

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 AUG -5 AM 9:58

In re Pers. Restraint

Petition of

Jose Toledo-Sotelo,

No. 65460-8-I

PETITIONER'S REPLY TO STATE'S  
RESPONSE TO PETITIONER'S  
PERSONAL RESTRAINT PETITION

85377-1

I. IDENTITY OF PETITIONER.

Jose Toledo-Sotelo is the petitioner replying to the State's response.

II. STATEMENT OF THE FACTS.

Jose Toledo-Sotelo plead guilty to two counts of child molestation in the first degree, and was found guilty by a jury trial of bail jumping in 2007. He was sentenced for both cases on the same day and received a standard range sentence of 84 months as to the child molestation convictions and 13 months as to the bail jumping, to be served concurrently. (see Appendix-1 and 2 of Petitioner's P.R.P). Mr. Toledo-Sotelo did not appeal the judgment and sentence.

III. ARGUMENT.

- 1). PETITIONER IS NOT TIME BARRED PURSUANT TO REC 10.73.090(1). BECASUE PETITIONER'S SENTENCE IS FACIAL INVALID ON ITS FACE.

Pursuant to RCW 10.73.090(1), Provides: No petition or motion for collateral attack in a judgment and sentence in a criminal case may be filed more than one year after the judgment became final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Under this statute, the "facial invalidity" inquiry is directed to the judgment and sentence itself. "Invalid on its face" means the judgment and sentence evidences the invalidity without further elaboration. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618(2002); In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240(2000). The court in Stoudmire and Thompson held that documents signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the validity of the judgment and sentence. In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615(2002). The State argues that Mr. Toledo-Sotelo does not allege that his judgments are facially invalid, Pursuant to RCW 10.73.090(1).

This court should not be persuaded by the State's claim. The State failed to include the sentence as it is written in the statute. The statute clearly states "judgment and sentence".

Petitioner's sentence is "facial invalid" on its face without further elaboration. Goodwin Wn.3d at 866-67. Petitioner's judgment and sentence reflects the incorrect standard sentencing range; seriousness level; and the miscalculation of both the bail jumping and the child molestation in the first degree. (see Petitioner's J&S).

The child molestation offender score is 3 points and the seriousness level is XII, with a sentencing range at 72 to 96 months.

The bail jumping offender score is 2 points with a sentencing range

at 13 to 17 months. Under the bail jumping, Petitioner was entitled to receive the First Time offender Waiver pursuant to RCW 9.94A.650.

The State contends that Petitioner agreed that the State had correctly calculated his offender score and his standard sentencing range pursuant to a plea agreement. This is perverse and this court should reject this argument. For the State to suggest that the Petitioner would knowingly and voluntarily agree to an incorrect higher calculation of his offender score and a higher incorrect sentencing range is just preposterous.(see State's response pg.3).

The State furthermore, mistated fact and law by stating "Pursuant to RCW 9.94A.525, other sex offenses count three points in the offender score". RCW 9.94A.525 provides: The offender score is measured on the horizontal axis of the sentencing grid. The offender score is the sum of points accrued under this section rounded down to the nearest whole number. The State further tried to mislead this court by stating "RCW 9.94A.525(1), Thus, each of Toledo-Sotelo's child molestation in the first degree convictions counted three points in the offender score of the other".(see pg.4 of State's response).

Pursuant to RCW 9.94A.525(1), provides: The offender score is measured on the horizontal axis of the sentencing grid. The offender score rule is as follows: The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1), A prior conviction is a conviction which exists before that date of sentencing 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.

RCW 9.94A.589(1).(a), provided in relevant part: 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. PROVIDED, that if the 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.525(1), does not support the States argument. The State known or should have known the appropriate statute in calculating Petitioner's offender score, the standard sentencing range, and the seriousness level. RCW 9.94A.525(17), Provides: If the present conviction is for a sex offense, count "priors" as in subsection (7) through (11) and (13) through (16) of this section; however, count three points for each adult and juvenile "prior" sex offense conviction. The Petitioner do not have any "prior sex offense conviction".

Petitioner's current offender score for the two counts of child molestation in the first degree should be 2 points with the seriousness level X and a standard sentence at 62 to 82 months.

