

May 13, 2009
Filing fee waived.
Genevieve Townsley
Clerk

FILED
APR 30 2009
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By SA 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

)
) Ct. App. # 279499
) NO. Trial Crt # 04-1-00158-0
) AMENDMENT TO
) PERSONAL RESTRAINT PETITION
)
RAYMOND MARTINEZ,
Petitioner's Full Name

83219-6

If there is not enough room on this form, use the back of these pages or use other paper. Fill out all of the form and other papers you are attaching before you sign this form in front of a notary.

A. STATUS OF PETITIONER

I, RAYMOND MARTINEZ, located at Airway Heights Correction Center, P.O.
(Full name and current address)
Box 2049, Airway Heights, WA 99001-2049

Apply for relief from confinement. I am X am not _____ now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order: re-commitment
(Identify type of court order)

1. The court in which I was sentenced is: GRANT COUNTY SUPERIOR COURT
2. I was convicted of the crime of: First Degree Burglary
3. I was sentenced after (check one) Trial X Plea of Guilty _____ on July 12, 2004
Date of Sentence
The Judge who imposed sentence was Honorable John Antosz
4. My lawyer at trial court was Attorney Randy Smith
Name and Address if known

5. I did X did not _____ appeal from the decision of the trial court. (If the answer is that I did), I appealed to: Court of Appeals: Division III
Name of court or courts to which appeal took place

My lawyer for my appeal was: Attorney Janet Gemberling "NONE"
Name and address if known or write "none"

The decision of the appellate court was N/A was not N/A published. (If the answer is that it was published, and I have this information) the decision is published in N/A

6. Since my conviction I have X have not _____ asked a court for some relief from my sentence other than I have already written above. (If the answer is that I have asked, the court I asked was Division III. Relief was denied on
Name of court
Year 2007.
Date of Decision or, if more than one, all dates)

7. (If I have answered in question 6 that I did ask for relief), the name of my lawyer in the proceeding mentioned in my answer to question 6 was N/A

8. If the answers to the above questions do not really tell about the proceedings and the courts, judges and attorneys involved in your case, tell about it here: N/A

B. GROUNDS FOR RELIEF:

(If I claim more than one reason for relief from confinement, I will attach sheets for each reason separately, in the same way as the first one. The attached sheets should be numbered "First Ground", "Second Ground", "Third Ground", etc). I claim that I have _____ reason(s) for this court to grant me relief from the conviction and sentence described in Part A.

_____ Ground
(First, Second, etc)

1. I should be given a new trial or released from confinement because (State legal reasons why you think there was some error made in your case which gives you the right to a new trial or release from confinement): These reasons are stated and supported in my 7.8

motion. please refer to my motion.

2. The following facts are important when considering my case. (After each fact statement put the name of the person or persona who know the fact and will support your statement of the fact. If the fact is already in the record of your case, indicate that also) _____

See STATE v. SABALA 44 Wn. App. 444, 723 P.2d 5(1986) also in my 7.8

motion. see STATE v. GOTCHER, 52 Wn. App. 350, 354, 356, 759 P.2d 1216 (1988), STATE v. BEFFORD, 148 Ariz. 508-10, 715 P.2d 761 (1986), also in 7.8

3. The following reported court decisions (indicate citations if possible) in cases similar to mine show the error I believed happened in my case. (If none are known, state "None Known". _____)

Please see my 7.8 motion

4. The following statutes and constitutional provisions should be considered by the court. (If none are now, state, "None Known") _____

Section violated include: RCW 9A.04.110(6), and VI and XIV Amendment of the United States Constitution. Also, included in my 7.8 motion.

5. This petition is the best way I know to get the relief I want, and not other way will work as well because: I am following the Rule's set forth by and through CrR Rules, GR Rules, CR Rules, RAP Rules, and Washington State and United States Constitution.

C. STATEMENT OF FINANCES

If you cannot afford to pay the filing fee or cannot afford to pay an attorney to help you, fill this out. If you have enough money for these things, do not fill out this part of the form.

1. I do / do not ___ ask the court to file this without making me pay the filing fee because I am so poor I cannot pay the fee.

2. I have a spendable balance of \$ 0 in my prison or institution account.

3. I do / do not ___ ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer. **Please appoint counsel**, per CrR Rule: 3.1(b)(2) and STATE V. ROBINSON, 153 Wn.2d 689, 692, 700-05, 107 P.3d 90(2005)

4. I am am not / employed. My salary or wages amount to \$ 0 a month. My employer is _____

(name and address)

5. During the past 12 months I did ___ did not ✓ get any money from a business, profession or other form of self-employment. (If I did, it was _____ and the total income I got was \$ 0.)
(kind of self-employment)

6. During the past 12 months, I
did did not get any rent payments. If so, the total amount I got was
\$ 0

___ N/A get any interest. If so, the total amount I got was \$ 0

___ N/A get any dividends. If so, the total amount I got was \$ 0

___ N/A get any other money. If so, the amount of money I got was
\$ 0

7. ___ N/A have any cash except as said in answer 2. If so, the total amount
of cash I have is \$ 0

___ N/A have any savings accounts or checking accounts. If so, the
amount in all accounts is \$ 0

___ N/A own stocks, bonds, or notes. If so, their total value is
\$ 0

8. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item of property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value
	<u>0</u>
	<u>0</u>
	<u>0</u>
	<u>0</u>

9. I am ___ am not married. If I am married, my wife or husband's name and address is _____

10. All of the persons who need me to support them are listed here.

Name and Address	Relationship	Age
AS A RESULT OF MY INCARCERATION. I NO LONGER HAVE CONTACT WITH MY CHILDREN.		

