in federal court, or elsewhere.

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

14 (d) If I am convicted of any new crimes before sentencing, or if any additional criminal
15 history is discovered, both the standard sentence range and the prosecuting attorney's
16 recommendations may increase or a mandatory sentence of life imprisonment without possibility of
17 parole may be required by law. Even so, I cannot change my mind and my plea of guilty to this
18 charge is binding on me.

19 (e) In addition to sentencing me to confinement, the judge will order me to pay \$500 as a
20 victim's compensation fund assessment. If this crime resulted in injury to any person or damages to
21 or loss of property, the judge will order me to make restitution, unless extraordinary circumstances
22 exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs,

1 attorney fees, and other costs and fees. Furthermore, the judge may place me on community
2 supervision, community placement or community custody and I will have restrictions and
3 requirements placed upon me.

4 (f) In addition to confinement, the judge will sentence me to a period of community
5 supervision, community placement or community custody.

6 ~~For crimes committed prior to July 1, 2000, the judge will sentence me to: (A) community~~
7 ~~supervision for a period of up to one year; or (B) to community placement or community custody~~
8 ~~for a period up to three years or up to the period of earned release awarded pursuant to RCW~~
9 ~~9.94A.728, whichever is longer. [If not applicable, this paragraph should be stricken and initialed~~
10 ~~by the defendant and the judge [initials] .]~~

11 For crimes committed on or after July 1, 2000, the judge will sentence me to the community
12 custody range which is from 24 months to 48 months or up to the period of earned
13 release awarded pursuant to 9.94A.728, whichever is longer, unless the judge finds substantial and
14 compelling reasons to do otherwise. During the period of community custody I will be under the
15 supervision of the Department of Corrections, and I will have restrictions and requirements placed
16 upon me. My failure to comply with these conditions will result in the Department of Corrections
17 transferring me to a more restrictive confinement status or other sanctions being imposed. [If not
18 applicable, this paragraph should be stricken and initialed by the defendant and the judge
19 .]

20 (g) The prosecuting attorney will make the following recommendation to the judge: _____

21 DISMISS FELONY ENHANCEMENT COUNT II; DISMISS CAUSE # 06-1-12112-7 SEA;
22 (NO FURTHER CHARGE THIS POLICE INVESTIGATION); PAY RESTITUTION FOR BUREAU
EXPENSES FOR STEPHAN KIRK; RECOMMEND 918 MONTH CTE; RECOMMEND

PAY REQUISITE, COURT COSTS, A.N.A. FEE,
84 MONTHS COUNT II, CONCURRENTLY; NO CONTACT FOR LIFE W/
1 JONETTA GLOVE, TOM KING, CHRIS MCCOY, ANTHONY JONES; Δ'S RECOMMEND
TEAM AT SENTENCING

2 The prosecutor will make the recommendation stated in the plea Agreement and State's
3 Sentence Recommendation, which are incorporated by reference.

4 (h) The judge does not have to follow anyone's recommendation as to sentence. The judge
5 must impose a sentence within the standard range unless there is a finding of substantial and
6 compelling reasons not to do so. If the judge goes outside the standard range, either I or the State
7 can appeal that sentence. If the sentence is within the standard range, no one can appeal the
8 sentence.

9 ~~(i) The crime of _____ has a mandatory minimum sentence
10 of at least _____ years of total confinement. The law does not allow any reduction of this
11 sentence. [If not applicable, this paragraph should be stricken and initialed by the defendant and the
12 judge DS]~~

13 (j) The crime charged in Count I includes a firearm deadly weapon
14 sentence enhancement of 60 months.

15 This additional confinement time is mandatory and must be served consecutively to any
16 other sentence and any other enhancement I have already received or will receive in this or any
17 other cause. [If not applicable, this paragraph should be stricken and initialed by the defendant and
18 the judge _____.]

19 (k) The sentences imposed on counts I | II, except for any weapons enhancement,
20 will run concurrently unless there is a finding of substantial and compelling reasons to do
21 otherwise. [If not applicable, this paragraph should be stricken and initialed by the defendant and
22 judge _____.]