The Petitioner's bail jumping current offender score should be calculated as 0 with a standar sentence of 6 to 12 months. This offense is a nonviolent offense and had qualified as a first time offense pursuant to RCW 9.94A.650.(see Appendix-A).

The State does not dispute the fact;(1).Petitioner's bail jumping offender score is incorrectly calculated as two points. and (2). The State does not disputethe fact that Petitioner was not awarded the 855 days by judge mattson.

The State failed to identify and respond to all material questions and facts, in Petitioner's Personal Restraint Petition pursuant to RAP 16.9. Petitioner raised the fact that the State miscalculated his bail jumping points as two.

Petitioner also raised the fact that he was not credited 855 days awarded by judge Mattson. (see Appendix-3).

IV.

CONCLUSION.

Petitioner request this court to grant the Petitioner's Personal Restraint Petition and allow the Petitioner to withdraw his plea of guilty because the Sixth Amendment requires that a guilty plea be knowing, voluntary, and intelligently made. Petitioner did not knowingly and voluntarily plea guilty to a miscalculated offender score, seriousness level, and the sentencing range.

Petitioner is not time barred because he was not informed of the consequence of the plea. Petitioner is also innocent of this sentence.

Petitioner request this court to grant any other relief it may deem appropriate.

Respectfully Submitted,

Dated This 3 day of August 2010.

  
JOSE TOLEDO-SOTELO  
CLALLAM BAY CORRECTION CNTR.  
1830 Eagle Crest Way  
CLALLAM BAY, WA 98326

**APPENDIX-A**

(15) percent. Offenders committing these offenses on or after July 1, 2003, will not earn release time credit in excess of ten (10) percent.

Offenders sentenced under the Special Sex Offender Sentencing Alternative are not eligible to accrue any earned release time while serving a suspended sentence.

An offender may not receive any earned release time for that portion of a sentence that results from any deadly weapon enhancements.

Finally, no matter how much release time has been earned under RCW 9.95A.728, an offender sentenced for a crime that has a mandatory minimum sentence shall not be released from total confinement before the completion of the mandatory minimum for that crime unless allowable under RCW 9.95A.540.

## **SENTENCING ALTERNATIVES**

For some types of offenses and offenders, sentencing courts have discretion to order alternative sentences. These alternative sentences include the First-time Offender Waiver (FTOW), the Drug Offender Sentencing Alternative (DOSA), local options for some chemically dependent offenders, the Special Sex Offender Sentencing Alternative (SSOSA), other treatment options for sex offenders while in prison, and Work Ethic Camp (WEC).

### **FIRST-TIME OFFENDER WAIVER (FTOW)**

RCW 9.94.650 provides a statutory alternative to the standard range for certain offenders who have not been previously convicted of a felony offense in this state, in federal court, or in another state, and who have never participated in a program of deferred prosecution for any felony. Such offenders are eligible for the First-time Offender Waiver when they are facing sentencing for an offense that:

- is not a violent offense;
- is not Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver
  - (a) a Schedule I or II Narcotic Drug,
  - (b) Flunitrazepam classified in Schedule IV,
  - (c) Methamphetamine, or
  - (d) any of Methamphetamine's salts, isomers and salts of its isomers as defined in RCW 69.50.206(d)(2);
- is not Selling for Profit any Controlled or Counterfeit Substance;
- is not sex offense; and

- is not Felony Driving While Under the Influence of Intoxicating Liquor or any Drug or felony Physical Control of a Vehicle While Under the Influence of Intoxicating Liquor or any Drug.

For these offenders, the court is given broad discretion in setting the sentence. Choices available to the court include:

- Imposing as little as zero or up to 90 days of confinement in a facility operated or utilized under contract by the county;
- Requiring that the offender refrain from committing new offenses;
- Requiring a term of community supervision which, in addition to crime-related prohibitions,<sup>18</sup> may include requirements that the offender perform any one or more of the following:
  - (a) Devote time to a specific employment or occupation;
  - (b) Undergo a term of available outpatient treatment, or inpatient treatment not to exceed the standard range of confinement for that offense;
  - (c) Pursue a prescribed, secular course of study or vocational training;
  - (d) Remain within prescribed geographical boundaries and notify the court or a community corrections officer prior to any change in the offender's address or employment;
  - (e) Report as directed to the court and a community corrections officer;
  - (f) Pay all court-ordered financial obligations, and/or perform some community service work.

