

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

08 FEB 21 AM 11:49

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 SYLVESTER JAMES MAHONE)
 (your name))
)
 Appellant.)

STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 36038-1-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Sylvester J. Mahone, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

see (attachment herein).

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: February 14, 2008

Signature:

[Signature] 719359/6W-B-11
Sylvester James Mahone
Washington State Penitentiary
4313 Nth 13th Ave
Walla Walla, WA 99362

I. STATEMENT OF CASE

FACTS:

On September 22, 1995, Sylvester James Mahone (hereinafter Mahone), plead guilty to one count of second degree murder, by way of an Alford Newton Plea. See (Appendix A, Plea Hearing Transcript).

Prior to pleading guilty, Mahone's trial counsel, Keith A. MacPie, provided a plea form that had the State's plea recommendations within it. See (Appendix B, page 3, section (e)).

Mahone's trial counsel went over the plea with Mahone and explained that the state was not recommending any community placement and that the judge would sentence Mahone in accordance to the plea agreement both the state and Mahone agreed to, "unless there were circumstances warranting an exceptional sentence." See (Appendix C, Affidavit Of Sylvester James Mahone, page 1, section 2).

Counsel further directed Mahone to initial several paragraphs within the plea form but to leave two sections blank regarding DNA Blood Draws, see (Appendix B, Plea Form page 4, (e)(f)),

and the judge sentencing the offender to an undetermined term of community placement, id, in order for the judge to accept Mahone's guilty plea. See (Appendix C, page 1, section 2, page 2, section 5).

Acting on the advice of Mahone's counsel, Mahone pled guilty. See (Appendix B, Plea Form page 4, (13)).

At Mahone's September 22, 1995, plea hearing, the trial judge engaged in the plea colloquy, and did not inform Mahone that he would receive 24 months community placement, that community placement was mandatory for his offense, or a direct consequence to pleading guilty and further failed to assure Mahone understood such direct consequence, prior to accepting Mahone's guilty plea. See (Appendix A, Plea Hearing Transcript).¹

On October 24, 1995, at Mahone's sentencing hearing, the Court sentenced Mahone to 178 months confinement (the top end of the standard range sentence), standard Court and Restitution Costs and 24 months community placement. See (Appendix D, Sentencing Transcripts pages 14-18).

¹ It must be noted for the record, trial counsel was silent during this colloquy.

During Mahone's sentencing hearing, his trial counsel:

1). Failed to object or move to withdraw Mahone's guilty plea, (when the trial judge imposed 24 months community placement to Mahone's sentence), on the grounds the Court, the State, and counsel never communicated to Mahone that he would receive the maximum 24 month term of community placement for pleading guilty nor that community placement was mandatory for Mahone's offense, and

2). Failed to appraise Mahone, during sentencing, of this intricate legal issue of community placement imposition, to give Mahone the ability to direct counsel to object and/or move to withdraw Mahone's guilty plea, under CrR 4.2 and RPC 1.2 (a).

Id.

The trial court then failed to mark the section on Mahone's judgment & sentence indicating the length of community placement Mahone is to serve. See (Appendix E, page 6).

Ten years later, in 2005, the state successfully moved the trial court to "Correct A Clerical Mistake," under CrR 7.8(a), to indicate the length Mahone was to serve. See (Appendix F, Transcript of Rehearing).

Mahone's 2005 appointed counsel, Sverre O. Staurset, immediately objected in which the Court overruled. *Id.* Counsel appealed the validity of the plea and Mahone appealed on a Blakely v. Washington, violation. *Id.*

This Court of Appeals - II, subsequently denied Mahone's entire appeal on October 31, 2006. See (Appendix G, Court Of Appeals - II Order).

Mahone sought discretionary review in the Washington Supreme Court on a Blakely v. Washington, violation claim, but that got denied.

Mahone immediately filed a CrR 7.8 (b) Motion For Relief From Judgment Or Order Vacating Judgment following the Court Of Appeals II, October 31, 2006, dated Order denying Mahone's appeal based solely on "The 1995) trial counsel's failure to object or move to withdraw Mahone's plea," to the 1995 trial judge's imposition of community placement to Mahone's sentence, prompting this appeal at present.

II. ARGUMENT

TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT DURING MAHONE'S 1995 SENTENCING HEARING WHEN COUNSEL FAILED TO OBJECT OR MOVE TO WITHDRAW MAHONE'S PLEA WHEN THE JUDGE IMPROPERLY IMPOSED 24 MONTHS COMMUNITY PLACEMENT TO MAHONE'S SENTENCE.

The Washington Supreme Court held that, [A] Defendant Waived His Right To Appeal His Plea On The Basis Of A Miscalculated Offender Score When He Was Informed Of The Miscalculation Before Sentencing And Failed To Object Or Move To Withdraw His Plea.

State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006).

To prevail in an ineffective assistance of counsel claim, a defendant must show: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 cert denied 506 U.S. 958 (1992); Strickland v. Washington, 466 U.S. 668, 687, 107 S.Ct. 2052, 80 L.Ed.2d 674 (1984); See also, U.S. v. Franks, 230 F.3d 811, 813 n.1, 2, 814-815 n.6-10 (5th cir. 2000).

Under the First Prong, Mahone argues that during his October 24, 1995, sentencing hearing, his trial counsel's performance was deficient in failing to object or move to withdraw Mahone's plea when the trial court improperly sentenced Mahone to 24 months community placement in the face of at least four Court decisions, prior to 1995, holding such sentencing improper in similar circumstances; such as arguing: (i). The trial court's imposition of community placement would be constitutionally unlawful invalidating Mahone's plea because the trial court failed to explicitly warn Mahone at his September 22, 1995, plea hearing, during the plea colloquy, that Mahone would receive a mandatory term of 24 months community placement as a direct consequence for pleading guilty as required and that, "Due Process also requires that a defendant's guilty plea be knowing, voluntary, and intelligent," under Boykin v. Alabama, 395 U.S. 238, 242 (1969), and that, "misinformation, misunderstanding, or material false assumptions as to any facts relevant to sentencing renders the entire sentencing procedure invalid as a violation of Due Process," under U.S. v. Fatico, 458 F. Supp. 388-397-98 (E.D. N.Y. 1978), and that, "a defendant need not be informed of all the direct consequences of his plea but he must be informed of all the direct consequences," under State v. Barton, 93 Wn.2d 301, 305 (1980), and that, "Where a defendant was not informed of the sentencing consequences of the plea, that the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdrawal of the plea," under State v. Miller, 110 Wn.2d 528, 537 (1988); See U.S. v. Franks, *supra*, at 814-15 n. 6-7.

Also in conjunction with the above, counsel should have argued that:

(ii). Mahone's September 22, 1995, plea form did not adequately advise him that 24 months community placement was a direct consequence for Mahone's plea or that it was mandatory and should have invited the court to examine the record and all clear and convincing 'extrinsic' evidence to determine whether Mahone had actual knowledge and an 'explicit understanding' of what the mandatory community placement consequences were, see State v. Ross, 129 Wn.2d 279, 287, 288 (1996), and that the scope of review was not limited to the pleading form. See State v. Oseguera, 88 Wn. App. 232, at 236-37 (Div. II 1997). . . Such lack of an objection shows counsel's performance as deficient.

Mahone directs the Court's attention to State v. Aaron, 95 Wn. App. 298 (Div. II 1999), where this Court addressed this issue, with identical plea form, and wording as Mahone's. Both Aaron, and Mahone's plea forms stated the following:

"In addition to confinement the judge will sentence me to community placement for at least one year. During the period of community placement I will be under the supervision of the Department Of Corrections and I will have restrictions placed on my activities."

Aaron, at 301. This Court found that, "the record in Aaron's case was insufficient to show that Aaron, was advised that community placement was required." See Aaron, at 303-05; and is the case herein regarding Mahone's position.

The Aaron, case is the only Washington State case that dealt with a record and plea form identical to Mahone's and found the entire record insufficient to show proper advisement of community placement.

From an OBJECTIVE analysis, the express terms of the plea form appear to: (1), inform a defendant what a sentencing judge is required to do when sentencing a defendant to community placement; (2), followed by community placement terms; (3), with no indication of any medium, maximum, or indefinite term limit a court can lawfully impose community placement; or (4), no indication that community placement is mandatory and will definitely be imposed for defendant's offense, plea, or sentence. See State v. Ross, 129 Wn. 2d 279 (1996).

It is not unreasonable for 'persons of common intelligence' to interpret this express language as requiring a sentencing judge to perform a specific act when sentencing a defendant to community placement.

Here, at Mahone's sentencing hearing, the length of community placement was discussed and the court articulated that there was a mandatory term of two years. See (Appendix D, page 16). Counsel did not, at that time, articulate any surprise at this condition, objected, nor moved to withdraw Mahone's plea challenging the fact that the express language in the plea form was ambiguous and/or insufficient to give proper notice that community placement was mandatory for Mahone's offense, plea, or sentence. See (Appendix D).

Thus such performance is constitutionally deficient satisfying the first prong of an ineffective assistance of counsel claim. M. Farland, *supra*; U.S. v. Franks, *supra*.

Third, counsel's performance was deficient in failing to object or move to withdraw Mahone's plea during sentencing in arguing:

(iii) the fact that the State never recommended ^{nor agreed} Mahone do any community placement in their statement of recommendations within Mahone's plea form, or ^{save} notice that community placement was mandatory for Mahone's plea and would receive for Mahone's offense and that by the Court sentencing Mahone to such would render Mahone's plea involuntary, and conviction constitutionally unlawful. See State v. Turkey, 149 Wn.2d 395, 398-99 (2003) (A Guilty Plea Is Considered Involuntary If The State Fails To Inform A Defendant Of A Direct Consequence Of His Plea). Counsel's failure to challenge this fact demonstrated counsel's deficient performance. See United States v. Granados, 168 F.3d 343, 346 n.3 (8th cir. 1999) rev. rem., (Citing, Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)), The Supreme Court's recognition that,

"When A Plea Agreement Rests In Any Significant Degree On A Promise Or Agreement Of The Prosecutor, So That It Can Be Said To Be Part Of The Inducement Or Consideration, Such Promise Must Be Fulfilled."

United States v. Granados, supra, at 346 n.3. Thus counsel's failure to object or move to withdraw plea demonstrates counsel's performance as constitutionally deficient. Id.

Finally, counsel should have objected or moved to withdraw Mahone's plea during sentencing arguing:

(iv). trial counsel himself advised Mahone during the signing and initialing of Mahone's September 22, 1995, plea agreement that Mahone would not receive any community placement because the state was not recommending any (evidenced by their recommendations stated within the plea agreement), and that the judge would adhere to the plea agreement unless there were facts warranting an exceptional sentence. See (Appendix A, Affidavit Of Sylvester Mahone page 1, sec. 2).

