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STATE OF WASHINGTON

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DEPUTY

No. 34313-4-II

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

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STATE OF WASHINGTON  
Respondent

v.

TROY A. GAMBER, JR.  
Appellant

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APPEAL FROM  
MASON COUNTY SUPERIOR COURT  
The Honorable JAMES B. SAWYER, II  
05-1-00374-0

BRIEF OF RESPONDENT

---

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PM 9/13/06

**TABLE OF CONTENTS**

A. APPELLANT’S ASSIGNMENTS OF ERROR ..... 2

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 3

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 4

    1. GAMBER’S REQUEST TO HAVE HIS SIGNATURE REMOVED FROM THE STIPULATION TO HIS PRIOR OFFENSE--AFTER IT HAD BEEN READ TO THE JURY AND WHEN HIS COUNSEL STILL WANTED THE STIPULATION IN PLACE--IS NOT SUFFICIENT TO ELIMINATE PROFF OF THAT ELEMENT OF THE OFFENSE.....4

        1A. Since the stipulation was still evidence available to the jury, there is sufficient evidence to allow the case to go to the jury

        1B. The trial court did not err in accepting Gamber's subsequent plea when there was no error in failing to dismiss for insufficient evidence at trial.

        1C. Defense counsel was not ineffective for failing to move for dismissal or for allowing Gamber to enter a subsequent plea of guilty.

    2. THE TRIAL COURT PROPERLY USED THE SENTENCING GUIDELINES FOR INDECENT EXPOSURE AS A LEVEL IV OFFENSE WHEN IT IMPOSED SENTENCE. ....9

    3. THE TRIAL COURT DID NOT ERRR BY IMPOSING A SENTENCE WHICH INCLUDED BOTH THE STATUTORY MAXIMUM INCARCERATION AND THE REQUIRED PERIOD OF COMMUNITY CUSTODY..... 12

4.	THE TRIAL COURT DID NOT ERR BY INCLUDING ONE ADDITIONAL OFFENDER SCORE POINT FOR GAMBER BEING ON COMMUNITY PLACEMENT AT THE TIME OF THE OFFENSE BUT EVEN IF THIS WAS ERROR, IT IS HARMLESS AS GAMBER'S STANDARD RANGE IS UNAFFECTED.....	14
5.	GAMBER CANNOT SHOW PREJUDICE FROM HIS CLAIMED ERROS BY COUNSEL FAILING TO OBJECT TO THE SENTENCE OR FOR FAILING TO OBJECT TO THE INCLUSION OF A POINT FOR COMMUNITY CUSTODY.....	14
E.	CONCLUSION .....	16

## TABLE OF AUTHORITIES

### CASES

#### State

<i>Riofta v. State</i> , 2006 WL 2411534 (WA Div 2, August 2006) .....	10,12
<i>State v. Bennett</i> , 87 Wn.App 73, 940 P.2d 299 (1997) .....	8
<i>State v. Bright</i> , 129 Wn.2d 257, 916 P.2d 922 (1996) .....	11
<i>State v. Contreras</i> , 124 Wn.2d 741, 880 P.2d 1000 (1994) .....	10
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980) .....	5
<i>State v. Giles</i> , 132 Wn.App.738, 132 P.3d 1151 (2006).....	14,15
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	7,8
<i>State v. Hochhalter</i> , 131 Wn.App. 506, 128 P.3d 104 (2006).....	15,16
<i>State v. Holt</i> , 56 Wn.App. 99, 783 P.2d 87 (1989).....	5
<i>State v. Johnson</i> , 92 Wn.2d 671, 600 P.2d 1249 (1979), <i>cert. dismissed</i> , 446 U.S. 948 (1980).....	8
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993) .....	5
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992) .....	7
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	8
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	5
<i>State v. Sloan</i> , 121 Wn.App 220, 87 P.3d 1214 (2004) .....	12,13,15
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	7,8
<i>State v. Walton</i> , 64 Wn.App. 410, 824 P.2d 533 (1992) <i>review denied</i> , 119 Wn.2d 1011, 833 P.2d 386 (1992).....	6

#### Federal

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2005).....	16
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	7
<i>Washington v. Recuenco</i> , 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	14