If an ongoing treatment program continues after the first year of the offender's community supervision, supervision may continue until the end of treatment. In total, community supervision under the First-time Offender Waiver may not exceed two years.

A court's decision to impose or not to impose the First-time Offender Waiver cannot be appealed by the prosecutor or defendant (RCW 9.94A.585(1)).

### **DRUG OFFENDER SENTENCING ALTERNATIVE (DOS)**

Prior to sentencing a defendant for a Violation of the Uniform Controlled Substances Act ("VUCSA") offense, for a criminal solicitation offense, or for any other felony where the Court finds the offender has a chemical dependency that contributed to the crime, the court is required to order a chemical dependency screening report, to be completed by the Department of Corrections (RCW 9.94A.500). The court may explicitly waive that requirement.

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<sup>18</sup> RCW 9.94A.030(13) provides: "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct."

APPENDIX-3

SENTENCING ORDER BY THE HONORABLE JUDGE GEORGE T. MATTSON

his plea is not voluntary, because Mr. Toledo-Sotelo would not have plead guilty to a sentence out side the standard range neither would he have knowingly and voluntary plead to an offender score of three points when his offender score should have been one point. The State miscalculated Mr. Toledo-Sotelo offender score for the bail jumping as two points, when it should have been calculated as one point. The State also miscalculated Mr. Toledo-Sotelo offender score for the child molestation as three points when it should have been calculated as one point, as a first time offender and ran together with the bail jumping and a seriousness level X with the proper sentencing 57 to 75 months.

"A defendant must understand the sentencing consequences for a guilty plea to be valid." Miller, 110 Wn.2d at 531; see also Skiggn, 58 Wn.App.831.

Mr. Toledo-Sotelo has established that his guilty plea was involuntary based upon both trial counsel and the State misinforming Mr. Toledo-Sotelo of the (1), the miscalcuation of his offender scroe, (2), being misinformed about the standard sentencing range, and (3), being misinformed about the seriousness level. "Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea." Miller, 110 Wn.2d at 528.

Mr. Toledo-Sotelo chooses to withdraw his plea of guilty. The prosecutor bears the burden of demonstrating that the defendant's choice of remedy is unjust. Miller, 110 Wn.2d at 536.

Mr. Toledo-Sotelo was misinformed about the sentencing consequences, his offender score and the seriousness level. His guilty plea was not knowingly, intelligently, and voluntary.

2). **THE KING COUNTY ADMINISTRATOR MCLELLAN  
FAILED TO CREDIT MR.TOLEDO-SOTELO 855  
DAYS OF PHYSICAL INCARCERATION**

a). Mr.Toledo-Sotelo is entitled to the 855 days  
physical incarceration granted by the Honorable Judge Mattson.

Judge Mattson ORDERED on June 17,2008, that Mr.Toledo-Sotelo "shall receive credit for his incarceration from the moment he was taken into custody in Canada on February 13th 2006 until the present day. This period shall be understood to include the period while he was being detained within the United States after the Canadian government extradited him to this country. Thus sentencing order is originally drafted on Monday June 16th 2008. As of today's drafting date, and including today's date, Mr.Toledo-Sotelo has served the following amount of time: 855 days."(see attach sentencing order).

Administrator McLellan failed to credit Mr.Toledo-Sotelo with his 855 days order by the court.(see attach Jail Certifications). Pursuant to RCW 9.94A.728(1), prescribes the contents of a jail certification and states in relevant part: If an offender is transferred from a county jail to the department, the administrator of a county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned release time.

The statutory requirement codified in former RCW 9.94A.120(17), that an offender receive credit for all pretrial detention time served, reflects a constitutional mandate. State v Speaks,119 Wn.2d 204,

(2)

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CERTIFIED COPY TO COUNTY JAIL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

) NO. 00-105743-8-KNT & 07-1-10361-5 KNT

Plaintiff,

) SENTENCING ORDER

*W/ regard to credit for  
time served*

vs.