Such advice did induce Mahone's decision to plead his case, and counsel's failure to bring this issue to the court through objection or motion to withdraw plea to determine the validity of Mahone's plea constituted counsel's performance as deficient. See Miller, supra, 110 Wn.2d at 531 (A guilty plea is not knowingly made when the defendant is given erroneous information of sentencing consequences).

Mahone contends counsel's failure to object or move to withdraw Mahone's plea, with respect to the four enumerated grounds presented above, fell below the objective standard of reasonableness, thus satisfying the First Prong of an ineffective assistance of counsel claim. U.S. v. Franks, 230 F.3d at 814 n.6-7; Mendoza, supra, at 584.

Under the Second Prong, Mahone must show how defense counsel's deficient representation prejudiced him. McFarland, supra; U.S. v. Franks, supra, at 814-15 n.8-10.

Here, Counsel's deficient representation prejudiced Mahone when counsel failed to object or move to withdraw Mahone's guilty plea during sentencing when the trial judge informed Mahone the court was obligated to and did impose a 24 month term of community placement to Mahone's sentence that resulted in four prejudicial circumstances against Mahone such as:

(i). Mahone receiving a 24 month term of community placement he was NOT properly informed of or agreed to. Counsel should have challenged such imposition as violative of Due Process. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006); U.S. v. Franks, 230 F.3d 811, 814-15 n. 6-10 (5th cir. 2000); U.S. v. Girardos, 168 F.3d 343, 346 n. 3 (8th cir. 1999).

(ii). Mahone's right to challenge the validity of his plea is now forever waived for future appellate review. Counsel should have made "ANY" lawful objection challenging the trial court's community placement imposition as improper, ^{or} as a trial court error rendering Mahone's plea involuntary because Mahone did not agree to any 24 months community placement or that the prosecution did not agree to or recommend Mahone serve any community custody as part of their plea agreement. "REGARDLESS IF THE OBJECTION WOULD HAVE BEEN SUSTAINED OR OVERRULED MAHONE'S RIGHT TO CHALLENGE THE VALIDITY OF HIS PLEA 'WOULD HAVE BEEN' PRESERVED FOR FUTURE APPELLATE REVIEW." State v. Mendoza, supra, 157 Wn.2d at 584.

(iii). Mahone's 2006, criminal appeal regarding the voluntariness of his plea got denied by the Court Of Appeals-II on the ground, "Counsel did not object or move to withdraw Mahone's plea during sentencing when the judge informed Mahone the Court was obligated to [and did] impose 24 months community placement to Mahone's sentence." See (Appendix A, COA-II Order pages 3-5); see Mendoza, supra, at 584, thus prejudice is presumed.

(iv). Prejudice is further presumed in Mahone receiving a sentence of 24 months of mandatory community placement that enhanced Mahone's punishment and exceeded Mahone's Top End STANDARD RANGE Sentence, "from 178 months to 202 months resulting in a specific demonstrable increase in Mahone's sentence that Mahone did not bargain for. See United States v. Franks, supra, 230 F.3d at 814-15 n.8-10; Mendoza, supra, at 584; United States v. Granados, supra, 168 F.3d at 346 n.3.

III. CONCLUSION

Counsel's professional deficiencies in failing to object or move to withdraw Mahone's plea to the Court's imposition of 24 months community placement during sentencing can in no way be considered sound professional

trial court strategy tactics or considered harmless error.

Counsel's performance demonstrated that counsel was uninformed that Mahone had a right to be properly and/or explicitly warned of all direct consequences of his plea, by the State, the trial court - during the plea hearing colloquy, and counsel himself prior to the trial court accepting Mahone's guilty plea.

Furthermore, trial counsel failed to appraise Mahone, during the 1995 sentencing hearing, of the 24 month community placement legal issue, "to give Mahone the ability," to direct counsel to object or move to withdraw Mahone's plea; which also deprived the trial court of its' ability/opportunity to review its' decision of imposing 24 months community placement to Mahone's sentence on:

1). Whether In Fact Mahone Was Explicitly Warned By The Court, During Plea Colloquy, of Receiving 24 Months Community Placement Prior To Pleading Guilty And The Court Excepting His Plea; and

2). Whether Mahone's Alford Plea Was Knowing Voluntary, And Intelegent Regarding Mahone's Understanding Of The Direct Consequences Of Being Sentenced/Receiving 24 Months

Community Placement, That It Was Mandatory For Mahone's Crime, Pleading Guilty, And Would Definitely Be Imposed.

Prejudice is presumed, because Mahone's counsel, NOT MAHONE, is legally required to know these legal intricacies of when to object and challenge legal wrongs as presented above. Counsel is the College Law School Graduate, NOT MAHONE. Although Mahone's ignorance in the law was no excuse, it is entirely "Unconscionable" for this Court of Appeals II to expect Mahone, who was not knowledgeable in the law in 1995, to know the complex legal intricacies of the law at issue herein.

Counsel's performance was ineffective and violative of the guarantees of the Constitution of the State Of Washington Art. I § 22 and the United States Constitution's Sixth and Fourteenth Amendment, rendering Mahone's present confinement a constitutionally unlawful restraint.

Mahone seeks his plea withdrawn and a new trial granted or remand Mahone's case back to the trial court for resentencing directing the Court to exclude the 24 months community placement from Mahone's sentence.

Dated this ⁴⁷~~14~~ day of February, 2008.

Respectfully,
W. S. J. M. 719359
Washington State Penitentiary
7313 Nth 13th Avenue
Walla Walla, WA 99362
Appellant herein

I, Sylvester James Mahone,
affirm the truth of the
facts herein under penalty
of perjury of the laws of the
State of Washington.

APPENDIX A

1/17/03 Appeal

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF PIERCE ^{FILED} IN COUNTY CLERK'S OFFICE

3 STATE OF WASHINGTON,)
4)
5 Plaintiff,)
6)
7 vs.)
8)
9 SYLVESTER JAMES MAHONE,)
10)
11 Defendant.)

A.M. JUN 10 2003 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

No. 95-1-01236-3
COA No. ~~20099-3-II~~
27550-4 II
O R I G I N A L

9 VERBATIM REPORT OF PROCEEDINGS

11 September 22, 1995
12 Pierce County Courthouse
13 Tacoma, Washington
14 Before the
15 HONORABLE TERRY D. SEBRING

03 JUN 24 PM 1:14
STATE OF WASHINGTON
BY _____ DEPUTY

FILED
COURT OF APPEALS
DIVISION II

17 A P P E A R A N C E S

18 For Plaintiff: STEVE GREGORICH
19 Deputy Prosecuting Attorney
Tacoma, Washington

20 For Defendant: KEITH MacFIE
21 Attorney at Law
Tacoma, Washington

24 Reported by: Fay J. Holme, CSR-RPR
License No. HOLMEFJ374P6

1 P R O C E E D I N G S

2 September 22, 1995

3 * * * * *

4 (Jury not present.)

5 THE COURT: Good afternoon.

6 MR. GREGORICH: Good afternoon, Your Honor.
7 Steven Gregorich for the State of Washington. I have
8 submitted to your judicial assistant a second amended
9 information, a prosecutor's statement regarding amended
10 information. At this time, the State is requesting
11 this court to accept the amended information, the
12 result of which would charge Mr. Mahone with murder in
13 the second degree. It's then anticipated that -- I
14 have seen a statement of defendant on plea of guilty
15 that has been prepared by defense counsel. It's the
16 State's anticipation that if the Court accepts this
17 amended information, that Mr. Mahone is prepared to
18 enter a plea of guilty to that amended information.

19 We would then be requesting that the Court set
20 over sentencing to a date that has been cleared with
21 your judicial assistant and that Mr. Mahone has
22 indicated he would be waiving a presentence
23 investigation, and he has so subscribed his name to an
24 order fixing time for sentencing.

25 THE COURT: One thing I'm mindful of the fact

1 is -- because I had them introduced -- and that is
2 representatives of the victim's family, and I know the
3 prosecutor reminded me early on of their right to
4 remain in the courtroom. I also think they have a
5 right to speak whenever there is an amended information
6 filed. I will honor that, and I will indicate if a
7 representative of the victim's family wishes to be
8 heard, I'll give you that opportunity. Understand that
9 it's an opportunity to express your opinion. It's
10 certainly not binding on me, but I will honor that and
11 I am willing to listen.

12 MR. GREGORICH: Thank you, Your Honor. While
13 we're entertaining whether anyone from the family does
14 wish to speak, we have spoken.

15 Can you come forward, please? First of all,
16 identify yourself for the record.

17 MS. LATHROP: I'm Margie Lathrop, and --

18 THE COURT: I just want to make sure you
19 understand. My understanding of what's occurring is
20 that the prosecutor is amending the charge from murder
21 in the first degree to murder in the second degree and
22 that although we haven't went through the procedure, my
23 understanding is that the defendant has at least
24 preliminarily indicated that he is interested in
25 pleading guilty to murder in the second degree.

1 Do you wish to make any comment relative to that?

2 MS. LATHROP: Well, Ms. Van Doorninck
3 explained to the family what was going on, and I don't
4 know. I guess nothing will make me happy about this,
5 but we understand what's happening, and it probably is
6 the course to take right now.

7 THE COURT: Okay. Thank you. I'll also
8 indicate to you that whether or not there's a
9 presentence report done, you have the right, and other
10 family members, to appear at sentencing, make
11 statements then relative to sentencing. Also, if you
12 want -- and particularly if there's multiple family
13 members that want to express their opinion, often
14 making -- or writing your thoughts and comments in a
15 letter is helpful. That can be sent to the Court in
16 advance. That way, it can be made available to both
17 counsel for the State and defendant. That as well is
18 also a right, and I would honor that as well, to make a
19 verbal statement in addition at the sentencing.

20 MS. LATHROP: Yes, we would like to do that.
21 Thank you.

22 THE COURT: Indicate for the record that I'm
23 going to accept the finding of the second amended
24 information to murder in the second degree for purposes
25 of a plea of guilty.

1 Mr. MacFie, please.

2 MR. MacFIE: Good afternoon, Your Honor. For
3 the record, Keith A. MacFie, representing Mr. Mahone.
4 Your Honor, I'm handing up to the Court the statement
5 of defendant on plea of guilty. I have read all 15
6 numbered paragraphs to Mr. Mahone, and the statement
7 that Mr. Mahone submitted is in the form of a Newton
8 plea.

9 I would note to the Court I have read that form to
10 Mr. Mahone. He's also had an opportunity to read
11 various portions of the form also. I believe that his
12 decision to enter a plea to the second amended
13 information is a knowing, voluntary, and informed plea,
14 and we would ask the Court to accept the plea and to
15 set the sentencing date for October 24.

16 Oh, by the way, Your Honor, we also received
17 copies of the amended information, and we waive any
18 further reading thereof.

19 THE COURT: Thank you. Mr. Mahone, I'm going
20 to ask you a number of questions relative to the plea
21 of guilty. I'm going to start out by asking you, have
22 you had the opportunity to read and go over this
23 statement on plea of guilty with your attorney?