1 ~~(l) For the crime of vehicular homicide while under the influence of intoxicating liquor or~~
2 ~~any drug, the sentence will be increased by two years for each prior offense as defined in RCW~~
3 ~~46.61.5055(8). This additional confinement time is mandatory and must be served consecutively to~~
4 ~~any other sentence and any other enhancement I have already received or will receive in this or any~~
5 ~~other cause. [If not applicable, this paragraph should be stricken and initialed by the defendant and~~
6 ~~the judge~~ BS/S

7 ~~(m) Counts I are serious violent offenses arising from separate and distinct~~
8 ~~criminal conduct and the sentences on those counts will run consecutively unless the judge finds~~
9 ~~substantial and compelling reasons to do otherwise. [If not applicable, this paragraph should be~~
10 ~~stricken and initialed by the defendant and the judge~~ BS/S

11 ~~(n) The judge may sentence me as a first-time offender instead of imposing a sentence~~
12 ~~within the standard range if I qualify under RCW 9.94A.650. This sentence may include as much~~
13 ~~as 90 days of confinement plus all of the conditions described in paragraph (6)(e). In addition, I~~
14 ~~may be sentenced up to two years of community supervision if the crime was committed prior to~~
15 ~~July 1, 2000, or two years of community custody if the crime was committed on or after July 1,~~
16 ~~2000. The judge also may require me to undergo treatment, to devote time to a specific occupation,~~
17 ~~and to pursue a prescribed course of study or occupational training. [If not applicable, this~~
18 ~~paragraph should be stricken and initialed by the defendant and the judge~~ BS/S

19 ~~(o) The judge may sentence me under the a special drug offender sentencing alternative~~
20 ~~(DOSA) if I qualify under former RCW 9.94A.120(6) (for crimes committed before July 1, 2001, or~~
21 ~~RCW 9.94A.660 (for offenses committed on or after July 1, 2001). This sentence could include a~~
22 ~~period of total confinement for one-half of the midpoint of the standard range and community~~

1 custody of at least one-half of the midpoint of the standard range, plus all of the other conditions
2 described in paragraph (6)(e). The judge could impose a residential treatment-based DOSA
3 alternative that would include three to six months of residential chemical dependency treatment and
4 24 months of community custody, plus all the other conditions described in paragraph (6)(e).
5 During confinement and community custody under either alternative, I will be required to
6 participate in substance abuse evaluation and treatment, not to use illegal controlled substances and
7 to submit to testing to monitor that, and other restrictions and requirements will be placed on me.

8 (p) This plea of guilty will result in revocation of my privilege to drive under RCW
9 46.20.285 (1)-(3), (5)-(7). If I have a driver's license, I must now surrender it to the judge. [If not
10 applicable, this paragraph should be stricken and initialed by the defendant and the judge

11 BS

12 (q) I understand that RCW 46.20.285(4) requires that my driver's license be revoked if the
13 judge finds I used a motor vehicle in the commission of this felony.

14 (r) If this crime involves a sexual offense, prostitution, or a drug offense associated with
15 hypodermic needles, I will be required to undergo testing for the human immunodeficiency virus
16 (HIV). [If not applicable, this paragraph should be stricken and initialed by the defendant and the

17 judge BS

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

21 (t) I will be required to provide a biological sample for purposes of DNA identification
22 analysis, AND PAY \$ 100 FEE FOR COLLECTION

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(u) Because this crime involves a kidnapping or unlawful imprisonment offense involving a minor, I will be required to register with the sheriff of the county of the state of Washington where I reside, study, or work. The specific registration requirements are described in the "Offender Registration" Attachment. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge] BS

(v) This plea of guilty will result in the revocation of my right to possess, own, or have in my control any firearm unless and until my right to do so is restored by a court of record.

(w) Because this is a crime of domestic violence, I may be ordered to pay a domestic violence assessment of up to \$100. If I, or the victim of the crime, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge] BS

(x) Because this crime involves the manufacture, delivery, or possession with intent to deliver methamphetamine, including its salts, isomers, and salts of isomers, or amphetamine, including its salts, isomers, and salts of isomers, a mandatory cleanup fine of \$3000 will be assessed. RCW 69.50.410. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge] BS

(y) Because this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits will be affected. 20 U.S.C. § 1091(r) and 21 U.S.C. § 862a. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge] BS

1 (z) Because the crimes I am pleading guilty to include both a conviction under RCW
2 9.41.040 for unlawful possession of a firearm in the first or second degree and one or more
3 convictions for the felony crimes of theft of a firearm or possession of a stolen firearm, the
4 sentences imposed for these crimes shall be served consecutively to each other. RCW
5 9.94A.589(c). [If not applicable, this paragraph should be stricken and initialed by the defendant
6 and the judge] RS

7 and 7. I plead guilty to the crime(s) of MURDER IN THE SECOND DEGREE WITH A FIREARM
8 ASSAULT IN THE SECOND DEGREE ENHANCEMENT

9
10 as charged in the information/ FIRST amended information. I have received a copy of
11 that information.