11. All the bills I owe are listed here.

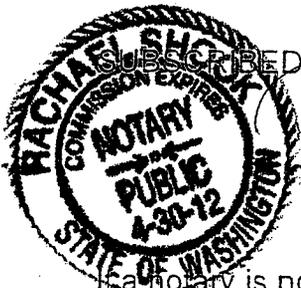
Name of creditor you owe money to	Address	Amount
COUNTY LEGAL FINANCIAL OBLIGATIONS,		AMMOUNT UNKNOWN.

E. OATH OF PETITIONER

THE STATE OF WASHINGTON)
 County of SPOKANE) ss.

After being first duly sworn, on oath, I depose and say That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

[Signature]
 [sign here]



SUBSCRIBED AND SWORN to before me this 16 day of APRIL.

[Signature]
 Notary Public in and for the State of Washington, residing at Spokane

If a notary is not available, explain why none is available and indicate who can be contacted to help you find a notary: _____

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

_____ [date].

_____ [sign here]

I. MOTION

COMES NOW, the defendant, Raymond Martinez, Pro se and moves the court for Motion for relief from Judgment and Sentence under CrR Rule 7.8(C)(2) barred by RCW 10.73.090, STATE v. SMITH, 144 Wn.App 860 (2008)

II, AFFIDAVIT OF TRUTH

I Raymond Martinez, declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

III. RELIEF SOUGHT

The defendant seeks a reversal and dismissal of conviction under Section V. and VI. of this motion

IV. ISSUES

Assignment of error's No. 1: The trial court's failure to properly define deadly weapon in first degree burglary violated RCW 9A.04.110 (6), VI & XIV Amendment of the United States Constitution.

(1) Defendant was improperly charged with first degree burglary.

V. FACTS RELEVANT TO MOTION

This case went to jury trial on approximately July 2004, verdict was entered in approximately July 2004, sentencing occurred approximately August 2004, direct appeal filed approximately immediately after sentencing and denied approximately two years later. Also, an initial PRP was filed and denied within approximately one year after the denial of direct appeal.

On approximately February 17, 2004, in the morning hours, the Grant County Sheriffs Deputies responded to a silent alarm call. Upon arrival the defendant apparently was running out of the structure. Grant County Deputies were involved in a short foot chase. Deputies tackled

and placed defendant, Raymond Martinez, in handcuffs and placed him in a marked vehicle. After further investigation, Deputies retraced the steps of the foot pursuit and discovered for the first time a knife that appeared to fit a sheath that defendant had on his belt.

According to Sheriff's Deputies trial courtroom testimony, defendant had been subdued, in handcuffs, and placed in back of a marked patrol vehicle. At which time, Officer's then discovered through investigation, a knife which was found in the path in which the defendant had taken flight, after apprehension.

VI. ARGUMENT

The defendant states that the charge of first degree burglary under RCW 9A.52.020(1), does not fit the elements of what is considered to be a deadly weapon in his case and circumstances of events.

In Gotcher, Courts held:

"We reject the State's position, that possession of a **switchblade knife** alone is a sufficient circumstance of use to render the knife a deadly weapon, because it makes a nullity of the "**used, attempted to be used, or threatened to be used**" language of RCW 9A.04.110(6). A switchblade knife falls within the **second hall** classification and is therefore not per se a deadly weapon. Hence, there must be some manifestation of willingness to use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6)." . . .

"We cannot know whether the jury applied the proper law in finding Gotcher guilty of first degree burglary. Hence, we cannot be confident that Gotcher received a fair trial. We conclude that the error was prejudicial.

STATE v. GOTCHER, 52 Wn. App. 350, 354, 356, 759 P.2d 1216 (1988)

Martinez's case is the same as in the case of Gotcher, because "we cannot know whether the jury applied the proper law in finding Martinez guilty of first degree burglary. Hence, we cannot be confident that Martinez received a fair trial. This would conclude that the error was prejudicial toward Martinez receiving a fair trial."

"the statute defining first degree burglary, RCW 9A.52.020(1) provides:

"A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person therein."

The term "armed" in the statute means that the weapon is readily accessible and available for use." Hence, Martinez was not armed as the alledge weapon was not readily accessible and available for use.

"The term "deadly weapon" is defined in former RCW as follows:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious bodily injury[.]"

STATE v. GOTCHER, 52 Wn. App. 350, 353-56 759 P.2d 1216 (1988)

Likewise, as in Gotcher, Martinez's case is the same as in Gotcher, because as interpreted by the Court in Gotcher, Martinez did not meet the requirement as defined under "deadly weapon," which, under the circumstances Martinez did not use, attempt to be used, or threaten to be used, or was not readily capable of causing death or serious bodily injury to anyone.

Certainly, this would include any threat upon any officer involved, as the knife in the case of Martinez was discovered and located after the fact, and found a great distance from where Martinez was seated in the back seat of a police vehicle.