24 THE DEFENDANT: Yes, sir, I have.

25 THE COURT: Do you have any questions or

1 anything you do not understand about it?

2 THE DEFENDANT: No, I don't. I understand
3 it.

4 THE COURT: You're entering a plea of guilty
5 to murder in the second degree. Standard sentencing
6 range is 134 months to 175 months --

7 MR. MacFIE: 178, Your Honor. Sorry.

8 THE COURT: Okay. Thank you -- 178 months
9 with a maximum penalty of life imprisonment. Okay. Do
10 you understand that?

11 THE DEFENDANT: Yes, sir, I understand it.

12 THE COURT: Do you understand that when you
13 enter a plea of guilty, you give up the right to trial?
14 Obviously, you understand that, since we're in the
15 middle of that process.

16 You also give up the right to appeal the sentence
17 as long as the sentence is within the standard range or
18 below the standard range. Only if the Court imposes a
19 sentence above the standard range -- and in this case,
20 that would be more than 178 months -- you would have a
21 right to appeal whether or not the Court had a legal
22 basis for exceeding the standard range sentence, but
23 that would be the only right to appeal that you would
24 retain. Do you understand?

25 THE DEFENDANT: Yes, I understand.

1 THE COURT: And do you understand the other
2 constitutional rights that you're giving up that are
3 set forth in Paragraph 5?

4 THE DEFENDANT: Yes, I understand.

5 THE COURT: Paragraph 7 recites the one
6 felony conviction of assault in the third degree. And
7 my understanding, the State, I'm assuming, has checked
8 out the other one you mentioned, and that is not a
9 conviction; is that correct?

10 MR. GREGORICH: We have been unable to find
11 any conviction data as to the previously alluded to
12 theft, grand theft, or some similarly titled crime.

13 THE COURT: I think for probably practical
14 purposes, we can assume that's the only conviction that
15 counts, but still, I'm going to tell you the
16 disclaimer.

17 If the State finds out some other conviction
18 either in this state or some other state, that's within
19 the law. That should be counted. Do you understand
20 that it could count? In addition, it could change the
21 sentencing range if it counts. I'm assuming it would
22 make it more. Do you understand that that will not be
23 a basis for you to withdraw your plea of guilty?

24 THE DEFENDANT: Yes, I understand.

25 THE COURT: Next, the prosecutor has

1 indicated that they would recommend a sentence within
2 the standard range, not ask for an exceptional
3 sentence.

4 Do you understand that the representations of the
5 prosecutor and their recommendation are not binding on
6 the Court but are, as they're represented, a
7 recommendation only?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Has anyone threatened or coerced
10 you to enter this plea of guilty?

11 THE DEFENDANT: No, they haven't, sir.

12 THE COURT: Next, as your attorney indicated,
13 Paragraph 13 indicates that the plea is in the form of
14 a Newton or Alford plea. I just want to make sure you
15 understand that it is still a plea of guilty, even
16 though you're not admitting to the factual
17 circumstances; that I can find that the elements of the
18 crime, murder of the second degree, have been met based
19 upon the affidavit of probable cause. Plus, at this
20 point, I've heard a fair amount of testimony which I
21 could also consider as well as forming the factual
22 basis for the elements of the crime. Do you understand
23 that?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: And it will -- obviously, it will

1 still go on your record as a plea of guilty because it
2 is a plea of guilty, even though you're not admitting
3 to all of the factual elements in making the statement.
4 Do you understand?

5 THE DEFENDANT: Yes, I understand. I agree.

6 THE COURT: Finally, I'm going to ask you,
7 are you entering a plea of guilty to murder in the
8 second degree as charged in the second amended
9 information, the victim being Patricia Noel?

10 THE DEFENDANT: Yes.

11 THE COURT: I'm going to accept your plea of
12 guilty and find you guilty; find that it's freely and
13 voluntarily entered into. You've made a knowing waiver
14 of your rights and that there is a factual basis for
15 the plea of guilty based upon the affidavit of probable
16 cause and the testimony that the Court has heard under
17 oath from the witness stand.

18 As I understand the earlier comments, that
19 everyone is in agreement for the October 24th, at 9
20 a.m., sentencing date; is that correct?

21 MR. MacFIE: That's correct, Your Honor.

22 THE COURT: I want to make a record as to the
23 presentence investigation. The state is not asking for
24 one, correct?

25 MR. GREGORICH: That is correct.

1 THE COURT: Defense, you also have a right to
2 ask for a presentence investigation. I just want to
3 make sure you understand that and are making a knowing
4 waiver of that.

5 Have you had an opportunity to talk about the
6 presentence investigation --

7 THE DEFENDANT: Yes, I have.

8 THE COURT: -- with your attorney?

9 THE DEFENDANT: Yes, I have.

10 THE COURT: Are you waiving the right to a
11 presentence investigation?

12 THE DEFENDANT: Yes.

13 THE COURT: I'm just indicating that on the
14 form, that you're waiving the presentence
15 investigation.

16 The only other thing I wanted to inquire about is
17 whether the State is making any requests for change in
18 conditions of release, specifically bail, although I'm
19 assuming that, perhaps, is academic. I --

20 MR. GREGORICH: A half a million dollars,
21 Your Honor. The State is not requesting any different
22 conditions of release.

23 THE COURT: I'll leave it as set. I've
24 signed the order.

25 The only thing I would want to deal with before

1 the defendant is released -- and that is the fact that
2 we have a jury, obviously, waiting, not knowing what's
3 going on.

4 What I would propose to do is release the
5 defendant, bring in the jury. I will tell them on the
6 record what has happened, and then I would propose
7 going off the record at that point. And if counsel are
8 interested, either or both, your choice, you could have
9 a few minutes to talk with them if they have any
10 questions about the case. I think that's just a
11 courtesy thing. Up to you if you want to do it. I'm
12 not telling you you have to do it. And also, I would
13 give them the option of whether they want to stay and
14 listen to that, but oftentimes, people that have been
15 involved in this process, even when it doesn't go all
16 the way through trial, like to ask a few questions so
17 they can have closure on the process. So if you're
18 interested, I'll give you that opportunity. Either
19 counsel interested?

20 MR. GREGORICH: The State is interested, Your
21 Honor.

22 MR. MacFIE: I'll stay, Your Honor.

23 THE COURT: Again, that's completely
24 voluntary. I don't care from my perspective, so you do
25 what you want, but I'll tell them that you have some

1 interest. And obviously, you can stay as long as you
2 want, and I will tell them they are also free to leave
3 at any time as well, so if they want to hang around for
4 a while, that will be up to them, and obviously, that
5 will be off the record. At least at this point, I
6 don't think -- I don't know if they'll send me anything
7 else, but given the hour, you'll probably have the
8 courtroom for at least a little bit. We'll tell you if
9 that changes.

10 MR. GREGORICH: Thank you, Your Honor.

11 MR. MacFIE: Thank you, Your Honor.

12 THE COURT: You're welcome.

13
14 (Plea concluded.)
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APPENDIX

B

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

IN OPEN COURT

SEP 22 1995

Pierce County Clerk
Plaintiff By DEPUTY

THE STATE OF WASHINGTON

NO. 95-1-01236-3

STATEMENT OF DEFENDANT ON
PLEA OF GUILTY

PN _____

vs.

Sylvester James Mahone

Defendant.

1. My true name is Sylvester James Mahone
2. My age is 25
3. I went through the 12th grade. - G.E.S.
4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
I have the right to be represented by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is Keith Mac Fle

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 trial and public trial by an impartial jury in the county where the crime is alleged to have been committed;
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
- (c) The right at trial to hear and question the witnesses who testify against me;
- (d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
- (e) I am 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. I am charged with the following: Murder in the Second Degree

Count I _____

Elements: 1) That on 3/11/95, 2) In Pierce Co., WA, 3) Intentionally caused the death of another person, 4) But without premeditation

Maximum Penalty Life Standard Range 134-178 months

Count II

Elements:

Maximum Penalty

Standard Range

Count III

Elements:

Maximum Penalty

Standard Range

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

- (a) The standard sentencing range is based on the crime I am pleading guilty to and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes juvenile court convictions as follows: convictions for sex offenses, any class A juvenile felony only if I was 15 or older at the time the juvenile offense was committed, any class B and C juvenile felony convictions only if I was 15 or older at the time the juvenile offense was committed and I was less than 23 years old when I committed the crime to which I am now pleading guilty.
- (b) The prosecuting attorney's statement of my criminal history for sentencing is as follows:

194 Adult Assault 3^o Pierce Co.

Unless I attach a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced I am obligated to tell the sentencing judge about those convictions.

- (c) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this crime is binding on me. I cannot change my mind even if additional criminal history is discovered and even though the standard sentencing range and the prosecuting attorney's recommendation increase.

(d) In addition to sentencing me to confinement within the standard range, the judge will order me to pay \$100 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration up to \$50 per day. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(e) The prosecuting attorney will make the following recommendations to the judge:

Sentence within standard range.
No exceptional sentence
Standard Fines & Costs
Restitution as applicable

The prosecuting attorney will make the recommendations set forth in the plea agreement which is incorporated herein by reference.

(f) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard sentencing range unless the judge finds substantial and compelling reasons not to do so. If the judge goes above or below the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

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

8. IF ANY OF THE FOLLOWING BOXED PARAGRAPHS DO NOT APPLY THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE.

<p>(a) The judge may sentence me as a first time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030(20). This sentence could include as much as 90 days' confinement plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training, and to maintain law abiding behavior.</p>	<i>SM</i>
<p>(b) I am being sentenced for two or more violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.</p>	<i>SM</i>
<p>(c) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. The law does not allow any reduction of this sentence.</p>	<i>SM</i>

(d) This plea of guilty will result in revocation of my privilege to drive. If I have a driver's license, I must now surrender it to the judge.	S/M
(e) In addition to confinement, the judge will sentence me to community placement for at least one year. During the period of community placement I will be under the supervision of the Department of Corrections and I will have restrictions placed on my activities.	
(f) Because this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis.	
(g) Because this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.	S/M
(b) Because this crime involves a sex offense, I will be required to register with the sheriff of the county of the state of Washington where I reside. I must register immediately upon being sentenced unless I am in custody, in which case I must register within 24 hours of my release. If I leave this state following my sentencing or release from custody but later move back to Washington, I must register within 30 days after moving to this state or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections. If I change my residence within a county, I must send written notice of my change of residence to the sheriff within 10 days of establishing my new residence. If I change my residence to a new county within this state, I must register with the sheriff of the new county and notify the sheriff of the county where I last registered, both within 10 days of establishing my new residence.	S/M

9. I plead guilty to the crime(s) of Murder 2nd as charged in the second Amended Information information. I have received a copy of the information.