12 8. I make this plea freely and voluntarily.

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

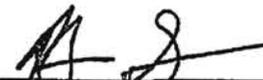
15 10. No person has made promises of any kind to cause me to enter this plea except as set
16 forth in this statement.

17 11. The judge has asked me to state briefly in my own words what I did that makes me
18 guilty of this (these) crime(s). This is my statement:

19 ON SEPTEMBER 13, 2002 IN SEATTLE, KING COUNTY, WA., I
20 DID COMMIT THE CRIME OF MURDER IN THE SECOND DEGREE AGAINST
21 STEPHEN KIRK WITH A FIREARM, BY INTENTIONALLY SHOOTING HIM TWO
TIMES AND CAUSING HIS DEATH; AND I DID COMMIT THE
22 CRIME OF ASSAULT IN THE SECOND DEGREE AGAINST

1 CAUSING HER TO FEAR IMMEDIATE INJURY OR DEATH
TOM KING, AGAINST THE PEACE AND DIGNITY OF WA. STATE.

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3
4 12. My lawyer has explained to me, and we have fully discussed, all of the above
5 paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on
6 Plea of Guilty." I have no further questions to ask the judge.

7
8 
DEFPDANT

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

11
12 
13 PROSECUTING ATTORNEY
14 Print Name: DAVID CLINE KALER
WSBA# 16082

12
13 
14 DEFENDANT'S LAWYER
15 Print Name: TOM ROBERTS KEMP
WSBA# 24701

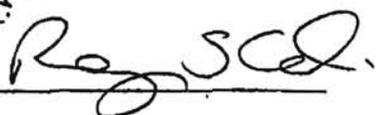
15 The foregoing statement was signed by the defendant in open court in the presence of the
16 defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- 16 (a) The defendant had previously read; or
17 (b) The defendant's lawyer had previously read to him or her; or
18 (c) An interpreter had previously read to the defendant the entire statement above;

18 and that the defendant understood it in full.

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

21 Dated this 14 day of November, 2005.

22 
JUDGE

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I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language and I am fluent in that language, which the defendant understands. I have translated this entire document for the defendant from English into that language. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 20__.

TRANSLATOR
Print Name: _____

INTERPRETER
Print Name: _____

FELONY PLEA AGREEMENT

Date of Crime: September 13, 2002 Date: November 12, 2008
Defendant: BENJAMIN SMAUS CCN# 1775325 Cause No: 08-1-02482-9 ~~SEARCHED~~

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

On Plea To: As charged in Count(s) I AND II of the original amended information.

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

DISMISS: Upon disposition of Count(s) I AND II, the State moves to dismiss: FIREARM ENHANCEMENT IN CR II

REAL FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES: In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing: AND CAUSE # DO 1-12112-7 KRT AT SENTENCING ON THIS CASE
 The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary.
 The facts set forth in Appendix C; _____
The defendant acknowledges and waives any right to have a jury determine these facts by proof beyond a reasonable doubt.

RESTITUTION: Pursuant to RCW 9.94A.753, the defendant shall pay restitution in full to the victim(s) on charged counts and agrees to pay restitution in the specific amount of FOR BURIAL EXPENSES FOR VICTIM IN CR. I
 agrees to pay restitution as set forth in Appendix C; _____

OTHER: NO CONTACT FOR LIFE, DIRECTLY OR INDIRECTLY THROUGH ANY PERSON(S) WITH JOHN BERRY GUNTER, TAMI KING, CHRIS McLOY, ANTHONY JONES

CRIMINAL HISTORY AND OFFENDER SCORE:

*

a. The defendant agrees to this Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A) and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). The State makes the sentencing recommendation set forth in the State's sentence recommendation. An essential term of this agreement is the parties' understanding of the standard sentencing range(s) and if the parties are mistaken as to the offender score on any count, neither party is bound by any term of this agreement.