In Befford, Court held:

"that to be armed defendant must possess the item considered a deadly weapon in such a manner as to indicate his willingness or present a ability to use it as a weapon. . . The rationale of the befford court was that under their statute, Ariz. Rev. Stat. Ann. § 13-105(7), which defines dangerous instrument as "anything that under the circumstances in which it is used, . . . is readily capable of causing death or serious physical injury"

STATE v. BEFFORD, 148 Ariz. 508-10, 715 P.2d 761 (1986)

Again, Martinez's case is very similiar to the Befford case, because as in Befford, the Court ruled in Befford that in order for the defendant to be armed, the **defendant must posses the item considered a deadly weapon** in such a manner as to indicate his willingness or present ability to use it as a weapon, and in the case of Martinez, their never existed any of the requirements for defendant (Martinez), as he did not, and never did posses the item considered a deadly weapon in such a manner, or any manner, as to indicate his willingness or present ability to use it as a weapon.

Moreover, the knife found, was discovered approximately thirty (30) minutes after Martinez was placed into the back seat of a marked police vehicle.

In SABALA Courts held:

"a person is **"armed"** if a weapon is **"easily accessible and readily available for use by defendant for either offensive or defensive purposes."**

STATE v. SABALA, 44 Wn. App. 444 723 P.2d 5 (1986)

Martinez's case is the same as in Sabala, because as in Sabala, the Court's interpretation of "a person is **"armed"** if a weapon is "easily accessible and readily available for use by defendant for either offensive or defensive purposes," and in the case of Martinez, he was never **"armed" with a knife**, or weapon of any kind "easily accessible and readily available for use by defendant for either offensive or defensive purposes." Sabala, Id. at 444

VII. CONCLUSION

Conclusively, Martinez's case arguement is similiar, if not much stronger than the case's of Sabala, Befford, and even Gotcher, because unlike either of the aforementioned case's, Martinez was not only seated in the back of a police vehicle when Deputies discovered a knife a half

hour after apprehension and placement into the back of police vehicle, a more compelling argument in Martinez's favor is the fact that he was already handcuffed and in an impossible position to impose any sort of accessible, readily, willingness, present ability to use, attempt to use, or even threaten to use the alleged deadly (knife) weapon.

Martinez argues, without proper jury instruction on the correct definition of "armed" with a "deadly weapon" as used in RCW 9A.52.020(1) First Degree Burglary; it would be completely unreasonable to be confident that Martinez received a fair jury trial. Furthermore, would conclude that this type of serious aggravated trial court error was prejudicial toward Martinez receiving the fair trial "guaranteed," Martinez, "by the Sixth Amendment of the United States Constitution." Strickland v. Washington, 466 U.S. 688, 80 L.Ed 2d 674, 104 S. Ct 2054 (1984)

Prior to arrest, a knife was never an issue and was never a threat during the short foot pursuit as Martinez was being chased by officer's, and finally, could have never imposed any harm upon officer's when discovered approximately thirty (30) minutes after Martinez was handcuffed and placed in the back seat of a marked police vehicle.

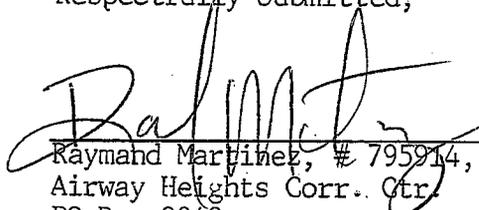
VIII. RELIEF SOUGHT

For the reasons put forth above, the Petitioner respectfully request that this court grant his motion, and award any and all relief as provided for by law.

In addition, the Petitioner respectfully request that this court respond promptly regarding confirmation of this motion along with answer to fee waiver and requested court appointed counsel to help defendant with representing this motion for relief.

I Raymand Martinez, hereby swear under the penalty of perjury of the Laws of the State of Washington, that I have read the contents of the above motion, and it is true and correct to the best of my knowledge. Signed this 22 day of April 2009.

Respectfully Submitted,



Raymand Martinez, # 795914, LA-59
Airway Heights Corr. Ctr.
PO Box 2049
Airway Heights, WA 99001-2049

FILED

APR 30 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

IN THE COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

Plaintiff,)

v.)

RAYMOND MARTINEZ,)
Defendant,)

Ct. App. #279499
Tr. Crt #04-1-00158-0

**DECLARATION OF SERVICE
BY MAILING**

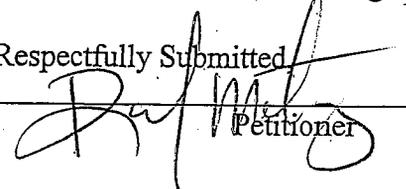
I, RAYMOND MARTINEZ, #795914, in the above entitled cause, do hereby declare that I have served the following documents:
Personal restraint Petition, Note To Docket, and Statement of finances to,

Grant County Prosecutors Office
-- JOHN KNODELL
P.O. BOX 37 Ephrata, WA. 98823

ATTN; Sherry L. Hirst
COURT OF APPEALS DIV. III
500 N. Cedar ST.
Spokane WA. 99201-1905

I deposited with the L-Unit Officer Station, by processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001-2049.

