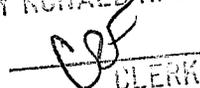


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CLERK SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DOUGLAS J. TOBIN, PETITIONER

Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy  
No. 02-1-01499-4

Court of Appeals No. 36202-3

**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO REVIEW.

1. Must this court remand for correction of the judgment and sentence in this case where the judgment contains a clerical error in the total months of confinement ordered?
2. Is the remaining portion of defendant's petition time barred where he alleges offender score miscalculation but filed the petition more than one year post judgment, and where the judgment is valid on its face and he stipulated to the offender score calculation?

B. STATEMENT OF THE CASE.

On April 25, 2003, as part of a negotiated plea agreement, Defendant pleaded guilty to one count of first degree unlawful possession of a firearm. (Statement of Defendant on Plea of Guilty, Appendix B).<sup>1</sup> Defendant agreed to a sentence of 116 months on this case (02-1-01499-4), to run consecutive to a 52-month sentence on cause number 02-1-05810-0. (Findings and Conclusions, Appendix C). The court sentenced defendant on December 15, 2003, to a total of 168 months -- 116 months on this case (cause number 02-1-014799-4), consecutive to a 52-month

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<sup>1</sup> All appendices refer to the appendices attached to the State's original response to defendant's personal restraint petition filed in the Court of Appeals.

sentence on cause number 02-1-05810-0. (Appendix A). Paragraph 4.5 of the Judgment and Sentence provides as follows:

**CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:  
**(a) CONFINEMENT.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>116</u> months on Count <u>I</u>	<u>        </u> months on Count <u>        </u>
<u>        </u> months on Count <u>        </u>	<u>        </u> months on Count <u>        </u>
<u>        </u> months on Count <u>        </u>	<u>        </u> months on Count <u>        </u>

**Actual numbers of months of total confinement ordered is: 168**

**CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Consecutive to 02-1-05810-0

(Appendix A).

There was no direct appeal from this judgment, and the judgment became final on the date it was entered, December 15, 2003.<sup>2</sup>

Defendant filed a personal restraint petition on April 5, 2007. In his petition he made three claims: (1) that the trial court erred in the calculation of his offender score where it used "35 Fish and Wildlife Tickets, which were "unranked crimes," and should not have counted in the Offender Score," (2) that the exceptional sentence entered was

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<sup>2</sup> Defendant erroneously asserts that there was a direct appeal in this matter that was not final until September 13, 2007. Defendant is referring to *State v. Tobin*, 161 Wn.2d 517, 166 P.3d 1167 (2007), filed by this court on September 13, 2007. This direct appeal stems from Pierce County Cause Nos., 02-1-05810-0, and 02-1-01236-3, and not 02-1-01499-4, the current case before the court. In that opinion, this court references the current case before the court, and also outlines the current offenses which were listed in the offender score presently before the court. 161 Wn.2d at 520-21, f.n. 1.

unlawful under *Blakely v. Washington*,<sup>3</sup> and (3) that the sentence imposed exceeded the statutory maximum. (PRP at 3-5).

The State filed a response to the personal restraint petition. In its response the State argued that the petition was time barred, but agreed that the judgment entered in this case contained an error and that remand was appropriate to correct the 168 month sentence to a 116 month sentence, as reflected in the court's factual findings entered in support of an exceptional sentence. (Response to Personal Restraint Petition at 6-7).

The Court of Appeals dismissed the petition and failed to remand for correction of the judgment and sentence. (Order Dismissing Petition).

Defendant petitioned this Court for review. In his petition for review he alleged new errors, including that the sentencing court failed to make a "same criminal conduct" determination prior to calculating his offender score and that the trial court erroneously included misdemeanors in his offender score. (Motion for Discretionary Review at 3, 4, 7).

This Court accepted review and ordered that the parties submit supplemental briefs "addressing the time bar issue and the issue of the

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<sup>3</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that a convicted offender has a Sixth Amendment right to have a jury determine, upon proof beyond a reasonable doubt, any fact, other than the fact of prior conviction, that increases the penalty for a crime above the standard sentencing range).

scoring of unranked fish and wildlife misdemeanors.” (Order dated June 4, 2008).