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

- (1) Conviction: _____ Basis: _____
- (2) Conviction: _____ Basis: _____

c. The parties agree that neither party will seek an exceptional sentence.

Maximum on Count(s) I is not more than LIFE years each and \$ 50,000 fine each.
Maximum on Count(s) II is not more than 10 years each and \$ 25,000 fine each.

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

Mandatory weapon sentence enhancement for Count(s) I is 60 months each; for Count(s) _____ is _____ months each. This/these additional term(s) must be served consecutively to each other and to any other term and without any earned early release.

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

B. Smaus
Defendant

[Signature] 16082
Deputy Prosecuting Attorney

[Signature] #29701
Attorney for Defendant
TERI COBURN KEMP

[Signature] 522
Judge, King County Superior Court

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

Defendant: BENJAMIN SMITH
CRIME

Date: Nov. 12, 2008

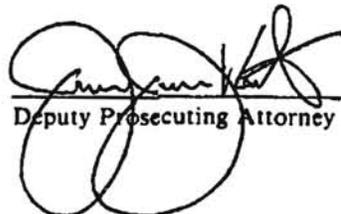
CRIME	DATE OF CONVICTION	PLACE OF CONVICTION	DISPOSITION (Probation and/or incarceration and length) SRA — Counts as Prior
ADULT FELONIES:			
02.1.07217.4 Agg. Assault (CLASS C)	5.30.03	KING CO.	4 MONTHS JAIL, 12 MONTH COMM. CUSTODY
" " VUCSA (CLASS C)	5.30.03	KING CO.	" " " " " "
03.1.06895.7 VUCSA	9.4.03	" "	12 MO + 10W DOC. 9-12 COMM CUSTODY
03.1.07855.3 Mal. Misch. 2 ^o (CLASS C)	11.10.03	" "	10 MO. JAIL

ADULT MISDEMEANORS:

JUVENILE FELONIES:

JUVENILE MISDEMEANORS:

97.8.07079.7 Robbery 1 ^o (CLASS A)	4.1.98	KING CO.	80-100 WEEKS IN JRA
00.8.03919.2 Unlaw. Poss. Firearm (CLASS C)	10.18.2000		60 DAYS 12 MONTHS COMM. SUPERVISION
00.8.03919.2 Unlaw. Poss. Firearm (CLASS C)	10.18.2000	" "	" " " "


Deputy Prosecuting Attorney

King County Prosecuting Attorney

ASSAULT, SECOND DEGREE

(RCW 9A.36.021(2)(a))

CLASS B FELONY

VIOLENT

I. OFFENDER SCORING (RCW 9.94A.525(8))

ADULT HISTORY:

Enter number of serious violent and violent felony convictions..... 4 x 2 = 8
 Enter number of nonviolent felony convictions..... 4 x 1 = 4

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions..... 1 x 2 = 2
 Enter number of nonviolent felony dispositions..... 2 x 1/2 = 1

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions 1 x 2 = 2
 Enter number of nonviolent felony convictions..... x 1 =

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 =

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

9

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IV)	3 - 9 months	6 - 12 months	12+ - 14 months	13 - 17 months	15 - 20 months	22 - 29 months	33 - 43 months	43 - 57 months	53 - 70 months	63 - 84 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-5 or III-6 to calculate the enhanced sentence.
- D. If a sentence is one year or less: community custody may be ordered for up to one year (See RCW 9.94A.545 for applicable situations).
- E. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 18 to 36 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- F. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-7, Sexual Motivation Enhancement – Form C.
 - Statutory maximum sentence is 120 months (10 years) (RCW 9A.20.021)

The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules.

STATE v. BEN SMITH * 08-1-02482-9 SEA CT II Assault 20

MURDER, SECOND DEGREE
 (RCW 9A.32.050)
 CLASS A FELONY
 SERIOUS VIOLENT

I. OFFENDER SCORING (RCW 9.94A.525(9))

ADULT HISTORY:

Enter number of serious violent felony convictions x 3 =
 Enter number of violent felony convictions..... x 2 =
 Enter number of nonviolent felony convictions..... 4 x 1 = 4

JUVENILE HISTORY:

Enter number of serious violent felony dispositions x 3 =
 Enter number of violent felony dispositions..... 1 x 2 = 2
 Enter number of nonviolent felony dispositions..... 2 x ½ = 1