JOSE TOLEDO-SOTELO,

Defendant

IT IS HEREBY ORDERED that Mr. JOSE TOLDEO-SOTELO ~~will serve a term of 6~~ *9*

~~months in Prison as punishment for his crimes in the above noted cases and he shall receive~~  
credit for his incarceration from the moment he was taken into custody in Canada on February  
13<sup>th</sup> 2006 until the present day. This period shall be understood to include the period while he  
was being detained within the United States after the Canadian government extradited him to  
this country. ~~This sentencing order is originally drafted on Monday, June 16<sup>th</sup> 2008.~~ As of *9*  
today's drafting date, and including today's date, Mr. TOLEDO-SOTELO has served the  
following amount of time: 855 days. ~~This can also be understood as 5 years, 4 months, and 4~~ *9*  
~~days (including the end date). This can also be understood as 122 weeks (rounded down). It is~~

SENTENCING ORDER

Page 1 of 2

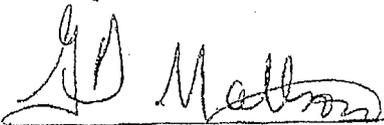
BARRY J. WALLIS  
WALLIS LAW FIRM, PLLC.  
9615 Bridgeport Way SW  
Lake-wood, Washington 98499  
Telephone: (253) 584-1110  
Fax: (253) 584-8858

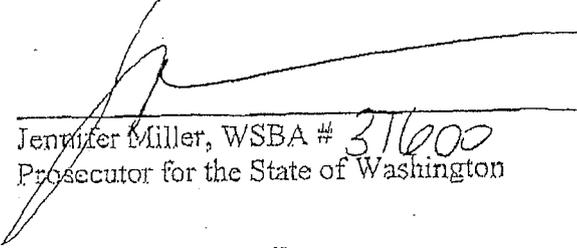


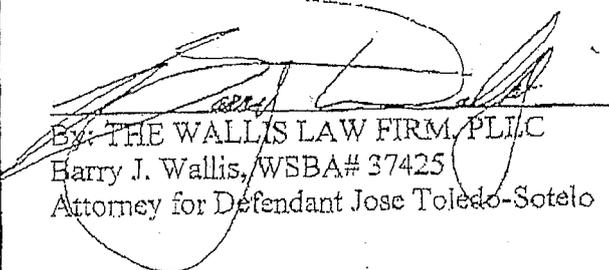
SCANNED

1 hereby ordered that Mr. Toledo-Sotelo shall receive credit for 855 days of physical  
2 incarceration as of June 16<sup>th</sup>, 2008 at midnight. ~~The total sentence for all of his above noted~~ *24*  
3 ~~charges is 24 months to be served concurrently.~~  
4

5  
6 DONE IN OPEN COURT THIS 17 day of June, 2008.

7   
8  
9 \_\_\_\_\_  
10 Honorable Judge George T. Mattson

11  
12   
13 \_\_\_\_\_  
14 Jennifer Miller, WSBA # 31600  
15 Prosecutor for the State of Washington

16  
17   
18 \_\_\_\_\_  
19 By: THE WALLIS LAW FIRM, PLLC  
20 Barry J. Wallis, WSBA# 37425  
21 Attorney for Defendant Jose Toledo-Sotelo  
22  
23  
24  
25

DECLARATION OF SERVICE BY MAIL

GR 3.1(c)

I, José Toledo Sotelo, declare that, on this 3 day of August, 2010. I deposited the forgoing documents:

No. 65460-8-1  
Petitioner's Reply to state's  
Response to Petitioner's  
Personal Restraint Petition

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STATE OF WASHINGTON  
2010 AUG -5 AM 9:59

or a copy thereof, in the internal legal mail system of

Clallam Bay Correction Center  
1830 Eagle Crest way  
Clallam Bay WA 98326

And made arrangements for postage, addressed to: (name & address of court or other party.)

<u>Daniel T. Satterberg</u>	<u>Richard D. Johnson</u>
<u>King County Prosecutor's Office</u>	<u>Division I</u>
<u>Appellate Unit</u>	<u>One Union Square</u>
<u>No 554. King County Courthouse</u>	<u>600 University Street</u>
<u>516 Third Avenue</u>	<u>Seattle WA, 98101</u>
<u>Seattle WA 98104</u>	

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

Dated at Clallam Bay WA 98326 on 8-3-10  
(City & State) (Date)

José Toledo Sotelo  
Signature

José Toledo Sotelo  
Type / Print Name