#### STATUTES

RCW 9.94A.515.....	10,11
RCW 9A.88.010.....	9-11

**A. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in not taking count I, indecent exposure, from the jury for lack of sufficient evidence.
2. The trial court erred in accepting Gamber's plea to the charge of indecent exposure where, had the charge been properly dismissed with prejudice, the plea was barred under art. I, section 9 of the Washington State Constitution and the Fifth Amendment of the United States Constitution.
3. The trial court erred in permitting Gamber to be represented by counsel who provided ineffective assistance by failing to move to dismiss count , indecent exposure, for insufficient evidence and in allowing Gamber to enter a plea to the charge where it should have been dismissed with prejudice.
4. The trial court erred in imposing a 60 month sentence for Gamber's conviction for indecent exposure.
5. The trial court erred in allowing Gamber to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence that exceeded statutory authority.
6. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.
7. The trial court erred in allowing Gamber to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence which exceeded the statutory maximum for the crime of conviction.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court's grant of Gamber's request to have his signature removed from the stipulation to his prior offense—after the stipulation had been read to the jury and when his counsel requested the stipulation remain before the jury as a tactical consideration—served to eliminate the evidence of the previous conviction. [Assignments of Error 1, 2, and 3].
2. Whether SRA standard range for indecent exposure as charged and convicted is based on the crime being an unranked felony or a Level IV offense. [Assignments of Error 4 and 5].
3. Whether the trial court erred by imposing a 60 month sentence plus 36 to 48 months of community custody. [Assignment of Error 6]
4. Whether the trial court erred by including an offender score point for being on community placement at the time the offense was committed. [Assignment of Error 6]
5. Whether trial counsel was ineffective for not objecting to the sentence imposed and for failing to argue the community placement point when no prejudice can be shown since the standard range was not affected by the inclusion of the community placement offender point.

**C. STATEMENT OF THE CASE**

Pursuant to RAP 10.3(b), the State accepts recitation of the procedural and substantive facts set forth in his opening brief.

#### **D. ARGUMENT**

1. GAMBER'S REQUEST TO HAVE HIS SIGNATURE REMOVED FROM THE STIPULATION TO HIS PRIOR OFFENSE--AFTER IT HAD BEEN READ TO THE JURY AND WHEN HIS COUNSEL STILL WANTED THE STIPULATION IN PLACE—IS NOT SUFFICIENT TO ELIMINATE PROOF OF THAT ELEMENT OF THE OFFENSE.

Gamber here only argues that his request to have his name removed from the stipulation as to his prior offense served to obviate his stipulation. This ignores three significant facts.

First, the stipulation had already been read to the jury. [RP 43-44].

Second, Gamber's counsel wanted the stipulation in front of the jury as a tactical move in spite of Gamber's desire to have his signature removed from the written document. [RP 45]. Gamber made no objection to his counsel's desire to still have the stipulation in place. [RP 45]. This is a consistent position for Gamber if one looks at the broader record. Gamber does not deny the existence of his prior sex offense conviction, he simply does not believe it should have any impact on his life [see for example RP 71, 95].

And finally, the jury hung on Count I, the only count that the stipulation bore evidence pertinent to. [RP 74].

This record is simply insufficient to support Gamber's current assertions that the stipulation was, or should have been, withdrawn *in toto* and, therefore: 1) the trial court erred in not trying to retract facts in evidence that the jury had already been exposed to, and 2) trial counsel was ineffective for failing to move for dismissal of count I based on insufficient evidence.

- 1A. Since the stipulation was still evidence available to the jury, there is sufficient evidence to allow the case to go to the jury.

*State v. Holt*, 119 Wn.App. 712, 82 P.3d 688 (2004)

succinctly sets out the considerations when sufficiency of the evidence is raised on appeal:

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, we give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of

the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992).

Gamber's argument re insufficient evidence is based only on the proof of, or failure to prove, his prior sex offense. No other element is are not contested here. Given Gamber's counsel continued request to have the stipulation available to the jury and Gamber's lack of objection to that request, there is clearly sufficient evidence of the prior offense to support the court's allowing the case to go to the jury. Could a rational trier of fact have found evidence to support a conviction? Obviously so since count I ended in a hung jury, not an acquittal. The trial court did not err in allowing the case to go to the jury.