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of violent felony convictions..... 1 x 2 = 2
 Enter number of nonviolent felony convictions..... x 1 =

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 =

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

9

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL XIV)	123 - 220 months	134 - 234 months	144 - 244 months	154 - 254 months	165 - 265 months	175 - 275 months	195 - 295 months	216 - 316 months	257 - 357 months	298 - 397 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 24 to 48 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- D. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-5 or III-6 to calculate the enhanced sentence.
- E. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-7, Sexual Motivation Enhancement – Form C.
- F. Multiple current serious violent offenses shall have consecutive sentences imposed per the rules in RCW 9.94A.589(1)(b).
 - Statutory maximum is a term of life imprisonment in a state correctional institution (RCW 9A.20.021(1)).

The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules.

STATE V. BEN SMALLS # 08-1-02482-9 S&A CT I MURDER 2^o

GENERAL DEADLY WEAPON ENHANCEMENT- FORM A

Firearm or Other Deadly Weapon Enhancements*¹

For offenses committed after July 23, 1995

Use of this form: Only for offenses committed after July 23, 1995 that have a firearm or other deadly weapon finding.

CLASS A FELONY DEADLY WEAPON ENHANCEMENTS:

First Deadly Weapon/Firearm Offense**:

Firearm	5 years
Other Deadly Weapon	2 years

Subsequent*** Deadly Weapon/Firearm Offense:

Firearm	10 years
Other Deadly Weapon	4 years

CLASS B FELONY DEADLY WEAPON ENHANCEMENTS:

First Deadly Weapon/Firearm Offense**:

Firearm	3 years
Other Deadly Weapon	1 year

Subsequent*** Deadly Weapon/Firearm Offense:

Firearm	6 years
Other Deadly Weapon	2 years

CLASS C FELONY DEADLY WEAPON ENHANCEMENTS:

First Deadly Weapon/Firearm Offense**:

Firearm	18 months
Other Deadly Weapon	6 months

Subsequent*** Deadly Weapon/Firearm Offense:

Firearm	3 years
Other Deadly Weapon	1 year

* Excluded offenses: Possession of a Machine Gun, Possessing a Stolen Firearm, Drive-by Shooting, Theft of a Firearm, Unlawful Possession of a Firearm 1 and 2, Use of a Machine Gun in a felony, or any offense committed on or before July 23, 1995 with a deadly weapon finding.

** This enhancement is limited to offenses committed after July 23, 1995.

*** To be sentenced as a subsequent deadly weapon finding, the offense in history with a deadly weapon finding must also have been committed after July 23, 1995.

STANDARD RANGE CALCULATION

CURRENT OFFENSE BEING SCORED	SERIOUSNESS LEVEL	OFFENDER SCORE	BASE STANDARD SENTENCE RANGE			
MURDER 2 ^o	XIV	9	298	TO	397	MONTHS
			LOW		HIGH	
	DEADLY WEAPON ENHANCEMENT		60		60	MONTHS
		STANDARD RANGE	358	TO	457	MONTHS
			LOW		HIGH	
				↓		
					418	MONTHS

NOTE: The "base standard sentence range" is the appropriate standard sentence without the deadly weapon enhancement.

STACE J. BEN SMITH # 08-1-024829 SEA CT I - MURDER 2^o w/ F.A.

¹For anticipatory offenses with a deadly weapon finding, add the enhancement after reducing the standard sentence range by 25%.