10. I make this plea freely and voluntarily. Information

11. No one has threatened any harm to me or to any other person to cause me to enter this plea.

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

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

Altho Although I am not Guilty of this crime I ve reviewed All of the Evidence with my Attorney And believe I may be Found Guilty at trial. There Fore I Am intering this plea to ^{take} Advantage of the PROSECUTORS sentencing Recommendation.

14. Pursuant to RCW 10.73.090 and 10.73.100, I understand that my right to file any kind of post sentence challenge to the conviction or the sentence may be limited to one year.
15. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the judge.

Substantive Mahone
 Defendant

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

[Signature]
 Attorney for Defendant

[Signature]
 Deputy Prosecuting Attorney 5242

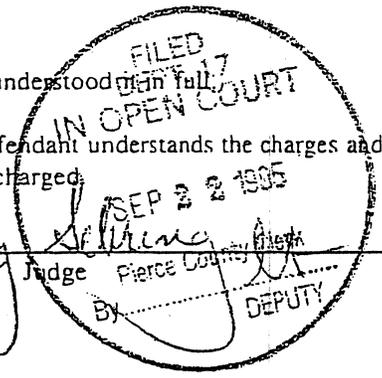
The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that:

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

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

DATED: 9/22/95

Tobey [Signature]
 Judge Pierce County
 BY *[Signature]* DEPUTY



*I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his or her understanding of both the translation and the subject matter of this document. 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 _____, 19____.

 Interpreter

APPENDIX C

1 AFFIDAVIT OF SYLVESTER JAMES MAHONE
2 STATE OF WASHINGTON } ss.
3 COUNTY OF WALLA WALLA }

4
5 I Sylvester James Mahone am the defendant herein
6 by pro-se affirms to tell the truth of the facts presented
7 below that:

8
9 1). The defendant affirms that he has lost his
10 'original affidavit' that accompanied his November 18,
11 2006, filed CrL 7.8(b) Motion For Relief From Judgment
12 Or Order Vacating Judgment and is filing a new
13 affidavit of the same facts in the defendant's
14 previous affidavit. . . as best remembered;

15
16 2). The defendant affirms that his 1995 trial
17 counsel Keith A. MacFie, on September 22, 1995 prior
18 to pleading guilty, told the defendant Sylvester J.
19 Mahone that "The State was not recommending
20 the defendant receive any community placement for
21 pleading guilty, and not to worry about receiving any
22 because the judge has to sentence the defendant
23 to the agreement the defendant and State bargained
24 to unless there were circumstances that warranted
25 an exceptional sentence outside the plea bargain.

26
27 3). The defendant affirms the state never
28

AFFIDAVIT OF
SYLVESTER JAMES MAHONE-1

1 explicitly informed the defendant that he would
2 receive any community placement nor recommended
3 the defendant receive any for pleading guilty;

4
5 4). The defendant affirms the trial court
6 failed to explicitly warn the defendant at his
7 September 22, 1995 guilty plea hearing "During The
8 Court's Colloquy" of the direct consequence of receiving
9 24 months of community placement for pleading guilty
10 nor that community placement was mandatory for the
11 defendant's conviction;

12
13 5). The defendant affirms his only understanding
14 of pleading guilty was that he would receive the
15 State's plea bargain recommendation which was:

- 16 (a). Sentence Within Standard Range;
17 (b). No Exceptional Sentence;
18 (c). Standard Fines And Costs;
19 (d). Restitution As Applicable. (See 1995 Plea Form page
20 3 section (e) and page 4, section (13)).

21
22 Dated this 17 day of December, 2006.

23
24 I affirm the truth
25 under penalty of perjury
26 of the laws of the
27 State of Washington.
28

 719359/Baker/B-3-05
Sylvester James Mahone
W.S.P./M.S.C.
1313 Nth 13th Avenue
Walla Walla, WA 99362

AFFIDAVIT OF
SYLVESTER JAMES MAHONE -2

APPENDIX D

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

STATE OF WASHINGTON,)
Plaintiff,)

vs.) Pierce County No. 95-1-01236-3

SYLVESTER J. MAHONE,) Court of Appeals No. 29550-4-II
Defendant.)

COPY

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 24th day of October 1995, the
above-entitled matter was heard before the HONORABLE SERGIO
ARMIJO, Department No. 9, at the County-City Building,
Tacoma, Washington;

Rebecca Mayse, RPR, CRR

CSR No. 458NU/COA No. 82118

REBECCA L. MAYSE, RPR, CRR
(253) 798-2979

SENTENCING

14

1 Can you pass this to the Judge, please, about the
2 confession of Steven Duncan I was talking about earlier?

3 THE COURT: Sir, if you want, I'll just make this part
4 of the court file.

5 Sir, I'm going to proceed to sentencing at this time.
6 I'm going to indicate to you I understand the concerns of
7 the family. I just want the family to know that in terms
8 of my perspective of this case and my understanding of
9 the law is that that my discretion is to sentence within
10 the standard range, 134 to 178 months. I'm going to
11 sentence to 178 months because I believe it is
12 appropriate, that is the high end of the range. I do not
13 believe I have the authority under the law to sentence to
14 an exceptional sentence, that being a greater sentence.

15 I certainly understand your grief. You have my
16 sympathy. I just want you to know that the law does not
17 give me complete discretion to decide when to do an
18 exceptional sentence, given the fact that a plea of
19 guilty was entered. I realize it's very frustrating to
20 you to have the Defendant say that he is not accountable
21 for that, that someone else is accountable. Obviously,
22 those were the issues that would have been decided by a
23 jury had this matter proceeded to trial. It was the
24 Defendant's choice, not my choice, to enter the plea of
25 guilty. I realize that he has since changed his mind and

REBECCA L. MAYSE, RPR, CRR
(253) 798-2979

SENTENCING

15

1 we've already dealt with that. But I'm dealing with it
2 based upon the evidence I heard at trial, his entry of a
3 plea of guilty, and what I'm aware of the factors are
4 involved in this matter. And given the factors that I'm
5 aware of, sentence at the high end of the range is
6 appropriate.

7 Counsel, we also need to indicate on the Judgment and
8 Sentence credit for time served. Do we have an agreed
9 time period?

10 MS. van DOORNINCK: I believe it was 244 days.

11 MR. McFIE: That appears to be right, Your Honor.

12 THE COURT: Credit for time served, 244 days.

13 MS. van DOORNINCK: Do you want to impose any costs?
14 I've filled in the amount of restitution for the funeral
15 expenses, and I believe that Mr. McFie indicates that
16 that's appropriate.

17 THE COURT: Is there any dispute?

18 MR. McFIE: No dispute as to the restitution. They're
19 all for funeral costs, Your Honor.

20 THE COURT: Indicated I am setting restitution in the
21 agreed amount for the funeral costs. Also going to
22 impose court costs, 110, crime victim compensation, 100.
23 Not imposing any additional obligations, realizing that
24 the restitution will be the first obligation of the
25 Defendant.

SENTENCING

16

1 Sir, I'm also going to hand to you -- there is an
2 Advice of Right to Appeal form which I am obligated to
3 impose. There's also a number of other conditions that
4 are required, given the nature of this offense. And I am
5 going to --

6 This has a period of -- what? -- 12 months placement?

7 MS. van DOORNINCK: I think it's 24 months, Your
8 Honor.

9 THE COURT: 24?

10 So the family understands; the statute provides for
11 supervision by the Department of Corrections after he
12 serves his time in the Department of Corrections. I'm
13 going to impose the standard amount, which I don't have
14 any discretion over, of 24 months. Also going to impose
15 the standard conditions, the additional condition that he
16 have no contact with any of the victim's family.

17 Sir, realize your attorney has already filed an appeal
18 for you. I still would like you to sign the Advisement
19 of Rights form for the record, indicating that you have
20 been advised of those rights although; I think the
21 record's clear, the appeal is already filed.

22 MR. McFIE: Your Honor, with regard to the Order of
23 Indigency, there's a space there indicating that a
24 specific person or organization will be appointed for
25 purposes of appeal and post-trial motions. I spoke to

SENTENCING

17

1 Mr. Hill, and what he suggested was simply indicate the
2 Department of Assigned Counsel. And then they will
3 assign the matter out to an attorney, so that I'm
4 completely out of the loop as far as having to make any
5 contact with attorneys trying to find counsel for
6 purposes of appeal.

7 THE COURT: Okay. I filled in the order to reflect
8 that; Department of Assigned Counsel --

9 MR. McFIE: Thank you, Your Honor.

10 THE COURT: -- is appointed.

11 Also, sir, the order reflects DNA testing. So they
12 will be drawing a blood sample to satisfy that
13 requirement under the statute. So I just want you to
14 know that that is required by the statute and I have
15 ordered it pursuant to the statute.

16 I'll just indicate, for the record, I have been handed
17 back the Record of Advice of Right to Appeal. And I note
18 that even though this was a plea of guilty, given your
19 prior statements to the Court and indication of -- and
20 motion before me to withdraw your plea of guilt, I just
21 wanted to make sure that you understand that you can
22 proceed and talk to counsel relative to that. And I have
23 appointed counsel to pursue that. Do you understand
24 that, sir?

25 THE DEFENDANT: Does that go to Supreme Court or what?

SENTENCING

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THE COURT: Well, sir, that's up to the appellate courts. My understanding of typically how the process works is your first appeal is to the Court of Appeals.

THE DEFENDANT: All right.

THE COURT: Okay. I have signed the Judgment and Sentence.

Court's at recess.

THE JUDICIAL ASSISTANT: All rise. Court is at recess.

(This matter was adjourned at 9:39 a.m.)

* * * * *

APPENDIX

E

FILED
DEPT. 17
IN OPEN COURT
OCT 24 1995
Pierce County Court

719359
10-31-95

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

STATE OF WASHINGTON,
Plaintiff,
vs.
SYLVESTER JAMES MAHONE,
Defendant.

CAUSE NO. 95-1-01236-3
JUDGMENT AND SENTENCE
(FELONY)

OCT 20 1995

DOB: 2/10/70
SID NO.: WA17015021
LOCAL ID:

I. HEARING

1.1 A sentencing hearing in this case was held on 10-24-95.
1.2 The defendant, the defendant's lawyer, KEITH MacFIE, and the deputy prosecuting attorney, W. STEPHEN GREGORICH/KITTY-ANN van DOORNINCK, were present.

II. FINDINGS

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

2.1 CURRENT OFFENSES(S): The defendant was found guilty on September 22, 1995 by

plea jury-verdict bench trial of:

Count No.: I
Crime: MURDER IN THE SECOND DEGREE, Charge Code: (D4)
RCW: 9A.32.050(1)(a)
Date of Crime: 3/11/95
Incident No.: PCSD 95 071 0531

Additional current offenses are attached in Appendix 2.1.
 A special verdict/finding for use of deadly weapon was returned on Count(s).