On this 22 day of April, 2009.
I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted

Petitioner

FILED

MAR 30 2009



COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____



04-004201

FILED
KENNETH O. KUNES, CLERK
BY _____ DEPUTY

JUL 12 2004

RECORDED IN _____
VOLUME _____ PAGE _____

JUDGMENT #

04-0-00980-6

SUPERIOR COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
v.)
)
RAYMOND (NMI) MARTINEZ,)
)
Defendant.)
)
SID# WA18510064; DOB 08-17-72)
)
AGENCY: GCSO 04-GS01566)
)

No. 04-1-00158-0

279499

JUDGMENT AND SENTENCE (JS)

Prison [] RCW 9.94A.712 Prison
Confinement

83219-6

[] Clerk's action required, para 4.1 & 5.8

I. HEARING

1.1 A sentencing hearing was held present were:
Defendant: RAYMOND (NMI) MARTINEZ
Defendant's Lawyer: Randy W. Smith
(Deputy) Prosecuting Attorney: Albert Lin

II. FINDINGS

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

2.1 CURRENT OFFENSE(S): The defendant was found guilty on April 9, 2004 by JURY TRIAL

COUNT	CRIME with RCW	CRIME DATE
1	Burglary in the First Degree, RCW 9A.52.020(1)(a)	2-17-04
3	Malicious Mischief in the Third Degree, RCW 9A.48.090(1)	2-17-04
4	Obstructing a Law Enforcement Officer, RCW 9A.76.020(1)	2-17-04
5	Resisting Arrest, RCW 9A.76.040(1)	2-17-04

as charged in the (Amended) X Information.

- The court finds that the defendant is subject to sentencing under RCW 9.94A.712.
- A special verdict/finding for use of **firearm** was returned on Count(s) _ RCW 9.94A.609, .510
- A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) _ RCW 9.94A.602, .510
- A special verdict/finding of **sexual motivation** was returned on Count(s) _ RCW 9.94A.835
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) __, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) . RCW 9.94A.605, RC W 69.500.401(a), RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130
- The court finds that the offender has a **chemical dependency that has contributed to the offense(s)**. RCW 9.94A.607
- The crime charged in Count(s) involve(s) **domestic violence**.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

CURRENT OFFENSES ENCOMPASSING

- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

OTHER CURRENT OFFENSES USED IN CALCULATING OFFENDER SCORE

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
1	Robbery Second Degree	5-11-99	Grant County, 99-1-00094-6	10-30-98	A	V
2	VUCSA: Attempted Possession of Heroin	6-25-00	Grant County, 00-1-00268-1	5-5-00	A	NV

- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

PRIOR CONVICTIONS ENCOMPASSING

- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

PRIOR CONVICTIONS COUNTED AS ENHANCEMENTS

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE(not including enhancements)	PLUS ENHANCEMENT *	Total STANDARD RANGE (including enhancements)	MAXIMUM TERM
1	3	VII	31-41 MONTHS		31-41 MONTHS	LIFE IMPRISONMENT
3	GROSS MISD	GROSS MISD	GROSS MISD		GROSS MISD	1 YEAR
4	GROSS MISD	GROSS MISD	GROSS MISD		GROSS MISD	1 YEAR
5	MISD	MISD	MISD		MISD	90 DAYS

*(F) Firearm, (D) Other deadly weapons, (V)VUCSA in protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile .Present

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence
 above within below the standard range for Count(s) _____. **Findings of fact and conclusions of law are attached in Appendix 2.4.** The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, 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 finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753
 The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: **THE STATE RESERVES RECOMMENDATION.**

III. JUDGMENT

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

3.2 The Court DISMISSES Counts N/A

The defendant is found NOT GUILTY of:
Count 2: Theft in the First Degree
Count 6: Possession Stolen Property First Degree

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

\$	Restitution to:	RTN/RJN	
\$	Restitution to:		
\$	Restitution to:		
	<small>(Name and Address--address may be withheld and provided confidentially to Clerk's Office).</small>		
<u>\$500.00</u>	Victim assessment		RCW 7.68.035
\$	DNA Test Fee, RCW 43.43.754		
<u>\$241.40</u>	Court costs, including RCW 9.94A.760, 9.94A.505,		
	10.01.160		CRC
	Criminal filing fee	<u>\$110.00</u>	FRC
	Witness costs	\$	WFR
	Sheriff service fees	<u>\$131.40</u>	SFR/SFS/SFW/SRF
	Jury demand fee	\$	JFR
	Extradition costs	\$	EXT

Other \$

\$ 500 Fees for court appointed attorney RCW 9.94A.760 PUB

\$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760 WFR

\$ _____ Fine RCW 9A.20.021 [] VUCSA chapter 69.50 RCW, [] VUCSA additional fine
deferred due to indigency RCW 69.50.430 FCM/MTH

\$ _____ VUCSA additional fine [] deferred due to indigency RCW 69.50.430 FCM/MTH

\$ _____ Drug enforcement fund of _____ RCW 9.94A.760 CDF/LDI/PCD
NTF/SAD/SDI

\$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690 CLF

\$ _____ \$3,000 Meth/amphetamine Cleanup Fine RCW 69.50.440
or 69.50.401 MTH

\$ _____ Felony DNA collection fee [] not imposed due to hardship RCW 43.43. (Ch. 289 L
2002 § 4).

\$ _____ Emergency response costs (Vehicular Assault,
Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ _____ Other costs for: _____

\$ 1241.40 TOTAL RCW 9.94A.760

[] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered, RCW 9.94A.142. A restitution hearing:

[] shall be set by the prosecutor

[] is scheduled for _____

[] RESTITUTION. Schedule attached.