State v. Ben Smalls #08-1-02482-9 SCA

TABLE I
SENTENCING GRID
FOR CRIMES COMMITTED AFTER JULY 24, 1999

SERIOUSNESS
LEVEL

OFFENDER SCORE

	0	1	2	3	4	5	6	7	8	9 or more
XVI	Life Sentence without Parole/Death Penalty									
XV	23y 4m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 - 361	27y 4m 281 - 374	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
XIV	14y 4m 123 - 220	15y 4m 134 - 234	16y 2m 144 - 244	17y 154 - 254	17y 11m 165 - 265	18y 9m 175 - 275	20y 5m 195 - 295	22y 2m 216 - 316	25y 7m 257 - 357	29y 298 - 397
XIII	12y 123 - 164	13y 134 - 178	14y 144 - 192	15y 154 - 205	16y 165 - 219	17y 175 - 233	19y 195 - 260	21y 216 - 288	25y 257 - 342	29y 298 - 397
XII	9y 93 - 123	9y 11m 102 - 136	10y 9m 111 - 147	11y 8m 120 - 160	12y 6m 129 - 171	13y 5m 138 - 184	15y 9m 162 - 216	17y 3m 178 - 236	20y 3m 209 - 277	23y 3m 240 - 318
XI	7y 6m 78 - 102	8y 4m 86 - 114	9y 2m 95 - 125	9y 11m 102 - 136	10y 9m 111 - 147	11y 7m 120 - 158	14y 2m 146 - 194	15y 5m 159 - 211	17y 11m 185 - 245	20y 5m 210 - 280
X	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
IX	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 51 - 68	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
VIII	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 6m 57 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
VII	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
II	0 - 90 Days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

GS I

MURDER 2^o

GS II ASSAULT 2^o



STATE'S SENTENCE RECOMMENDATION
(USE FOR NON-SEX OFFENSE, NON-DOSA SENTENCES OF OVER ONE YEAR ONLY)

Defendant: BENJAMIN SHAW
CCL # 1775325 SEARCHED

Date: NOVEMBER 12, 2003
Cause No.: 08-1-024829 SEA

The State recommends that the defendant be sentenced to a term of total confinement in the Department of Corrections as follows:

418 months/days on Count I _____ months/days on Count _____
84 months/days on Count II _____ months/days on Count _____

with credit for time served as provided under RCW 9.94A.505. Terms to be served concurrently with each other. Terms to be served concurrently/consecutively with: _____
Terms to be consecutive to any other term(s) not specifically referred to in this form

WEAPONS ENHANCEMENT - RCW 9.94A.510: The above recommended term(s) of confinement do not include the following weapons enhancement time: 60 months for Ct. I, _____ months for Ct. _____, _____ months for Ct. _____; which is/are mandatory, served without good time and served consecutive to any other term of confinement.

TOTAL LENGTH OF CONFINEMENT recommended in this cause, including all counts and enhancements is 418 months.

This is an agreed recommendation.

Defendant is legally eligible for WORK ETHIC CAMP - RCW 9.94A.690 (range at least 12 months + 1 day, not more than 36 months, current offense is not VUCSA or VUCSA Solicitation for crimes after July 23, 1999; no current or prior sex or violent offense) and State recommends WEC.

Work Ethic Camp is not recommended because MURDER CAUTION W/FIREARM ENHANCEMENT

NO DRUG OFFENDER SENTENCE ALTERNATIVE (DOSA) - RCW 9.94A.660:

- Defendant is not legally eligible for DOSA because current sex or violent offense; prior violent offense within 10 years or any prior sex offense; weapon enhancement; subject to final deportation order; not small quantity of drugs; more than one prior DOSA within 10 years; felony DUI or physical control.
- Defendant is eligible but DOSA is not recommended because _____

EXCEPTIONAL SENTENCE: This is an exceptional sentence, and the substantial and compelling reasons for departing from the presumptive sentence range are set forth in the attached form or brief.

NO CONTACT: For the maximum term LIFE defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: JOURNIA GONZALEZ, TONI KING, CHRIS MCCOY, ANTHONY JONES

MONETARY PAYMENTS: Defendant shall make the following monetary payments under the supervision of the Department of Corrections for up to 10 years pursuant to RCW 9.94A.753 and RCW 9.94A.760.

- Restitution as set forth in the "Plea Agreement" page and Appendix C.
- Court costs; mandatory \$500 Victim Penalty Assessment; recoupment of cost for appointed counsel; \$100 DNA collection fee.
- King County Local Drug Fund \$ _____; \$100 lab fee (RCW 43.43.690).
- Fine of \$ _____; \$1,000 fine for VUCSA; \$2,000 fine for subsequent VUCSA.
- Costs of incarceration in K.C. Jail at \$50 per day (RCW 9.94A.760(2)).
- Emergency response costs \$ _____ (RCW 38.52.430); Extradition costs of \$ _____; Other _____.

COMMUNITY CUSTODY - RCW 9.94A.715: for qualifying crimes committed on or after July 1, 2000, the defendant shall serve a term of community custody for the period set forth below, or the entire period of earned early release, whichever is longer.