JUDGMENT AND SENTENCE
(FELONY) - 1

95-1-01236-3

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3
4 A special verdict/finding of sexual motivation was returned on
Count(s).
- 5 A special verdict/finding of a RCW 69.50.401(a) violation in a
6 school bus, public transit vehicle, public park, public transit
shelter or within 1000 feet of a school bus route stop or the
7 perimeter of a school grounds (RCW 69.50.435).
- 8 Other current convictions listed under different cause numbers
used in calculating the offender score are (list offense and cause
9 number):
- 10 Current offenses encompassing the same criminal conduct and
counting as one crime in determining the offender score are (RCW
11 9.94A.400(1)):

12 2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history
13 for purposes of calculating the offender score are (RCW
9.94A.360):

<u>Crime</u>	<u>Sentencing Date</u>	<u>Adult or Juv. Crime</u>	<u>Date of Crime</u>	<u>Crime Type</u>
ASSAULT 3	4/7/94	ADULT		N/V

- 14
15
16
17 Additional criminal history is attached in Appendix 2.2.
18 Prior convictions served concurrently and counted as one offense
in determining the offender score are (RCW 9.94A.360(11)):

19 2.3 SENTENCING DATA:

	<u>Offender Score</u>	<u>Seriousness Level</u>	<u>Range Months</u>	<u>Maximum Years</u>
Count No. I:	1	XIII	134-178 mos	LIFE

- 20
21
22
23 Additional current offense sentencing data is
24 attached in Appendix 2.3.

25 2.4 EXCEPTIONAL SENTENCE:

- 26 Substantial and compelling reasons exist which justify a sentence
27 above below the standard range for Count(s) _____. Findings
of fact and conclusions of law are attached in Appendix 2.4. The
28

JUDGMENT AND SENTENCE
(FELONY) - 2

95-1-01236-3

Prosecuting Attorney [] did [] did not recommend a similar sentence.

2.5 RECOMMENDED AGREEMENTS:

[X] For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9.94A.125; any felony with any deadly weapon enhancements under RCW 9.94A.310(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are [] attached [X] as follows:

WITHIN STANDARD RANGE

2.6 RESTITUTION:

[] Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.
 [] Restitution should be ordered. A hearing is set for _____.
 [] Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.

2.7 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

[X]

no legal financial obligations.
 the following legal financial obligations:

- crime victim's compensation fees.
- [] court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
- [] county or interlocal drug funds.
- [] court appointed attorney's fees and cost of defense.
- [] fines.
- [] other financial obligations assessed as a result of the felony conviction.

JUDGMENT AND SENTENCE
 (FELONY) - 3

95-1-01236-3

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL JUDGMENTS. RCW 10.82.070. AN AWARD OF COSTS ON APPEAL AGAINST THE DEFENDANT MAY BE ADDED TO THE TOTAL LEGAL FINANCIAL OBLIGATIONS. RCW 10.73.

2.8 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120:

- The defendant is a first time offender (RCW 9.94A.030(20)) who shall be sentenced under the waiver of the presumptive sentence range pursuant to RCW 9.94A.120(5).
- The defendant is a sex offender who is eligible for the special sentencing alternative under RCW 9.94A.120(7)(a). The court has determined, pursuant to RCW 9.94A.120(7)(a)(ii), that the special sex offender sentencing alternative is appropriate.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ 2,036.13, Restitution to:

Margie Lathrop.

4350 Lt. Sammamish Pkwy S.E. # 133

Issaquah WA 98037

\$ 1127.00

Crime Victim Comp.

PO Box 44520

Olympia WA 98504-4520

RE: V#04898, Noel

JUDGMENT AND SENTENCE (FELONY) - 4

95-1-01236-3

1
2
3
4 \$ 110, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

5 \$ 100, Victim assessment;

6 \$ _____, Fine; [] VUCSA additional fine waived due to indigency (RCW 69.50.430);

7

8 \$ _____, Fees for court appointed attorney;

9 \$ _____, Washington State Patrol Crime Lab costs;

10 \$ _____, Drug enforcement fund of _____;

11 \$ _____, Other costs for: _____;

12 \$ 3316.13, TOTAL legal financial obligations [X] including restitution [] not including restitution.

13 Payments shall not be less than \$ Attorney per month. Payments shall commence on _____.

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

Name	Cause Number
<u>Steve Dorian</u>	<u>95-1-01236-5</u>
<u>Lynn Peters</u>	<u>95-1-01237-1</u>

15
16
17
18 The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

19
20 Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

21
22 Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release or by _____.

23 [] Bond is hereby exonerated.

24
25
26
27
28 JUDGMENT AND SENTENCE
(FELONY) - 5

95-1-01236-3

4.2 CONFINEMENT OVER ONE YEAR; ~~The court imposes the following sentence:~~

(a) CONFINEMENT: Defendant is sentenced to following term of total confinement in the custody of the Department of Corrections commencing immediately.

178 months on Count No. 1 [] concurrent [] consecutive
_____ months on Count No. _____ [] concurrent [] consecutive
_____ months on Count No. _____ [] concurrent [] consecutive

[] Actual number of days of total confinement ordered is: _____

[] This sentence shall be [] concurrent [] consecutive with the sentence in _____;

Credit is given for 244 days served;

(b) [] COMMUNITY PLACEMENT (RCW 9.94A.120(B)(b)). ^{Appendix F} The defendant is sentenced to community placement for [] one year [] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The offender shall comply with the following terms of community placement:

WHILE ON COMMUNITY PLACEMENT OR COMMUNITY CUSTODY, THE DEFENDANT SHALL: 1) REPORT TO AND BE AVAILABLE FOR CONTACT WITH THE ASSIGNED COMMUNITY CORRECTIONS OFFICER AS DIRECTED; 2) WORK AT DEPARTMENT OF CORRECTIONS-APPROVED EDUCATION, EMPLOYMENT AND/OR COMMUNITY SERVICE; 3) NOT CONSUME CONTROLLED SUBSTANCES EXCEPT PURSUANT TO LAWFULLY ISSUED PRESCRIPTIONS; 4) NOT UNLAWFULLY POSSESS CONTROLLED SUBSTANCES WHILE IN COMMUNITY CUSTODY; 5) PAY SUPERVISION FEES AS DETERMINED BY THE DEPARTMENT OF CORRECTIONS; 6) RESIDENCE LOCATION AND LIVING ARRANGEMENTS ARE SUBJECT TO THE APPROVAL OF THE DEPARTMENT OF CORRECTIONS DURING THE PERIOD OF COMMUNITY PLACEMENT; 7) DO NOT OWN, USE OR POSSESS FIREARMS OR AMMUNITION.

(a) [] The offender shall not consume any alcohol;

(b) The offender shall have no contact with: Victim's family
Bob's Estrop Mcd.

(c) [] The offender shall remain [] within or [] outside of a specified geographical boundary, to-wit: _____

(d) [] The offender shall participate in the following crime related treatment or counseling services: _____

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

SENTENCE OVER ONE YEAR - 1

P. 6.

95-1-01236-3

(f) [] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

(g) [] HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(h) [X] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department of Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[X] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF THIS OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 24 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT HAS THE RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 10-24-95

FILED DEPT. 17 OPEN COURT OCT 24 1995 TERRY SCHWING JUDGE Pierce County, Wash By DEPUTY

Presented by:

[Signature] Deputy Prosecuting Attorney WSB # 13668

Approved as to form:

[Signature] Lawyer for Defendant WSB # 11315

SENTENCE OVER ONE YEAR - 2

APPENDIX F

Cause No. 95-1-01236-3

The defendant having been sentenced to the Department of Corrections for a:

- ~~_____~~ sex offense
- ~~_____~~ serious violent offense
- ~~_____~~ assault in the second degree
- ~~_____~~ any crime where the defendant or an accomplice was armed with a deadly weapon
- ~~_____~~ any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

TBS

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The Court may also order any of the following special conditions:

_____ (I) The offender shall remain within, or outside of, a specified geographical boundary:

~~_____~~ (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals:
Victim only

_____ (III) The offender shall participate in crime-related treatment or counseling services;

_____ (IV) The offender shall not consume alcohol;

_____ (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

_____ (VI) The offender shall comply with any crime-related prohibitions.

_____ (VII) Other: _____

APPENDIX
F

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

3 FILED
IN COUNTY CLERK'S OFFICE

4 STATE OF WASHINGTON,
5 Plaintiff,
6 vs.
7 SYLVESTER J. MAHONE,
8 Defendant.

MOTION

A.M. MAR 09 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

S/C NO. 95-1-01236-3
COA NO. 34134-4-II

9 REPORT OF PROCEEDINGS

10
11
12 FRIDAY, NOVEMBER 18, 2005

13
14 Pierce County Courthouse
15 Tacoma, Washington
16 Before the
17 HONORABLE RONALD E. CULPEPPER

FILED
COURT OF APPEALS
DIVISION II
06 MAR 23 PM 9:21
STATE OF WASHINGTON
BY _____ DEPUTY

18
19 [Appearances on next page]

20
21
22 Reported by: Karla A. Johnson, RPR
23 Official Court Reporter, #82191
24
25

ORIGINAL

1 FRIDAY, NOVEMBER 18, 2005; AFTERNOON SESSION

2 (All parties present.)

3
4 --o0o--

5
6 THE COURT: Good afternoon. You can all be
7 seated. We're here on the case of Sylvester Mahone,
8 Case No. 95-1-01236-3. Mr. Mahone is here with his
9 attorney, Mr. Staurset; and Mr. Costello for the State.
10 I guess we have two motions. The State's motion
11 originally was to correct the Judgment and Sentence,
12 and then Mr. Mahone now has a motion to vacate his
13 guilty plea. We'll do the State's first?

14 MR. COSTELLO: Yes, Your Honor. I'm prepared
15 to argue in response or in favor of the State's motion
16 brought under Criminal Rule 7.8(a). Before I do that,
17 Your Honor -- well, this might be getting ahead of
18 ourselves a little bit here, but as I indicated in
19 pleadings that I filed, the State has filed a
20 preliminary response. I fashioned it that way to the
21 defendant's affirmative motion to set aside his plea,
22 and that was done in anticipation of the Court deciding
23 its preliminary matter on how to treat the defendant's
24 motion and whether the State would be ordered to show
25 cause under Criminal Rule 7.8(c)(2), to show cause why

3

1 the motion should be granted or whether the Court would
2 be transferring that to the Court of Appeals or ruling
3 on the merits. So I just wanted to let the Court know
4 as a preliminary matter that I'm here to argue the
5 State's motion, which has been pending for something
6 like five or six weeks now.

7 The State brought its motion under 7.8(a), which
8 indicates that a motion for correction of a clerical
9 mistake can be brought at any time. And that is what
10 has occurred here. The State has asked the Court a
11 very simple thing, to enforce the superior court's
12 order entered in 1995 that the defendant serve 24
13 months of community placement as part of the sentence.
14 That was the court's sentence in 1995.