[] Restitution ordered above shall be paid jointly and severally (if adjudicated) with:

NAME of other defendant	CAUSE NO.	(VICTIM NAME)	(AMOUNT)

RJN

[] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction, RCW 9.94A.7602

All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____, RCW 9.94A.760

[] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate, RCW 9.94A.760

[] The defendant shall pay the costs of services to collect unpaid legal financial obligations, RCW 36.18.190

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 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340

4.3 The defendant RAYMOND (NMI) MARTINEZ shall not have contact with _____ (name, DOB), including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

Domestic Violence Protection Order or Anti Harassment Order is filed with this Judgment and Sentence.

4.4 OTHER: _____

The following firearm(s) shall be forfeited pursuant to RCW 9.41.098: _____

4.5 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>38</u>	months on Count	<u>1</u>	months on Count
_____	months on Count	_____	months on Count
_____	months on Count	_____	months on Count

Actual number of months of total confinement ordered is: _____
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

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: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

(b) CONFINEMENT. RCW 9.94A.712: The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count _____	minimum term _____	maximum term _____
Count _____	minimum term _____	maximum term _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6 **COMMUNITY PLACEMENT** is ordered as follows: Count _____ for _____ months; Count _____ for _____ months; Count _____ for _____ months;

COMMUNITY CUSTODY for count(s) _____, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

COMMUNITY CUSTODY is ordered as follows:

Count 1 for a range from 18 to 36 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for a period of earned early release awarded pursuant to RCW 9.94A.728(1) and (2), which ever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000 See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

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 DOC-approved education, employment and/or community restitution; (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 DOC; (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: _____

Defendant shall remain within outside of a specified geographical boundary, to wit: _____

The defendant shall participate in the following crime related treatment or counseling services: _____

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions: defendant shall pay all court-ordered legal financial obligations; _____

For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7

working days.

4.7 [] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

SENTENCE AND ORDER AS TO GROSS MISDEMEANOR - MISDEMEANOR

IT IS FURTHER ORDERED:

4.9 Defendant is sentenced by imprisonment in the Grant County jail

for a period of 365 days, with 365 days suspended for 2 years on good behavior of the defendant as to Count 3. (SEE APPENDIX G, if applicable)

for a period of 365 days, with 365 days suspended for 2 years on good behavior of the defendant as to Count 4.

for a period of 90 days, with 90 days suspended for 2 years on good behavior of the defendant as to Count 5.

the terms in counts _____ are concurrent/consecutive
[] with each other [] with counts _____ sentenced herein
[] with Cause No. _____

the terms in counts _____ are concurrent/consecutive
[] with each other [] with counts _____ sentenced herein
[] with Cause No. _____

the terms in counts _____ are concurrent/consecutive
[] with each other [] with counts _____ sentenced herein
[] with Cause No. _____

The defendant shall receive credit, against the sentence stated above, for early release time, if any, earned by the defendant pursuant to the policies of the Grant County jail.

GROSS MISDEMEANOR MONETARY ASSESSMENTS:

4.10 Defendant shall pay a fine of \$ _____, with \$ _____ suspended for _____ years.

4.11 CONDITIONS FOR SUSPENSION ON GROSS MISDEMEANOR(S):

SUPERVISION

Defendant shall be supervised by the Department of Corrections, Division of Community Corrections, for _____ months pursuant to the rules and regulations of the Department of Corrections, Division of Community Supervision. Defendant shall report to the Community Corrections Office at 229 First Avenue NW, Ephrata, Washington, immediately or upon release from custody.

(a) The offender shall not use, possess or deliver any controlled substance, except by valid prescription.

(b) Defendant shall not consume alcohol in Grant County, Washington.

(c) _____

(d) Defendant shall appear for review hearing as to the gross-misdemeanor(s) on _____

In the event of any violation of these conditions, all or any portion of the suspended portions of sentence may be imposed.

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period of up to 10 years from the date of the sentence or release from confinement, which ever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed all on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the

obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606

5.4 RESTITUTION HEARING.

Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047

Cross off if not applicable:

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex or kidnapping offense involving a minor as defined in RCW 9A.44.130 (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence

at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

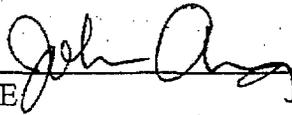
If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

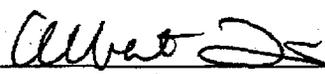
5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: ^{July} APRIL 12, 2004.



JOHN ANTOSZ, JUDGE



Albert Lin, WSBA# 28066
(Deputy) Prosecuting Attorney

Randy W. Smith, WSBA#
29950 Attorney for Defendant

RAYMOND (NMI)
MARTINEZ, Defendant

Translator signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case:

04-1-00158-0

I, KENNETH O. KUNES, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: APRIL _____, 2004. Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. WA18510064
(If no SID take fingerprint card for State Patrol)

Date of Birth 08-17-72

FBI No. 438565HA8

Local ID No. 53007

PCN No. 925489263

Other

Alias name, SSN, DOB: David Ortiz, Richard Henry Martinez

Race:

Asian/Pacific Islander

Black/African-American

Caucasian

Ethnicity:

Hispanic

Sex:

Male

Native American

Other: _____

Non-Hispanic

Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court by:

A. Sperline-Knight

Deputy Clerk. Dated: APRIL 12, 2004

DEFENDANT'S SIGNATURE: _____

(Def refused to sign) ASK

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
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STATE OF WASHINGTON)
) ss.
County of Grant)

WARRANT OF COMMITMENT

THE STATE OF WASHINGTON, To the sheriff of Grant County and to the superintendent and officers in charge of the Washington State Correctional Institution at Shelton, Washington.