C. LAW AND ARGUMENT.

1. THE STATE AGREES THAT REMAND FOR A CORRECTION OF THE JUDGMENT AND SENTENCE IN THIS CASE IS WARRANTED WHERE THE JUDGMENT CONTAINS A SCRIVENER’S ERROR AS TO TOTAL MONTHS OF CONFINEMENT ORDERED.

The State agrees there is an invalidity in the judgment and remand for correction of the judgment is proper.

In this case the trial court imposed consecutive sentences of 116 months on this case and 52 months on cause number 02-1-05810-0, for a total of 168 months. For reasons unknown, the court listed the *total* sentence of 168 months as the “actual number of months of total confinement” on this cause number. (Appendix A). This, results in a sentence that appears to exceed the statutory maximum. But the sentence on *this* case (02-1-01499-4) is clearly intended to be a 116-month sentence, which does not exceed the 120-month statutory maximum.<sup>4</sup> Thus, the error in the judgment was nothing more than a clerical mistake. A clerical mistake is one that, when amended, would correctly convey the

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<sup>4</sup> Unlawful possession of a firearm in the first degree is a class B felony subject to a maximum penalty of 10 years in prison. RCW 9A.040(1)(b); RCW 9A.20.021(1)(b).

intention of the court based on other evidence. *State v. Priest*, 100 Wn. App. 451, 455, 997 P.2d 452 (2000).

The State agrees that with respect to the issue of total months confinement ordered in this case, 168 months, that this exceeds the statutory maximum, and remand to correct this clerical error is appropriate. The judgment as it stands, with respect to this portion only, is invalid. The rest of the judgment should remain in tact. See *In re PRP of West*, 154 Wn.2d 204, 206, 110 P.3d 122 (2005).

The State, in its original briefing in the Court of Appeals, looked to the 168 months as an error in the judgment and advised that correction was appropriate. The State at that time did not concede that it rendered the judgment “invalid on its face.” However, upon further review, the State believes that whether one calls it “invalid on its face” or a “mere scrivener’s error” the point is that the court has the duty to correct the judgment, which at this time exceeds the statutory maximum. As this Court said in *In re West*, 154 Wn.2d 204, 110 P.3d 1122 (2005) it is not “what the notation means, but what weight it carries,” and although it is clear here that the intent of the court was 116 months, the weight of the judgment carries the apparent authority for 168 months. For this reason, remand for correction of the judgment is required.

2. DEFENDANT'S OFFENDER SCORE  
CALCULATION IS TIME BARRED WHERE HE  
STIPULATED TO THE CALCULATION AND  
WHERE THE JUDGMENT IS VALID ON ITS  
FACE.

- a. This Court should not consider amendments to defendant's personal restraint petition, and issues which were not considered below.

In defendant's original petition to the Court of Appeals, he complained that the trial court erroneously included 35 "unranked felonies" in the judgment and sentence. *See* PRP at 3-4. The Court of Appeals rejected this claim, correctly concluding that unranked felony offenses may be included in the offender score. (Order Dismissing Petition at 1). The defendant then petitioned this Court for review, arguing that the court erred in including these 35 unranked crimes, which were actually "misdemeanors," and that such offenses constitute the "same criminal conduct." Motion for Discretionary Review at 4, 7. This Court asked the State to "submit supplemental briefs addressing the time bar issue and the issue of the scoring of unranked fish and wildlife misdemeanors."

Defendant should not be allowed to amend his personal restraint petition at this time to raise a challenge that his actual claim is that the 35 offenses are "misdemeanors," and that they constitute the same criminal conduct, as opposed to his claim that they are "unranked felonies." *See In re Benn*, 134 Wn.2d 868, 938-39, 952 P.2d 116

(1998) (holding that an amendment to a personal restraint petition is procedurally impossible because there is no provision at all regarding amendments to personal restraint petitions.”); *See also State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) (“An issue not raised or briefed in the Court of Appeals will not be considered by this court.”).

This Court should limit its consideration to those issues raised and presented to the Court of Appeals in this matter. Any additional claims defendant may have must be brought in a separate petition.