15 This is not an effort to change the substance of
16 the defendant's sentence. It is an effort to have a
17 clerical correction to the paperwork, the Judgment and
18 Sentence herein. The Department of Corrections cannot
19 act unless and until the Court specifies the duration
20 of the community placement term. So from the State's
21 perspective the motion is very simple and it is amply
22 supported by the transcript of the sentencing hearing
23 wherein Judge Sebring's sentence was quite plain.

24 The defendant's response, Your Honor, in the
25 State's view, confuses the issue and attempts to change

1 the Court's analysis of what is before it. The
2 defendant, from the State's perspective, didn't really
3 file a response to the State's motion brought under
4 7.8(a). What he did is he filed an affirmative motion
5 to set aside his guilty plea, which can only be
6 reasonably construed as a collateral attack on his
7 plea.

8 The plea can and should and really must be
9 presumed to be valid. This matter has been up to the
10 Court of Appeals. The one-year time frame for
11 collateral attack has come and gone. The Court must
12 presume that this Judgment and Sentence is valid, and
13 yet the defendant would ask the Court now to take
14 another look at it. On the theory that if the plea and
15 subsequent Judgment and Sentence is invalid, is flawed,
16 is faulty, well, then there's nothing to correct.

17 And that is the way he attempts to fashion it, but
18 when you peel back the layers of the onion, from the
19 State's perspective, it has to be viewed as collateral
20 attack on a facially valid Judgment and Sentence
21 supported by a guilty plea.

22 Now, the Court, from the State's view, can and
23 should rule on the State's motion for a simple clerical
24 correction to the facially valid Judgment and Sentence
25 and refuse -- the Court should refuse to become

1 entangled in evaluating the validity of the Judgment
2 and Sentence. The Court should treat these issues
3 separately, and the way to treat them separately is
4 under Criminal Rule 7.8(c), to initially consider the
5 defendant's motion.

6 As an aside here, counsel has argued in his
7 briefing that the State is saying the Court has no
8 jurisdiction over the defendant's motion. That's not
9 what I'm saying. What I'm trying to contend, Your
10 Honor, is that the Court should treat it as a motion
11 made under 7.8(b) and therefore implicating 7.8(c),
12 which requires initial consideration by the court as to
13 what to do with the defendant's motion attacking his
14 Judgment and Sentence. And the way to treat them
15 separately is the Court can, as I argued, do one of
16 three things: Deny the motion, transfer it to the
17 Court of Appeals, correctly, without ruling, or order
18 the State to show cause why the motion should not be
19 granted and deal with the merits of it.

20 The State has urged the Court to simply transfer
21 it to the Court of Appeals without making a ruling. If
22 you make a ruling, Your Honor, either way you go with
23 it, either side can directly appeal it; they have a
24 right to a direct appeal. If theoretically Your Honor
25 were to simply transfer it to the Court of Appeals,

1 then that court can decide. Prospectively, they can
2 look at whether it has any prospective merits. And if
3 the Court decided it did not have merits and dismissed
4 the personal restraint petition outright, the State of
5 Washington would not have to file a responsive
6 pleading, whereas if the Court were to deny the
7 defendant's motion on the merits, the defendant has an
8 automatic right to appeal.

9 Now, I can make some arguments at this point, Your
10 Honor, if you have an intention to entertain the
11 defendant's motion, but I would, frankly, prefer to
12 have the Court decide whether the State will be ordered
13 to show cause to respond.

14 THE COURT: Let's see what Mr. Staurset has
15 to say.

16 Mr. Staurset?

17 MR. STAURSET: Well, I do find a little
18 humorous that you try to bifurcate and it was the State
19 that actually ended up arguing both things. As the
20 Court can recall back when I first appeared here, the
21 State had filed a motion to correct a clerical error
22 and I informed the Court that we couldn't proceed
23 because there was no transcript.

24 Now, today for the first time we hear the State
25 talk about the facially valid plea and a facially valid

1 Judgment and Sentence. In fact, at the time that I
2 appeared here first on behalf of Mr. Mahone, the
3 Judgment and Sentence was not facially invalid. It
4 just didn't have a -- it just didn't have a Judgment
5 and Sentence which reflected any kind of community
6 placement. However, after I had vociferously argued
7 that the transcript was necessary, I notice that it was
8 the State that ran out and got the copy of the
9 transcript and sent it to us and attached it to its
10 tentative brief.

11 It is only after you pierce the document on its
12 face by going to the actual language of the sentencing
13 proceeding that we discovered that the 24 months was,
14 in fact, explicitly, as the Court of Appeals refer to
15 them, as explicitly listed.

16 Now, it's interesting because if you then take a
17 look -- so the Judgment and Sentence, the 24 months
18 only comes because he at one time pled. Now, the plea
19 requires that it also be facially valid, and under
20 7.8(b)(3), (4), and (5), which in this case we believe
21 that (4), an invalid plea on its face --

22 THE COURT: Hasn't the Court of Appeals ruled
23 on three prior petitions and denied them all, maybe on
24 different grounds? Isn't Mr. Mahone simply wanting to
25 move to vacate kind of on an annual basis here? He's

1 had three prior motions to vacate and he's had
2 petitions for review that have been denied. One of
3 them the Supreme Court declined to hear. This is a
4 ten-year-old case. Do the courts not have some
5 interest in finality? Frankly, I wish the motion to
6 correct had been brought about nine years ago.

7 MR. STAURSET: Isn't it convenient that the
8 State -- we make laws for the State to be able to
9 correct any time they want to?

10 THE COURT: But there are different rules.
11 Rule 7.8(a) talks about clerical mistakes and says at
12 any time. Now, maybe it shouldn't. This would have
13 been better if it had been done nine years ago. I'm
14 sure everybody agreed with that, or if whoever forgot
15 to check the box had checked it. That was clearly a
16 clerical error.

17 Judge Sebring said 24 months community placement,
18 which was mandatory. Judge Sebring ordered what was
19 mandatory, so I am going to grant the motion to correct
20 the clerical error, adding the 24 months community
21 placement, which was ordered, which Mr. Mahone knew at
22 the time.

23 The plea agreement is perhaps another issue.
24 Although I note his attorney said he read everything to
25 him, they struck out the things that did not apply.

1 They left in the paragraph in the plea saying community
2 placement.

3 MR. STAURSET: But did you read that block?

4 THE COURT: I read that block.

5 MR. STAURSET: And what that block said, it
6 said that he will be sentenced to one year or more.

7 THE COURT: And he was sentenced to two
8 years, which is mandatory. He was sentenced to the
9 mandatory term of community placement; mandatory,
10 meaning the law says it has to be 24.

11 MR. STAURSET: Didn't the Court read all the
12 cases I gave you, including the Rawson case, which has
13 exactly the same -- identically the same form?

14 THE COURT: I read that case. I don't have
15 it right in front of me. There were a lot of
16 differences.

17 What I'm going to do with respect to the motion --
18 number one, I appreciate the time you spent on this,
19 Mr. Staurset. You got into this at the last possible
20 minute. But there's some history to this case. I went
21 through the entire file. I won't go through
22 everything. You are, I think, the seventh attorney
23 representing Mr. Mahone. He had three before trial he
24 fired, then Mr. McNeish, who he tried to fire. He had
25 a woman -- I forget her name -- Mr. Phillip and

1 Ms. Arnold on appeal. He's had three petitions for
2 discretionary review denied. His petition to the
3 Supreme Court, or his review, was denied by the Court
4 of Appeals. His petition to the Supreme Court was
5 denied. Mr. Mahone will file another motion to vacate,
6 I know, but I'm not going to rule on it. I think this
7 is time barred.

8 MR. STAURSET: Can I --

9 THE COURT: Well, you don't need to. I don't
10 mean to cut you off, but I'm going to cut this short
11 because I'm ready to rule.

12 Rule 7.8(b) talks about you can bring various
13 things within a year or a reasonable time. It's not a
14 reasonable time ten years later after you had three
15 petitions already rejected and a review denied by the
16 Supreme Court.

17 Mr. Mahone has had a chance to have this reviewed
18 by the Court of Appeals three times and the Supreme
19 Court. He had a motion to vacate in front of Judge
20 Sebring. He had a motion to vacate in front of Judge
21 Fleming. He had a motion to vacate in front of Judge
22 Orlando.

23 I'm not going to issue a ruling; I'm simply going
24 to transfer this to the Court of Appeals and let them
25 treat it as a personal restraint petition because I

1 know whatever I do here is going to end up there
2 anyway. This is not a waste of time. I'm sorry;
3 that's a bad phrase. This simply wouldn't accomplish
4 anything. Whatever I do will be reviewed by the Court
5 of Appeals anyway. Let's just transfer it to a
6 personal restraint petition.

7 MR. STAURSET: Would you please make sure
8 that all of my pleadings get transferred as well?

9 THE COURT: Yes.

10 THE DEFENDANT: I object to this whole issue.

11 THE COURT: Please do.

12 THE DEFENDANT: I want to be heard on my
13 objection on this whole issue. Here, the Court
14 jurisdiction is automatically applied under RCW
15 10.73.090(1) overcoming the one-year time bar whenever
16 a defendant successfully demonstrates and establishes
17 --

18 THE COURT: Did you say successfully
19 demonstrates?

20 THE DEFENDANT: I'll finish in just a moment,
21 sir. Let me read this. Here, court jurisdiction is
22 automatically applied under 10.73.090(1) overcoming the
23 one year time bar whenever a defendant successfully
24 demonstrates and establishes an invalid Judgment and
25 Sentence; thus a positive showing of an involuntary,

1 not knowing nor an intelligently made plea made is an
2 invalid plea under Criminal Rule 4.2(d), producing a
3 manifest injustice and gives the trial court additional
4 jurisdiction to act on the defense's motion under
5 Criminal Rule 4.2(f), contrary to the State's belief.

6 The Second objection I have to the State's motion
7 is invited error doctrine. Here, the State is asking
8 this Court to commit a reversible error in granting
9 their motion to amend the defendant's already invalid
10 Judgment and Sentence, to add a 24-month community
11 placement term, when the defense has made a sufficient
12 demonstration establishing the defendant's guilty plea
13 was involuntary, not intelligent, or knowingly made at
14 his 1995 plea hearing, thus invalidating the entire
15 Judgment and Sentence.

16 The State cited the Supreme Court's ruling in
17 State v. Broadaway in that the Court has the authority
18 to correct an erroneous sentence regarding an
19 insufficiently specific period of community placement
20 order to support their position.

21 The defendant argues the Broadaway case does not
22 apply to his case and is distinguishable. The
23 Broadaway ruling was premised on a trial judge being
24 mistaken about the period of community placement
25 required by law. Here in this case, upon the discovery

1 of the sentencing hearing transcripts, revealed the
2 trial judge was specific in ordering the defendant to
3 do 24 months community placement, and this now alters
4 the context of this hearing.