1B. The trial court did not err in accepting Gamber's subsequent plea when there was no error in failing to dismiss for insufficient evidence at trial.

As argued above, the stipulation as to Gamber's prior sex offense remained properly before the jury and there was sufficient evidence to allow the case to proceed to the jury. Also, since count I resulted in a hung jury at trial, it is clear that at least some jurors found sufficient evidence to convict Gamber of

indecent exposure. Since there was no error in the trial court not dismissing for lack of sufficient evidence at trial, the trial court did not err in accepting a plea of guilty as the matter proceeded toward a new trial.

- 1C. Defense counsel was not ineffective for failing to move for dismissal or for allowing Gamber to enter a subsequent plea of guilty.

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. .

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Since the stipulation properly remained before the jury, there was no basis to move for dismissal for insufficient evidence as

Gamber now asserts. In fact, his counsel clearly wanted the stipulation to remain in place as a tactical decision. [RP 45].

Gamber simply cannot show that counsel acted in any way short of the expectations of competent representation or that he was in any way prejudiced at trial or by entering a plea.

2. THE TRIAL COURT PROPERLY USED THE SENTENCING GUIDELINES FOR INDECENT EXPOSURE AS A LEVEL IV OFFENSE WHEN IT IMPOSED SENTENCE.

The State charged, and Gamber pled guilty to, indecent exposure as charged in the fourth amended information. [CP 39]. The specific charge called out in the fourth amended information includes the language from RCW 9A.88.010(2)(c) wherein the charge of indecent exposure is a class C felony "if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030."

RCW 9A.88.010(1) defines the acts necessary to commit the crime of indecent exposure. RCW 9A.88.010(2)(a) specifies that indecent exposure is a misdemeanor unless the act of exposure is done to a person under 14 years old in which case indecent exposure is a gross misdemeanor. RCW 9A.88.010(2)(b). Only

when a person has a previous conviction for indecent exposure or a previous conviction of a defined sex crime does the current conviction become a class C felony. RCW 9A.88.010(2)(c).

Gamber urges this court to read RCW 9.94A.515 as creating an entirely new crime of indecent exposure which requires both exposure to someone under age 14 and that the perpetrator have a prior sex offense. While the title given in RCW 9.94A.515 of “Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)” would indeed seem to require that the offense include both age and prior conviction elements, RCW 9A.88.010(2) simply does not require that the victim be of any particular age for the offense to become a felony, only that the perpetrator have a prior indecent exposure or sex offense conviction.

To read RCW 9.94A.515 as Gamber urges would render that portion of the statute meaningless because it would then define the offense level for a non-existent crime. Appellate courts avoid construing a statute in a manner that renders a provision meaningless. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). See also *Riofta v. State*, 2006 WL 2411534, (Wn.App. Div. 2,2006).

The goal of an appellate court “is to identify and then give effect to the Legislature's intent in drafting the statute.” *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). The clear intent of RCW 9A.88.010 is to create three escalating levels of punishment within the crime of indecent exposure. First offenses are misdemeanors unless the perpetrator exposes himself to someone under age fourteen in which case the offense is a gross misdemeanor. Only when a perpetrator has a prior conviction for indecent exposure or a conviction for a defined sex offense—without regard to the age of the person the perpetrator exposes to—does the offense become a class C felony.

Interestingly, the SRA Offender Scoring sheet (See Appendix A), while using the same language as RCW 9.94A.515 – “Indecent Exposure to Person Under Age Fourteen (subsequent sex offense)” – also refers to RCW 9A.88.010(2)(c) as the applicable statute. This is the subsection that defines the class C felony version of indecent exposure based on a prior conviction, again with no reference to age of the victim.

The legislative intent is clear that the class C felony version of indecent exposure that Gamber pled guilty to is a level IV

offense, not an unranked offense as Gamber argues. Since the legislative intent is clear, Gamber is not entitled to any application of the rule of lenity. See *Riofta*.

The trial court did not err in applying the offender score sheet and standard range for a level IV offense.