WHEREAS RAYMOND (NMI) MARTINEZ has been duly convicted in the Superior Court of the State of Washington, for said county, of the crime(s) of

COUNT	CRIME with RCW	CRIME DATE
1	Burglary in the First Degree, RCW 9A.52.020(1)(a)	2-17-04
3	Malicious Mischief in the Third Degree, RCW 9A.48.090(1)	2-17-04
4	Obstructing a Law Enforcement Officer, RCW 9A.76.020(1)	2-17-04
5	Resisting Arrest, RCW 9A.76.040(1)	2-17-04

and judgment has been pronounced against said defendant, and the Court having decreed that the defendant be punished by classification, confinement and placement in such correctional facility under the supervision of the Department of Corrections, Adult Corrections Division, as said department shall deem appropriate, pursuant to RCW 72.13.120, all of which appears of record.

NOW, THIS IS TO COMMAND YOU, The said sheriff, that you take and deliver the defendant to the proper officers of said institution; and this is to command you, the superintendent and officers in charge of said institution, to receive the said defendant and to confine said defendant at hard labor in said institution as provided by law for the aforesaid term and until such costs are paid, secured, or disposed of as by law provided, and these presents are your authority for the same, **HEREIN FAIL NOT.**

WITNESS THE HONORABLE JOHN ANTOSZ, Judge of Grant County Superior Court, and the seal thereof, this 12 day of ~~APRIL~~, 2004.

July

KENNETH O. KUNES
Clerk of the Superior Court

By: *H. Spurline-Knight*
Deputy Clerk

**ACKNOWLEDGMENT OF ADVICE OF RIGHT TO APPEAL
AND TIME LIMIT FOR FILING COLLATERAL ATTACK**

The court has entered the Judgment and Sentence to which this form is attached. The undersigned, counsel for the defendant or the defendant, and a qualified or certified interpreter (where applicable) acknowledge that the defendant has read or heard, and has acknowledged understanding, the following rights:

RIGHTS REGARDING APPEAL

If the defendant was convicted after trial and upon the defendant's plea of not guilty, or if the defendant was sentenced to a term outside the standard range for confinement, as provided in chapter 9.94A RCW:

1. The defendant has the right to appeal to the Court of Appeals.
2. Unless a notice of appeal is filed with the clerk of this court within thirty (30) days from the entry of the Judgment and Sentence, the right to appeal will be forever lost.
3. The defendant has the right to be represented by a lawyer for the purposes of appeal, including preparation and filing of the notice of appeal. If the defendant cannot afford to hire a lawyer, the court will appoint a lawyer to represent the defendant at public expense.
4. The defendant has the right to have those parts of the trial record necessary for appeal prepared at public expense if the defendant cannot afford to pay for such preparation.

TIME LIMITS FOR COLLATERAL ATTACK

5. No petition or motion for relief from the Judgment and Sentence may be filed after one (1) year has elapsed from the time the Judgment and Sentence becomes final.

The Judgment and Sentence becomes final on the last of the following dates:

- a. when it is filed with the clerk of this court;
 - b. after a direct appeal (see rights above), when an appellate court issues its mandate disposing of such appeal,
 - c. when the United States Supreme Court denies a timely petition for certiorari to review a decision upholding the defendant's conviction on appeal. Filing a motion to reconsider denial of certiorari does not prevent the Judgment and Sentence from becoming final.
6. The time limit stated above does not apply to a petition or motion based solely on one or more of the following grounds:
 - a. newly discovered evidence, if the defendant acted with due diligence in discovering the evidence and filing the petition or motion;

- b. that the statute the defendant is convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- c. the conviction was barred by double jeopardy, under Amendment V to the United States Constitution or Article 1, Section 9 of the Washington State Constitution
- d. the defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- e. the sentence imposed was in excess of the court's jurisdiction;
- f. there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence or other order entered in a criminal or civil proceeding instituted by the state or local government, and either (1) the legislature has expressly provided that the change in the law is to be applied retroactively, or (2) a court, in interpreting a change in the law that lacks such an express legislative intent, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

DEFENDANT'S ACKNOWLEDGMENT

I HAVE READ, OR HAVE HAD READ TO ME, THE FOREGOING STATEMENT; I UNDERSTAND THE RIGHTS ENUMERATED ABOVE AND ACKNOWLEDGE MY RECEIPT OF A COPY OF THESE RIGHTS.

Date: _____

_____ DEFENDANT

DEFENSE COUNSEL'S CERTIFICATION

I CERTIFY, AS DEFENDANT'S COUNSEL OF RECORD, THAT THE DEFENDANT HAS READ, OR HAS HAD READ TO HIM/HER, AND HAS ACKNOWLEDGED TO ME HIS/HER UNDERSTANDING OF, THE FOREGOING STATEMENT.

Date: _____

_____ DEFENSE COUNSEL

INTERPRETER'S CERTIFICATION

I AM CERTIFIED, OR HAVE BEEN FOUND BY THE COURT TO BE QUALIFIED, AS AN INTERPRETER IN THE _____ LANGUAGE, AND I HAVE TRANSLATED THE FOREGOING STATEMENT OF RIGHTS AND DEFENDANT'S ACKNOWLEDGMENT INTO THAT LANGUAGE TO THE DEFENDANT. THE DEFENDANT HAS ACKNOWLEDGED THAT HE/SHE UNDERSTANDS 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.