5 In the defendant's case, his entire Judgment and
6 Sentence is invalid on its face based on: One, an
7 involuntary plea by way of the trial court and State's
8 failure to explicitly inform the defendant that 24
9 months community placement was mandatory and would be
10 imposed as a sentencing consequence to pleading guilty;
11 No. 2, the recommendation by the State in the 1995 plea
12 agreement the State and the defendant agreed to is not
13 the same plea agreement the State now seeks to enforce,
14 which will increase the defendant's statutory maximum
15 sentence beyond the State's recommendation in the plea
16 agreement; No. 3, the State's 7.8 motion breaches their
17 1995 plea agreement; No. 4, the plea agreement the
18 State now seeks to enforce was not ratified by the
19 defendant; No. 5, said action violates the due process
20 clause warranting withdrawal under CrR 4.2(f) and, No.
21 6, is also a state-invited error.

22 In light of the 1999 Division Two Court of Appeals
23 holding in State v. Rawson, an appeal from the Superior
24 Court in Pierce County on this same issue, proscribes a
25 trial court from imposing community placement on a

1 defendant when he was not explicitly informed that
2 community placement was mandatory. Thus to act
3 contrary to said holding invites reversible trial court
4 error regardless if it is done intentionally or
5 unintentionally under City of Seattle v. Pratt, a
6 Supreme Court case in 2000.

7 Finally, sir, sentencing enhancements. The
8 defendant apprises this court to a final manifest
9 injustice warranting a CrR 4.2(f) remedy. Here, when
10 the trial court sentenced the defendant to a 24-month
11 term of community placement to follow the defendant's
12 178-month statutory maximum sentence ordered by the
13 Court, did constitute a sentence enhancement fact, that
14 did increase the penalty for the defendant's offense
15 beyond the statutory maximum a judge can impose for the
16 underlying offense, violating the defendant's Sixth
17 Amendment right to a jury trial under Blakely v.
18 Washington.

19 Furthermore, the Washington State Supreme Court in
20 2003 in State v. Desantiago, ruled that the total
21 sentence, including enhancements, remains presumptively
22 limited by the statutory maximum for the underlying
23 offense. As reiterated, the trial court erred when it
24 gave the defendant a 24-month sentence enhancement of
25 community placement that exceeded the 178-month

1 statutory maximum for the underlying offense, further
2 invalidating the defendant's Judgment and Sentence
3 where a remedy is required under CrR 4.2(f) to correct
4 this manifest injustice. The defendant requests the
5 withdrawal of his plea and the denial of the State's
6 motion in its entirety.

7 THE COURT: Do you want to file that or a
8 copy of that so we can send that on to the Court of
9 Appeals also?

10 THE DEFENDANT: Will that be in my
11 transcript?

12 THE COURT: Well, I hope so.

13 THE DEFENDANT: I don't want to transfer it
14 as a PRP because I have other lawsuits and I would just
15 like to grant the motion because I'm not going to go
16 through the PRP thing. I have some stuff going on,
17 including an associate's degree I'm doing and school
18 stuff going on. I don't want no PRP.

19 THE COURT: I don't mean to cut you off,
20 Mr. Mahone. I did cut off Mr. Staurset. And again, I
21 appreciate Mr. Staurset putting in a lot of time.
22 Mr. Staurset made some good arguments, the same as
23 you're making there. I'm going to transfer this to the
24 Court of Appeals. I think it's time barred.

25 THE DEFENDANT: Can this just be denied?

1 Because I can't represent it to the Court of Appeals.

2 THE COURT: I'm transferring it to the Court
3 of Appeals and they can do what they wish.

4 THE DEFENDANT: What do I do? I file for an
5 attorney or something like that if --

6 THE COURT: They have to review it first, and
7 I think the attorneys, because they have that new
8 statute --

9 MR. STAURSET: They don't until after they
10 find meritorious, although a lot of the PRP's now are
11 just coming -- for instance, the inmates are filing
12 them and they grant them and actually send them back
13 without getting prosecutors' input.

14 THE COURT: So I'm checking the box that says
15 the Court of Appeals, Division II, pursuant to CrR 7
16 and personal restraint petition.

17 MR. STAURSET: I guess he wishes this to go
18 along. We'll send that along, as well as all of Mr.
19 Staurset's hard work.

20 THE DEFENDANT: Can I ask you a question?

21 THE COURT: Yes.

22 THE DEFENDANT: Regarding the case law that
23 my attorney cited, can you tell what in those cases --
24 that you could just override those cases and go with
25 the State's motion?

1 THE COURT: No, I can't tell you what allows
2 me to override them. I don't believe I'm overriding
3 any of them, so, no, I can't tell you what I did to
4 override them.

5 THE DEFENDANT: The last question: What was
6 your reason for denying the defense motion to withdraw
7 the plea?

8 THE COURT: It's too late. It's time barred.
9 It's supposed to be done within a reasonable time. You
10 had three different motions to vacate already, so
11 you've certainly had plenty of time for a motion to
12 vacate. Ten years isn't a reasonable time.

13 THE DEFENDANT: It was on a different issue,
14 and what I was trying to figure out is under 10.73.090,
15 we feel that we established the invalid Judgment and
16 Sentence.

17 THE COURT: I understand that's how you feel.
18 I disagree with you.

19 THE DEFENDANT: Can you tell us why?

20 THE COURT: I appreciate all the work that
21 Mr. Staurset did because I don't think your position
22 has any merit, is why I'm denying it, Mr. Mahone.

23 MR. COSTELLO: Technically you haven't denied
24 it, Your Honor; you transferred it.

25 THE COURT: That's correct, I'm transferring

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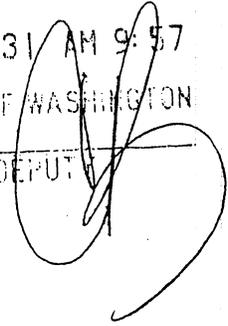
it. And the motion to correct can be done at any time.
It would have been nice to have caught it earlier.

MR. COSTELLO: I agree.

(The matter was concluded.)

APPENDIX G

FILED
COURT OF APPEALS
DIVISION II
06 OCT 31 AM 9:57
STATE OF WASHINGTON
BY _____
DEPUTY



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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER J. MAHONE,

Appellant.

No. 34134-4-II
(consolidated with)
No. 34562-5-II

UNPUBLISHED OPINION

HOUGHTON, C.J. — Sylvester J. Mahone appeals the trial court’s order amending his judgment and sentence to include two years of mandatory community placement. We affirm.

FACTS

Mahone pleaded guilty to second degree murder on September 22, 1995. His statement on plea of guilty provided that “[i]n addition to confinement, the judge will sentence me to community placement for at least one year.” Clerk’s Papers (CP) at 104. No one discussed community placement during his plea hearing. During his sentencing hearing, the trial court stated that it would impose a mandatory 24-month term of community placement in addition to a high-end standard range sentence of 178 months. In Mahone’s judgment and sentence, however, the community placement box was left unchecked and there was no indication that the court had imposed any period of community placement.

On October 14, 2004, the Department of Corrections (DOC) notified the State and the trial court that Mahone's judgment and sentence was deficient because it failed to impose community placement. On April 13, 2005, DOC sent a second letter asking the court to amend the judgment and sentence by including the mandatory 24-month term of community placement. The State moved to amend the judgment and sentence on August 17, 2005. In response, Mahone moved to set aside his plea.

On November 18, 2005, the trial court granted the State's motion and amended the judgment and sentence to include two years of community placement. The court also transferred Mahone's motion to us for treatment as a personal restraint petition. After Mahone filed a direct appeal from the order amending his judgment and sentence, we consolidated that appeal with his personal restraint petition.

ANALYSIS

CLERICAL MISTAKE

Mahone argues initially that the trial court erred in amending his judgment and sentence to include community placement.

The State filed its motion to amend under CrR 7.8(a), which states in pertinent part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." A clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence. *State v. Priest*, 100 Wn. App. 451, 455, 997 P.2d 452 (2000).

The transcript from Mahone's 1995 sentencing hearing clearly sets forth the trial court's intention to impose the mandatory 24-month period of community placement. Thus, when

notified that his judgment and sentence did not include that requirement, the State properly brought a motion to amend under CrR 7.8(a). The rule expressly states that there is no time limit for correcting clerical errors. CrR 7.8(a). The trial court did not err in amending Mahone's judgment and sentence to include community placement.

VOLUNTARINESS OF PLEA

Mahone argues next that the amendment of his judgment and sentence to include a term of community placement shows that he was misinformed about a direct consequence of his plea, thus rendering his plea involuntary.

Due process requires that a guilty plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A guilty plea is not knowingly made when based on misinformation regarding sentencing consequences. *Isadore*, 151 Wn.2d at 298. A defendant need not be informed of all possible consequences of his plea, but he must be informed of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

Mandatory community placement is a direct consequence of pleading guilty. *Isadore*, 151 Wn.2d at 298; *see also State v. Rawson*, 94 Wn. App. 293, 295, 971 P.2d 578 (1999). Consequently, the failure to inform a defendant that he will be subject to mandatory community placement if he pleads guilty renders the plea invalid. *Isadore*, 151 Wn.2d at 298; *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003).

When Isadore pleaded guilty, both parties were unaware that his sentence required community placement. *Isadore*, 151 Wn.2d at 296-97. Accordingly, the community placement and community supervision check-boxes on the plea form were left blank, and the prosecuting attorney informed the court during the plea hearing that community placement did not apply. *Isadore*, 151 Wn.2d at 297. Approximately 18 months after Isadore's sentencing, DOC notified

the prosecutor's office that his sentence should have included a mandatory one-year term of community placement. *Isadore*, 151 Wn.2d at 297. When the trial court amended the judgment and sentence to include community placement, Isadore filed a personal restraint petition.

Our Supreme Court agreed with Isadore that his plea was invalid. *Isadore*, 151 Wn.2d at 302. When the trial court asked about community placement, the prosecuting attorney said it did not apply, and there was no indication of the requirement on the plea form. Because Isadore was not informed of a consequence of his plea, his plea was invalid and his restraint was unlawful. *Isadore*, 151 Wn.2d at 302.

In *Rawson*, the defendant pleaded guilty under two cause numbers and both plea forms notified him that community placement was possible: "In addition to confinement, the Judge may sentence me to community placement for at least 1 year." *Rawson*, 94 Wn. App. at 295 (boldface omitted). The trial court did not notify Rawson when he pleaded guilty that 12 months' community placement was mandatory, and it did not impose community placement in sentencing him. *Rawson*, 94 Wn. App. at 295. A few months later, DOC informed the trial court of the community placement requirement, and the court amended Rawson's sentences accordingly.

On appeal, we agreed with Rawson that he was entitled to withdraw his guilty plea. *Rawson*, 94 Wn. App. at 299. We noted that a defendant ordinarily receives a plea form indicating, where appropriate, that "[i]n addition to confinement, the judge will sentence me to community placement for at least 1 year." *Rawson*, 94 Wn. App. at 295-96 (citing former CrR 4.2(g)(6)(k)). Rawson's plea form stated that the judge "may" impose community placement and thus did not warn him that community placement was mandatory. In addition, the trial court

did not address community placement either in the plea hearing or the sentencing hearing.