Since the trial court did not err in applying the level IV standard range calculations, Gamber cannot show that his trial counsel was ineffective for failing to object to the use of this offender range nor can he show any prejudice from the use of the correct scoring ranges.<sup>1</sup>

3. THE TRIAL COURT DID NOT ERR BY IMPOSING A SENTENCE WHICH INCLUDED BOTH THE STATUTORY MAXIMUM INCARCERATION AND THE REQUIRED PERIOD OF COMMUNITY CUSTODY.

Gamber cites to *State v. Sloan*, 121 Wn.App. 220, 87 P.3d 1214 (2004) in support of his argument that the trial court exceeded the statutory maximum for a class C felony by imposing both a 60 month sentence plus 36-48 months of community custody.

However that is exactly the type of sentence upheld in *Sloan*. Tina Sloan was sentenced to 60 months (the maximum) plus 36-48

months community custody. The *Sloan* court recognized that a defendant may earn early release credits and that those credits could effect the time in custody and therefore the total time on community custody status. *Sloan* at 223.

The remedy in such a circumstance is not, as Gamber infers, a total *on the judgment and sentence* of incarceration and community that does not exceed five years but:

To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

*Sloan* at 223-224.

This court should remand for clarification of the existing sentence by incorporating a statement “that the total of incarceration and community custody cannot exceed the maximum” as suggested by the *Sloan* court. There is no need under existing caselaw for any other change in the sentence as ordered.

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<sup>1</sup> For the purpose of avoiding needless duplication, the discussion of ineffective assistance of counsel detailed in section 1C above is incorporated here by reference.

4. THE TRIAL COURT DID NOT ERR BY INCLUDING ONE ADDITIONAL OFFENDER SCORE POINT FOR GAMBER BEING ON COMMUNITY PLACEMENT AT THE TIME OF THE OFFENSE BUT EVEN IF THIS WAS ERROR, IT IS HARMLESS AS GAMBER'S STANDARD RANGE IS UNAFFECTED.

The majority of judges in this Division have clearly stated that the inclusion of an offender score point for being on community placement is a judicial decision. See *State v. Giles*, 132 Wn.App. 738, 132 P.3d 1151 (2006).

Even if the State Supreme Court subsequently decides that the community placement point is a jury decision, the error here would be harmless<sup>2</sup> since Gamber's offender score would go from 10 to 9 with no resultant change in standard range. [RP 92]. Also, see Appendix A.

5. GAMBER'S CANNOT SHOW PREJUDICE FROM HIS CLAIMED ERRORS BY COUNSEL FAILING TO OBJECT TO THE SENTENCE OR FOR FAILING TO OBJECT TO THE INCLUSION OF A POINT FOR COMMUNITY CUSTODY<sup>3</sup>.

Gamber asserts that his trial counsel was ineffective for failing to object to the court's sentence of 60 months incarceration

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<sup>2</sup> Harmless error is available in Blakely-based sentencing errors. See *Washington v. Recuenco*, 126 S.Ct 2546, 165 L.Ed.2d 466 (2006)

and 36-48 months of community custody. As shown above, this is not an inappropriate sentence under *Sloan*, particularly if the appropriate clarifying language is added on remand. Gamber can show no error or prejudice.

Gamber also asserts ineffective assistance for failing to object to the inclusion of the community placement point. Again Gamber can show no prejudice as removing the community placement offender score point has no impact on his standard range since he goes from a “10” to a “9”, both with a standard range of 60 months. See Appendix A.

Further, when Gamber was sentenced on this matter, Division 2 had not yet ruled on the issue of whether the addition of an offender score point for being on community placement was a jury or judge question. Both *State v. Hochhalter*, 131 Wn.App. 506, 128 P.3d 104 (2006) and *Giles* were decided after the date of Gamber’s sentencing.<sup>4</sup>

Because the standard range is not affected by the inclusion of the community placement offender point, there is no violation of

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<sup>3</sup> For the purpose of avoiding needless duplication, the discussion of ineffective assistance of counsel detailed in section 1C above is incorporated here by reference

<sup>4</sup> And the trial court is internally consistent in its application of the community placement offender score point as the *Giles* matter originated from the same trial court as this appeal.