Date: _____

_____ INTERPRETER



FILED

MAR 27 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY SA



FILED *KK*

MAR 20 2009

KIMBERLY A ALLEN
Grant County Clerk

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

279499

STATE OF WASHINGTON,)
)
 Plaintiff,)
 vs.)
 Raymond Martinez)
 Defendant.)

NO. 04-1-158-0

ORDER TRANSFERRING CrR 7.8
MOTION TO COURT OF APPEALS
FOR CONSIDERATION AS PERSONAL
RESTRAINT PETITION

83219-6

on 3/13/09
Petitioner/Defendant has filed a motion and/or other documents seeking post-judgment relief. Having reviewed the motion and/or other documents, this Court determines that the ends of justice will best be served by their transfer to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2). *

IT IS HEREBY ORDERED this matter is transferred to the Court of Appeals for consideration as a personal restraint petition.

DONE this 19 day of March, 2009.

John Anthony
JUDGE

NO. _____
ORDER TRANSFERRING MOTION
TO COURT OF APPEALS AS
PERSONAL RESTRAINT PETITION

* Court does not find a
substantive showing that
Δ is entitled to relief as
per CrR 7.8(c)(2)

FILED

MAR 13 2009

KIMBERLY A. ALLEN
Grant County Clerk



07-162751

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SUPERIOR COURT FOR WASHINGTON IN THE COUNTY OF GRANT

STATE OF WASHINGTON
Plaintiff,

CASE No. 04-1-00158-0

V.

MOTION FOR RELIEF FROM:
JUDGMENT AND ORDER
UNDER CrR Rule 7.8

RAYMOND MARTINEZ
Defendant,

83219-6

I. MOTION

COMES NOW, the defendant, Raymond Martinez, Pro se and moves the Court for a Motion for relief from Judgment and Order Under CrR Rule 7.8(b)(1)(2)(3)(4)(5), and is not barred by RCW 10.73.090, .100. STATE v. SMITH, 144 Wn.App. 860 (2008)

II. AFFIDAVIT OF TRUTH

I, Raymond Martinez, declare under penalty of perjury under the law of the State of Washington that the foregoing is true and correct to the best of my personal knowledge.

III. RELIEF SOUGHT

The defendant seeks a reversal and dismissal of conviction Under CrR Rule 7.8(a)(1)(2)(3)(4)(5).

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IV ISSUES

Assignment of Error No. 1: The Trial Court's failure to properly define deadly weapon, in 1st degree burglary violated RCW 9A.04.110(6), and XIV Amendment of the United States Constitution.

(1) Defendant was improperly charged with first degree burglary.

V FACTS RELEVANT TO MOTION

On approximately February 17, 2004, in the morning hours, the Grant County Sheriffs Deputies responded to a silent alarm call. Upon arrival the defendant apparently was running out of the building. Grant County Deputies were involved in a short foot chase. Deputies tackled and placed defendant, Raymond Martinez, in handcuffs and placed him in a marked vehicle. After further investigation Deputies retraced the steps of the pursuit and discovered a knife that fit the sheath that defendant had on his belt.

According to Sheriff Deputies Trial Courtroom testimonie, defendant had been subdued, in handcuffs and placed in back of a patrol vehicle. At which time, officer's then discovered through investigation, a knife which was recovered in the defendant's flight path, after apprehension.

VI ARGUEMENT

The defendant states that the charge of first degree burglary Under RCW 9A.52.020(1), does not fit the elements of what is considered to be a deadly weapon in his case and circumstances of events.

In Gotcher, Courts held:

"We reject the State's position, that possession of a switchblade knife alone is a sufficient circumstance of use to render the knife a deadly weapon, because it makes a nullity of the "used, attempted to be used, or threatened to be used" language of RCW 9A.04.110(6). A switchblade knife falls within the second Hall classification and is therefore

1 not per se a deadly weapon. Hence, there must be some manifestation of
2 willingness to use the knife before it can be found to be a deadly weapon
under RCW 9A.04.110(6)". . .

3 . . .
4 "we cannot know whether the jury applied the proper law in finding
5 Gotcher guilty of first degree burglary. Hence, we cannot be confident
6 that Gotcher received a fair trial. We conclude that the error was
7 prejudicial."

8 STATE v. GOTCHER, 52 Wn.App. 350, 354, 356 759 P.2d 1216 (1988)

9
10 Martinez's case is the same as in the case of Gotcher, because as
11 in Gotcher, "the statute defining first degree burglary, RCW 9A.52.020(1),
12 provides:

13 "A person is guilty of burglary in the first degree if, with intent
14 to commit a crime against a person or property therein, he enters
15 or remains unlawfully in a dwelling and if, in entering or while
16 in the dwelling or in immediate flight therefrom, the actor or
17 another participant in the crime (a) is armed with a deadly weapon,
18 or (b) assaults any person therein."

19 "The term "armed" in the statute means that the weapon is readily
20 accessible and available for use."

21 "The term "deadly weapon" is defined in former RCW 9A.04.110(6)
22 as follows:

23 "Deadly weapon" means any explosive or loaded or unloaded
24 firearm, and shall include any other weapon, device, instrument,
25 article, or substance, including a "vehicle" as defined in this
26 section, which, under the circumstances in which it is used,
attempted to be used, or threatened to be used, is readily capable
of causing death or serious bodily injury[.]"