- Serious violent offense: 24-48 months Crimes against persons: 9-18 months
- Violent offense: 18-36 months Violation of Ch. 69.50 or .52: 9-12 months

Community Custody includes mandatory statutory conditions as well as discretionary conditions set by the court or Dept. of Corrections. The State recommends the court impose these discretionary conditions:

- Obtain an alcohol/substance abuse evaluation and follow all treatment recommendations; not possess or use alcohol.
- Enter into, make reasonable progress in, and successfully complete Domestic Violence Batterer's treatment, per WAC 388-60.
- Other: _____

MANDATORY CONSEQUENCES: blood testing (RCW 70.24.340) for any prostitution related offense, or drug offense associated with needle use. DNA testing (RCW 43.43.754). Revocation of right to possess a FIREARM (RCW 9.41.040). DRIVER'S LICENSE REVOCATION (RCW 46.20.285; RCW 69.50.420). REGISTRATION: Persons convicted of some kidnap/unlawful imprisonment offenses are required to register pursuant to RCW 9A.44.130.

KING COUNTY PROSECUTING ATTORNEY
Revised 2/2007

[Signature]
Deputy Prosecuting Attorney, WSBA No. 16082
[Signature]

APPENDIX F

COMMITMENT ISSUED **MAR 22 2011**

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

STATE OF WASHINGTON,
Respondent,

v.

BENJAMIN LEE SMALLS,
Appellant.

No. 64348-7-1

MANDATE

King County

Superior Court No. 08-1-02482-9. SEA

Court Action Required

FILED
KING COUNTY, WASHINGTON

MAR 21 2011

SEA
SUPERIOR COURT CLERK

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington In and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on November 8, 2010, became the decision terminating review of this court in the above entitled case on March 18, 2011. An order denying a petition for review was entered in the Supreme Court on March 2, 2011. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

- c: Craig McDonald
- Gregory Link, Vanessa Mi-jo Lee
- Ann Summers
- Hon. Gregory Canova

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 18th day of March, 2011.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
	)	No. 64348-7-1
Respondent,)	
	)	DIVISION ONE
v.)	
	)	UNPUBLISHED OPINION
BENJAMIN LEE SMALLS,)	
)	
Appellant.	)	FILED: November 8, 2010

GROSSE, J. — A voluntary plea obtained with proper advisement of the then-existing law is not rendered involuntary because of post-plea changes in the law. At the time the defendant entered his plea, he was advised of the correct range of community custody that would be imposed. The fact that the legislature subsequently modified the amount of community custody required does not alter the voluntariness of the plea. This is particularly true here, where the legislature’s amendment required mandatory community custody of 36 months, less than the maximum previously imposed.

Because the court improperly imposed community custody of 48 months, rather than 36 months, we remand for entry of an order amending the community custody period, and otherwise affirm the judgment and sentence.

FACTS

Benjamin Smalls pleaded guilty to one count of second degree murder while armed with a firearm and one count of second degree assault. In return, the State recommended a sentence of 418 months’ total confinement and agreed to dismiss not only the firearm enhancement on the second degree assault, but also charges that were pending against Smalls in another case. At the plea hearing, the prosecutor conducted

No. 64348-7-1 / 2

an extensive colloquy with Smalls advising him as to each provision of the plea agreement. During that oral colloquy, Smalls was advised that the court would impose 24 to 48 months of community custody.

Before sentencing, Smalls obtained new counsel and sought to withdraw his guilty plea on the basis of Smalls' lack of competency. Smalls was evaluated at Western State Hospital as well as an independent doctor. Both evaluations concluded that Smalls was competent.

Smalls was sentenced on September 25, 2009. During sentencing, the court interjected that the legislature had recently amended the Sentencing Reform Act of 1981, chapter 9.94A RCW, to require that community custody be set at a specific length of time rather than a range. Believing that the range for serious violent offenses was 48 months, the court imposed a 48-month term of community custody. The plea agreement called for imposition of between 24 to 48 months of community custody. Defense counsel objected to the imposition of the fixed term of 48 months because Smalls had pleaded guilty before the new legislation was passed. The court noted the objection and imposed a sentence of 418 months' total confinement and 48 months of community custody.