- b. Defendant’s offender score challenge is time-barred where he stipulated to the calculation of the score and the judgment is valid on its face.

Regardless of the framing of the issue, defendant cannot get around the time bar of RCW 10.73.090, because neither claim shows that this portion of the judgment is invalid on its face.

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Here, defendant’s judgment became final on the date it was entered, December 15, 2003. *See* RCW 10.73.090(3)(a). Thus, Defendant’s claim is time barred unless he can establish that the judgment

is invalid on its face, or that his claims are subject to one of the exceptions outlined in RCW 10.73.100.<sup>5</sup> Defendant fails to do so.

**i. Same Criminal Conduct.**

Defendant complains that the trial court erroneously included 35<sup>6</sup> fish and wildlife violations in his offender score because such crimes constitute the same criminal conduct. Defendant proffers no evidence that he asked the original sentencing court to make such a finding. Instead, defendant in this case stipulated to his criminal history and has waived any argument regarding same criminal conduct.

Where a court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. RCW 9.94A.589(1)(a). For offender score purposes, multiple crimes encompass the same criminal conduct when they involve the same objective criminal intent, the same victim, and the same time and place. RCW 9.94A.589(1)(a). Failure to meet any one

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<sup>5</sup> Here, defendant does not claim that his petition meets any of the exceptions contained in RCW 10.73.100, instead his argument rests entirely on whether the judgment is invalid on its face. PRP at 5.

<sup>6</sup> These 35 offenses were not a part of the cause number before the court, under 02-1-01499-4; instead these offenses arose out of a different cause number, 02-1-01236-3, and were included as part of "other current" offenses since they were sentenced on the same day. See *State v. Tobin*, 161 Wn.2d at 520-21.

element precludes a finding of the same criminal conduct. *State v. Morris*, 123 Wn. App. 467, 475, 98 P.3d 513, 517 (2004).

When challenging a judgment, a defendant must first show the existence of an error of fact or law “within the four corners of his judgment and sentence.” *State v. Ross*, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004). Generally, a defendant cannot waive a challenge to a miscalculated offender score where the claimed sentencing error is a legal one. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). But a defendant may waive a miscalculated offender score if the alleged error involves an agreement to facts, later disputed, or a matter of trial court discretion. *Goodwin*, 146 Wn.2d at 874.

Where a defendant stipulates to an offender score, such a stipulation waives a determination of whether offenses constitute “same criminal conduct” pursuant to RCW 9.94A.525(5)(a)(i). See *State v. Ross*, *supra* at 232 at f.n. 3, 95 P.3d 1225 (2004) (citing *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000)).

This Court most recently considered and rejected the issue here: whether an agreement to the calculation of the offender score waives the defendant’s right to challenge her sentence on the basis of same criminal conduct. *In re Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007). This Court

held that where a defendant fails to identify a factual dispute for the court's resolution and fails to request an exercise of the court's discretion, the defendant has waived a challenge to calculation of his offender score. *Id.* at 495 (citing *State v. Nitsch*, 100 Wn. App. 512, 520-523, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000)).

Like *Shale*, *supra*, the defendant in this case affirmatively agreed to both the calculation of his offender score and the standard range. (Appendix B). After entering such an agreement pursuant to the plea, and the judgment and sentence being valid on its face, the defendant cannot attack at this time the finding (or lack of finding) of whether his crimes encompass the same criminal conduct under RCW 9.94A.589.

Under *Goodwin*, and *Ross*, *supra*, there is not any error of fact or law within the four corners of defendant's judgment and sentence. Moreover, defendant has proffered nothing to this court to show that at the time of his original sentencing on the fish and wildlife offenses, he had the court make such a finding. See RCW 9.94A.525(5)(a)(i) ("Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense).

Because defendant failed to request the court to exercise its discretion at sentencing, and instead chose to stipulate to the offender

score, defendant's challenge to his offender score calculation is time barred.