27 STATE v. GOTCHER, 52 Wn.App. 350, 353, 354-56, 759 P.2d 1216 (1988)

28
29 Likewise, as in Gotcher, Martinez's case is same in that Martinez
30 had been placed in the back seat of a police car, then officers located
31 a knife along the path of the short foot pursuit prior to arrest.

32 It would have been impossible for Martinez to use, attempt to use, or
33 threaten to use the recovered knife that was located after the fact and
34 found a great distance from the back seat of the police car.

1 In Befford, Court held:

2 "at page 510 that to be armed defendant must posses the item considered
3 a deadly weapon in such a manner as to indicate his willingness or present
4 ability to use it as a weapon. . . The rationale of the **befford** court was
5 that under their statute, Ariz. Rev. Stat. Ann. § 13-105(7), which defines
6 dangerous instrument as "anything that under the circumstances inwhich it
7 is used, . . . is readily capable of causing death or serious physical
8 injury"

9 STATE v. BEFFORD, 148 Ariz. 508-10, 715 P.2d 761 (1986)

10 Here again, as in the case of Befford, Martinez's case is the same
11 because Martinez **indicated no willingness or present ability to use the**
12 knife that was found later on after arrest and placement into a marked
13 vehicle.

14 In Sabala, Courts held:

15 "a person is "armed" if a weapon is "easily accessible and readily
16 available for use by the defendant for either offensive or defensive
17 puposes."

18 STATE v. SABALA, 44 W.App. 444, 723 P.2d 5 (1986)

19 Finally, Martinez's case arguement is similiar if not stronger than
20 the case of Sabala, because unlike Sabala, or even Befford, or Gotcher,
21 Martinez was not only seated in the back seat of a police car when Deputies
22 discovered and recovered a knife, but Martinez was hand cuffed. It would
23 be completely unreasonable for his jury, had they been properly instructed
24 on the definition of "armed with a deadly weapon" to have ever convict this
25 person with first degree burglary.

26 Martinez could not have imposed any danger whatsoever to sheriff
deputies or any one else **because he could not use, attempt to use, or**
threaten to use, a knife that was not accessible while handcuffed in a car.

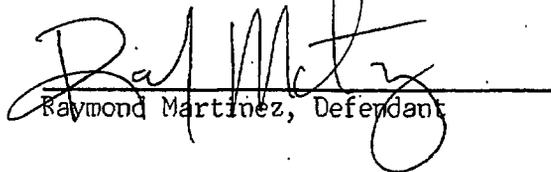
VII. CONCLUSION AND RELIEF SOUGHT

For the reasons put forth above, the petitioner respectfully requests that this Court grant his motion, and award any and all relief as provided for by law.

In addition, the petitioner respectfully requests that this Court Order a Motion and Order for Note to Docket the Criminal Calendar for any necessary future hearing requiring the presents of the defendant. Further, defendant request an Order for Transport ~~for any and all future hearings on this matter be granted and issued.~~

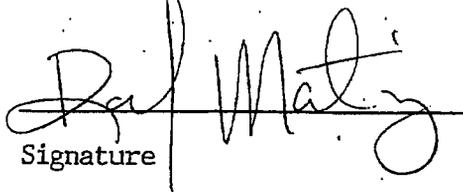
Furthermore, the petitioner respectfully requests that this Court appoint counsel to argue any issues.

Respectfully Submitted,


Raymond Martinez, Defendant

I, Raymond Martinez, hereby swear under penalty of perjury of the laws of the State of Washington, that I have read the contents of the above Motion, and it is true and correct to the best of my knowledge.

signed this 11 day of MARCH, 2009.


Signature

RAYMOND MARTINEZ #795914 LA 81
AIRWAY HEIGHTS CORRECTIONS CENTER

P.O. BOX 2049 AIRWAY HEIGHTS, WA. 99002 MAR 2008 PM 2 T

SPOKANE WA 992



GRANT COUNTY SUPERIOR COURT CLERK

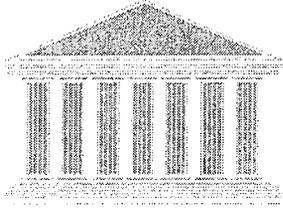
P.O. BOX 37

EPHRATA WA. 98823

LEGAL MAIL

3323+0037





SONIA DAVIS, CHIEF DEPUTY
ELISA PONOZZO, CLERK SUPERVISOR

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March 25, 2009

Honorable Renee S. Townsley, Clerk
Court of Appeals - Division III
500 North Cedar
Spokane, WA 99201-1905

FILED
MAR 27 2009
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

RE: State of Washington vs. Raymond Martinez #795914
Grant County Cause No. 04-1-00158-0

Dear Ms. Townsley:

Enclosed please find certified copies of the following documents, which Judge John Antosz has directed us to forward to you:

Document	Filing Date
Order Transferring CrR 7.8 Motion to Court of Appeals for Consideration as Personal Restraint Petition	March 20, 2009
Motion for Relief from Judgment	March 13, 2009

Please acknowledge receipt of the above papers on the enclosed copy of this letter and return same to this office.

Sincerely,

KIMBERLY A. ALLEN

By Rebecca Chedd
Deputy Clerk

KAA/rjc
Enclosures
cc: Defendant