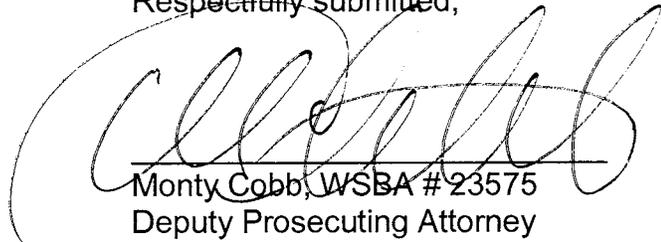
*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).<sup>5</sup>

**E. CONCLUSION**

Based on the foregoing, the State respectfully asks this Court to affirm the conviction and sentence imposed remanding only for the inclusion of the clarifying language required by *Sloan*.

DATED this 12<sup>th</sup> day of September 2006.

Respectfully submitted,



Monty Cobb, WSBA # 23575  
Deputy Prosecuting Attorney  
Attorney for Respondent

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<sup>5</sup> Even if one applies the test laid out in *State v. Hochhalter*, 131 Wn.App. 506, 519, 128 P.3d 104 (2006), this is the result. In *Hochhalter* the court said: “A three-step analysis will disclose whether *Blakely’s* holding impacts a given sentence. The first step is to identify the sentence that the trial judge actually imposed. The second step is to ascertain the maximum sentence that the trial judge could have imposed based solely on the jury’s findings and any scorable prior convictions (the maximum permissible sentence). The third step is to compare the results of the first two. If the actual sentence exceeds the maximum permissible sentence, it violates the Sixth Amendment. If the actual sentence equals or is less than the maximum permissible sentence, it does not violate the Sixth Amendment.”

The sentence imposed was 60 months. The maximum imposed based only upon scorable-under *Hochhalter*- convictions is 60 months. No violation of the Sixth Amendment has occurred.

**Appendix A**

TO

STATE'S REPSONSE

Court of Appeals, Division II  
No. 34313-4-II

State of Washington

v.

Troy A. Gamber jr.

Mason County No. 05-1-00374-0

**INDECENT EXPOSURE TO PERSON UNDER AGE 14  
(SUBSEQUENT SEX OFFENSE)**

(RCW 9A.88.010(2)(c))

CLASS C FELONY

NONVIOLENT

*(If sexual motivation finding/verdict, use form on page III-13)*

**I. OFFENDER SCORING (RCW 9.94A.525(7))**

**ADULT HISTORY:**

Enter number of felony convictions..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x ½ = \_\_\_\_\_

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

Enter number of other 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)

**II. SENTENCE RANGE**

A. OFFENDER SCORE:  
STANDARD RANGE  
(LEVEL IV)

0	1	2	3	4	5	6	7	8	9 or more
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 - 60* months	60* months

- B. 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.
- 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 36 to 48 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- 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).

• *Statutory maximum sentence is 60 months (five years) (RCW 9A.20.021).*

**III. SENTENCING OPTIONS**

- A. If "First-time Offender" eligible: 0-90 days confinement and up to one year of community custody. If treatment is ordered, the period of community custody may include up to the period of treatment, but shall not exceed two years.
- B. If sentence is one year or less: one day of jail can be converted to one day of partial confinement or eight hours of community service (up to 240 hours) (RCW 9.94A.680).
- C. Partial confinement may be served in home detention (RCW 9.94A.030).
- D. If eligible, Work Ethic Camp may be recommended (RCW 9.94A.690).
- E. If Drug Offender Sentencing Alternative (DOSA) eligible: see DOSA form for alternative sentence on page III-7 (RCW 9.94A.660).

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

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

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 34313-4-II  
 )  
 vs. ) DECLARATION OF  
 ) FILING/MAILING  
 ) PROOF OF SERVICE  
 TROY A. GAMBER JR., )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

FILED  
COURT OF APPEALS  
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STATE OF WASHINGTON  
BY *TK*  
TITIVITY

I, TRICIA KEALY, declare and state as follows:

On September 13, 2006, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas E. Doyle  
P.O. Box 510  
Hansville, WA 98340-0510

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 13<sup>th</sup> day of September 13, 2006, at Shelton, Washington.

*Tricia Kealy*  
\_\_\_\_\_  
Tricia Kealy