Rawson, 94 Wn. App. at 298-99.

Mahone cites *Isadore* as support and contends that his case is indistinguishable from *Rawson*, but we see significant differences. First, Mahone's plea form notified him that community placement of at least one year was mandatory in accordance with the language of CrR 4.2 then in effect. *See* former CrR 4.2(g)(6)(j) (1995). (Mahone struck and initialed inapplicable conditions set forth in the plea form but left the community placement paragraph intact.) Although no mention of that requirement was made during the plea hearing, the trial court informed Mahone during his sentencing hearing that it was obligated to impose 24 months of community placement.

Mahone did not then object or seek to withdraw his guilty plea. Our Supreme Court recently held that a defendant waived his right to appeal his plea on the basis of a miscalculated offender score when he was informed of the miscalculation before sentencing and failed to object or move to withdraw his plea. *State v. Mendoza*, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). Thus, even if Mahone was not properly informed of the community placement requirement, he waived his right to challenge his plea on that basis when he failed to object or move to withdraw his plea when he was informed of the mandatory community placement during sentencing.

One final matter remains with regard to this issue. Mahone's personal restraint petition also challenges the voluntariness of his plea, and the State devotes much of its appellate brief to the contention that his petition must be dismissed because it is both untimely and successive. Although Mahone's petition has little significance because of its consolidation with his direct appeal raising the same issue, we briefly note our disagreement with the State's assessment of the petition's procedural flaws.

The State argues that the petition is untimely because it was filed more than a year after the judgment and sentence became final in 1998. *See* RCW 10.73.090(3)(b). Mahone filed his petition in response to the State's motion to amend his judgment and sentence and that motion resulted in an amended judgment and sentence that was filed in 2005. The judgment and sentence was not final until that filing, at least for the purpose of challenging the basis of the amendment. *See* RCW 10.73.090(3)(a); *Isadore*, 151 Wn.2d 294 (no discussion of timeliness of petition challenging plea that was filed 18 months after entry of the initial judgment and sentence). Moreover, the time bar did not apply because Mahone's judgment and sentence was facially invalid due to the omission of mandatory community placement. *See* RCW 10.73.090(1); *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 353-54, 5 P.3d 1240 (2000) (court may consider plea documents in determining whether judgment and sentence is invalid on its face).

Furthermore, despite the fact that Mahone has already filed several petitions challenging his 1995 judgment and sentence, his current petition is not barred as successive. The State's motion to amend gave him good cause to file the present petition, and it was appropriate for us to consider it in the first instance. *See* RCW 10.73.140; *In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 19 P.3d 1027 (2001).

PRO SE ISSUE

Finally, Mahone argues in a pro se Statement of Additional Grounds, RAP 10.10, that the addition of community placement unlawfully exceeded the statutory maximum sentence permissible for his offense.

As support for his argument, Mahone cites RCW 9.94A.505(5), which provides that with exceptions not pertinent here, "a court may not impose a sentence providing for a term of

confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” Division Three cited this statutory provision in vacating a sentence where the term of confinement plus the community custody term exceeded the 120-month maximum sentence possible for the defendant’s drug crime. *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

The trial court sentenced Mahone to 178 months for second degree murder. The maximum sentence for this class A felony under chapter 9A.20 RCW is life imprisonment. See RCW 9A.32.050(2); RCW 9A.20.021(1)(a). The addition of a 24-month term of community placement to a 178-month sentence thus did not exceed the statutory maximum sentence permissible under chapter 9A.20 RCW.

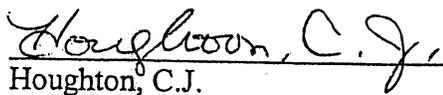
Mahone contends that the maximum sentence to be considered, however, is the top of the standard sentencing range and cites as support *State v. Evans*, 154 Wn.2d 438, 114 P.3d 627, cert. denied, 126 S. Ct. 560 (2005). *Evans* explained that the United States Supreme Court has held that every fact (other than the fact of a prior conviction) that increases the defendant’s sentence beyond the statutory maximum may be used only if it was proved beyond a reasonable doubt to the trier of fact at trial or admitted by the defendant. 154 Wn.2d at 441 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). In a later decision, the Court clarified that the “statutory maximum” referred to in *Apprendi* was not the maximum sentence authorized by the legislature for the crime but the top of the standard sentencing range. *Evans*, 154 Wn.2d at 441-42 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2538, 159 L. Ed. 2d 403 (2004)). Mahone argues that it is the *Blakely* interpretation of “statutory maximum” that applies here, and he contends that this statutory maximum was

unlawfully exceeded when the trial court added community placement to his high-end standard range sentence.

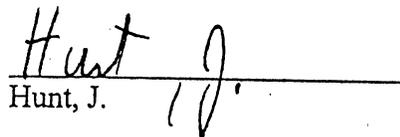
Blakely is not relevant in this context because the statutory maximum at issue is that set forth in chapter 9A.20 RCW. *See* RCW 9.94A.505(5). Moreover, the addition of community placement to a sentence does not trigger *Blakely* because there is no fact finding involved. Rather, the law dictates the term of community placement that a sentencing court must impose according to the seriousness and type of the underlying offense. RCW 9.94A.700. As long as the combined total of the period of incarceration imposed and the period of community placement possible does not exceed the statutory maximum for the offense, as set forth in chapter 9A.20 RCW, the sentence is lawful.

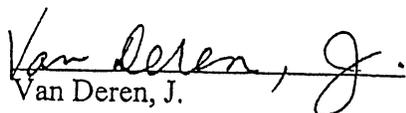
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Houghton, C.J.

We concur:


Hunt, J.


Van Deren, J.

FILED
COURT OF APPEALS
DIVISION II

08 FEB 21 AM 11:49

STATE OF WASHINGTON
BY WMM
DEPUTY

NO. 36038-II

AFFIDAVIT OF SERVICE
BY MAILING

STATE OF WASHINGTON,
)
)
)
COUNTY OF WALLA WALLA)

I, Sylvester James McPherson, being first sworn upon oath, do hereby certify that I have served the following documents:

- (1) Two - Affidavit of service By Mailings;
- (2) One - Statement of Additional Grounds - w/Appendix A - G.

Upon:

David Panzora
Court of Appeals - II
950 Broadway Ste. 300
TACOMA, WA 98402.

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this ⁵⁰17 day of February, 2008.

[Signature]
Name & Number
719359/6W-B-II

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

FILED
COURT OF APPEALS
DIVISION II

08 FEB 21 AM 11:49

STATE OF WASHINGTON
BY Crum
DEPUTY

STATE OF WASHINGTON)
)
)
COUNTY OF WALLA WALLA)

NO. 36038-1-II

ss.

AFFIDAVIT OF SERVICE
BY MAILING

I, Sylvester James Mehone, being first sworn upon oath, do hereby certify that I have served the following documents:

- (1), One Affidavit of Service By Mailing ;
- (2), One Statement of Additional Grounds, w/ Appendix A - G.

Upon:

Kathleen Proctor (Prosecuting Attorney)
Pierce County Prosecuting Att, Ofc.,
930 Tacoma Avenue S., Rm., 946
Tacoma, WA 98402-2171

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 17 day of February, 2008.

SJM 719259/6W-B-11
Name & Number
Sylvester James Mehone

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

Mr. Sylvester James Mahone 219359/6W-B-11-2
Washington State Penitentiary
1313 Nth 13th Avenue
Walla Walla, WA 99362

RECEIVED
FEB 22 2008

February 19, 2008

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Kathleen Proctor
Dpty. Proc. Att., Ofc.,
Pierce County Prosecuting Att., Ofc.,
930 Tacoma Avenue S., Rm. 946
Tacoma, Wash., 98402-2102

David Penzaha, Clerk
Court Of Appeals-II, Judges
950 Broadway Ste, 302
Tacoma, WA 98402

In re: St. of Wash. v. Sylvester James Mahone, COA No.
① ~~Cause No.~~ 36038-1-II;

Dear Counsel & Judges:

I am the appellant herein, and am notifying both of you of a typed error in my handwriting within my February 18, 2008, dated "Statement Of Additional Grounds" pleading.

66 Within my Statement Of Additional Grounds on page 6, section (iv) lines 8-9, it states, "See (Appendix A, Affidavit of Sylvester Mahone, page 1, sec., 2)."

This should read, "See (Appendix C, Affidavit of Sylvester Mahone page 1, sec., 2)." Just change the A to a C.

Then on page 8, section (iii), of my
"Statement of Additional Grounds" Line/Sentence
9, reads, (Appendix A, CoA-II Order pages
3-5)," this should read (Appendix G, CoA-II,
Order pages 3-5). Just change the A
to a G.

I hope I have not inconvenienced
anyone as the error is not intentional
but inadvertent, and not caused to
bring any undue delay in this case.

I eagerly await your reply.

Cordially,

Mr. Sylvester James Mahone
Appellant herein

FILED
COURT OF APPEALS
DIVISION II

08 FEB 22 AM 11:19

STATE OF WASHINGTON

BY _____
DEPUTY

STATE OF WASHINGTON)

)
)
COUNTY OF WALLA WALLA)

NO. 36038-1-II

SS:

AFFIDAVIT OF SERVICE
BY MAILING

I, Sylvester James McPhine, being first sworn upon oath, do hereby certify that I have served the following documents:

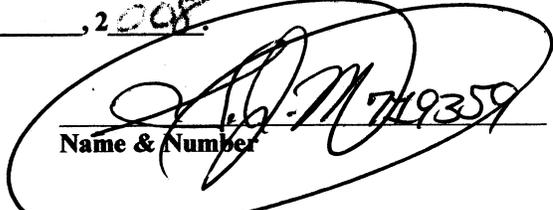
- 1) Two Affidavit of Service By Mailing;
- 2) One Letter.

Upon:
David Ponzona - Clerk,
COA - II

SN 950 Tacoma Ave S
950 Broadway Ste, 300
Tacoma, Washington 98402
By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 19 day of February, 2008.


Name & Number 719359

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

FILED
COURT OF APPEALS
DIVISION II

08 FEB 22 AM 11:19

STATE OF WASHINGTON
BY _____ DEPUTY

STATE OF WASHINGTON

COUNTY OF WALLA WALLA

SS:

NO. 36038-1-II

AFFIDAVIT OF SERVICE
BY MAILING

I, Sylvester James Mahone, being first sworn upon oath, do hereby certify that I have served the following documents:

- (1) One Affidavit of Service By Mailing;
- 2). One Letter.

Upon:

Kathleen Proctor - Depty., Prosec., Att.,
936 Tacoma Avenue S., Rm., 946
Tacoma, WA 98402-2202

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 19 day of February

2008
[Signature]
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.