ANALYSIS

A defendant's failure to understand a direct consequence of his plea constitutes manifest injustice and may be withdrawn. CrR 4.2(f). Smalls argues that he should be permitted to withdraw his plea because he was misinformed about a direct consequence of his plea—community custody. At the time of his plea, he was advised that the court would impose 24 to 48 months of community custody, rather than the

No. 64348-7-1 / 3

fixed amount of custody actually imposed. At the time Smalls entered his guilty plea, however, former RCW 9.94A.701(1)(b) (2008) provided that the term of community custody for violent offenses was set forth in former RCW 9.94A.850 (2008).¹ Murder in the second degree is a serious violent offense.² The range of community custody for serious violent offenses was 24 to 48 months.³

In July 2009, before Smalls was sentenced, the legislature amended RCW 9.94A.701 establishing a set period of three years for violent offenders.⁴ Effective July 26, 2009, the amendment applied retroactively and prospectively to all offenders whether sentenced before or after the effective date of the statute.⁵ Smalls was not misadvised in the plea hearing. In In re Newlun, we recently noted that a voluntary plea which is given after being correctly advised of the then-existing law is not rendered involuntary because of post-plea changes in the law.⁶ Smalls also disputes the inclusion of three prior juvenile convictions in his offender score because those convictions were not decided by a jury. This argument has been rejected by the Washington Supreme Court in State v. Weber, which he challenges.⁷ The decision Smalls challenges is binding on this court. We therefore affirm the inclusion of the juvenile convictions in Smalls' offender score.

Smalls also raises a number of additional issues in a statement of additional

¹ Former RCW 9.94A.701 (2008).

² RCW 9.94A.030(41)(a)(iii).

³ WAC 437-20-010.

⁴ Former RCW 9.94A.701(1)(b) (2008) (amended by LAWS OF 2009, ch. 375, § 5).

⁵ LAWS OF 2009, ch. 375, § 20.

⁶ No. 63810-6, 2010 WL 3894559, *4 (Wash. Ct. App. October 4, 2010); see also Brady v. United States, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (no right to withdraw plea because the maximum penalty assumed applicable was later held inapplicable in subsequent judicial decisions).

⁷ 159 Wn.2d 252, 149 P.3d 646 (2006).

grounds. He contends that he did not sign a waiver of his speedy trial rights. But the verbatim report of proceedings belies that contention. A trial court's decision to grant a continuance under CrR 3.3 will not be disturbed absent a showing of manifest abuse of discretion.⁸ Defense counsel moved for a continuance after consulting with Smalls and waived speedy sentencing. There was no violation of his rights. Smalls next contends that his plea was invalid because there was no factual basis to support the plea and, further, that it was not in his own handwriting. But the verbatim report of proceedings shows that Smalls was aware that his plea was filled out by his defense counsel and that he agreed with the assertions made therein. Smalls also contends that he received ineffective assistance of counsel. "To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice."⁹ Counsel's representation is presumed to have been reasonable, and all significant decisions by counsel are presumed to be an exercise of reasonable professional judgment.¹⁰ Smalls asserts his counsel was ineffective because he failed to interview witnesses, provided no discovery, and forced him to take a plea. Smalls' argument is conclusory. To support these allegations, he submits additional affidavits from family members who assert that they had difficulty contacting defense counsel. These affidavits are outside the record. We cannot determine from the record before us the witnesses who might have been interviewed or even whether those witnesses would have been helpful to the defense. We find no merit to any of the allegations in the statement of additional grounds.

⁸ State v. Nguyen, 131 Wn. App. 815, 819, 129 P.3d 821 (2006).

⁹ State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

¹⁰ State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

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At the time of sentencing, the court erroneously imposed community custody for 48 months, rather than the 36 months required under amended RCW 9.94A.701(1)(b). Accordingly, we remand for entry of an order awarding the correct community custody period, and otherwise affirm the judgment and sentence.

Grosse, J

WE CONCUR:

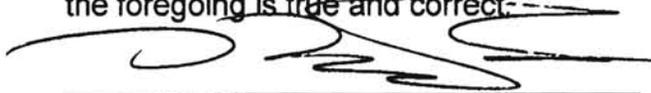
Dupe, C. S.

Appelwick, J

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Benjamin Lee Smalls, DOC #856519, the petitioner, at Clallam Bay Correction Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, containing a copy of the State's Response to Personal Restraint Petition, in IN RE PERS. RESTRAINT OF BENJAMIN LEE SMALLS, Cause No. 68740-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

08/28/12

Date