**ii. Unranked felony/misdemeanor.**

Defendant is also incorrect that as an unranked felony, the court could not include his 35 fish and wildlife violations in his offender score. While these may be unranked, they are still felonies (not misdemeanors as defendant claims) and thus, each add an additional point. *See* RCW 77.15.260(3)(b) (unlawful trafficking in fish, shellfish in the first degree— is a class C felony<sup>7</sup>); RCW 9.94A.589(1)(a) (score other current offenses on the scoring form line entitled “other current offenses”).

“Under this State’s determinant sentencing scheme, once a defendant has been convicted of a felony, the sentencing judge determines the defendant’s standard range sentence based on the *seriousness level of the current offense* and the defendant’s offender score.” *State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006); (citing RCW 9.94A.530(1), .510) (emphasis added). “The defendant’s offender score is determined by his or her other convictions, with the scoring of those prior convictions

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<sup>7</sup> While the judgment and sentence only lists the offenses as “35 fish and wildlife violations” defendant may not complain that these are simply misdemeanors where he entered a stipulation that these current offenses were Class C felonies, and each added one point to his offender score. Nor does this classification call into question whether the face of the judgment is valid. Fish and wildlife violations do include felony offenses. *See e.g.* RCW 77.15.260(3)(b).

dependent upon the nature of the current offense.” *State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006) (citing RCW 9.94A.525).

RCW 9.94A.589 provides the method of calculation of the offender score when including other current offenses:

(1) (a) Except as provided in (b) or (c)<sup>8</sup> of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score . . .

Thirty five fish and wildlife offenses were included in the current offenses and thus were included in the calculation of the offender score, pursuant to RCW 9.94A.525.<sup>9</sup> Under RCW 9.94A.525(7), unlawful possession of a firearm in the first degree, is a Class B nonviolent felony, and as such, the court was required to count one point for each adult prior felony conviction. RCW 9.94A.589 requires the court to treat “other currents” as prior convictions, for “offender score” purposes.

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<sup>8</sup> RCW 9.94A.589(b) addresses persons convicted of two or more serious violent offenses, and section (c) addresses persons convicted of both unlawful possession of a firearm and theft of a firearm, or possession of a stolen firearm, neither of these provisions are at issue in this case.

<sup>9</sup> RCW 9.94A.525(1) provides “A prior conviction is a conviction which exists before the date of sentence for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.

Here, the defendant stipulated to the existence of 35 “other current” fish and wildlife offenses, that were Class C felonies. Under RCW 9.94A.525(1)(c), a class C prior felony conviction is also included in the offender score, unless the offense has washed out under the five year crime free provision. Thus, regardless of the “seriousness level” of the fish and wildlife offense, the nature of the offense as a Class C felony mandated inclusion in the offender score calculation.

In other words, the seriousness level does not determine the calculation of the offender score and therefore does not determine the standard range sentence defendant is facing. The seriousness level of a crime comes into play only when determining the standard range sentence: “[t]he intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range.” RCW 9.94A.530(1); *See also* RCW 9.94A.520 (“The offense seriousness level is determined by the offense of conviction.”).

Defendant cites to *In re Goodwin*, *supra*, in support of his argument, but *In re Goodwin* is silent on this issue.

Nor is there any merit to the claim that these were simply misdemeanors. This Court’s order directing briefing of issues states, “The parties are requested to submit supplemental briefs addressing the time bar issue and the issue of the scoring of unranked fish and wildlife

*misdemeanors.*” As defendant’s stipulation states, the offenses were Class C felonies, not misdemeanors. It is unclear where the use of misdemeanor comes from in this case. Because the face of the judgment lists the offenses as felonies, and there is nothing from the face of the judgment to indicate that they are anything other than felonies, the judgment is facially valid and there is no one year time bar exception.

D. CONCLUSION.

The State agrees that the Court of Appeals erred when it failed to remand for a correction on the judgment and sentence as to total time of confinement ordered. However, the remainder of the petition is time barred where the defendant agreed to the calculation of his offender score and fails to establish that the remainder of the judgment is invalid on its face. The State requests that this court affirm the Court of Appeals with respect to all other issues raised to the Court in the original petition.

DATED: July 7, 2008.

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Prosecuting Attorney



MICHELLE LUNA-GREEN  
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

to petitioner

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