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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 92129-6
COURT OF APPEALS NO. 71313-2-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARLON ALDRIDGE,

Respondent.

FILED
AUG 25 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review the Court of Appeals' decision in State v. Aldrich, No. 71313-2-I, slip op. at 1 (Wash. Ct. App. Div. I, May 11, 2015).

B. ISSUE PRESENTED FOR REVIEW

Has a defendant failed to show a manifest injustice that merits withdrawal of a guilty plea where he pleaded guilty to an information charging assault in the first degree "using force or means likely to result in death," where he knew that a five-year minimum sentence must be imposed for an assault conviction based on that prong of the statute, and where the five-year minimum sentence could have been but was never actually imposed?

C. STATEMENT OF THE CASE

1. TRIAL COURT

Marlon Aldridge got into a fistfight with Reginald Carey over drug dealing in downtown Seattle. After Carey knocked Aldridge to

the ground in the fight, Aldridge pulled out a handgun and shot Carey in the groin, the bullet exiting through his buttocks.

Aldridge was charged with one count of assault in the first degree with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. CP 1-2. The State alleged that Aldridge shot Carey "with intent to inflict great bodily harm" and using "*force and means likely to produce* great bodily harm or *death*, to-wit: a gun[.]" CP 1 (italics added).

Aldridge pled guilty during jury selection. The State agreed to dismiss the firearm enhancement and promised that there would be no federal prosecution for possession of the gun. CP 67-79; 2RP 2-5. In the Statement of Defendant on Plea of Guilty, Aldridge averred that he knew he was "charged with the crime of Assault 1°" and that "[t]he elements of this crime[] are set forth in the information ... which is incorporated by reference and which I have reviewed with my lawyer." CP 67. The Statement of Defendant on Plea of Guilty provided that "The crime of Assault 1° has a mandatory minimum sentence of at least 5 years of total confinement. The law does not allow any reduction of this

sentence." CP 71.[1] Aldridge was also informed orally that first-degree assault carried a mandatory minimum five-year sentence. Aldridge stated during the plea that he had discussed the minimum sentence with his lawyer and understood what it meant. 2RP 15. Aldridge pleaded guilty to the two offenses "as charged in the information," and said that "with intent to inflict great bodily harm ...[he] did assault Reginald Carey by shooting him with a firearm." CP 78. Aldridge stipulated to the "real and material" facts in the certification for determination of probable cause and prosecutor's summary. CP 80.

The parties agreed to recommend a high-end standard range sentence of 171 months in custody. 2RP 12-15; CP 71, 84. The State promised that Aldridge would not be prosecuted in federal court for the firearm violation. CP 71.

Before sentencing Aldridge moved to withdraw his plea, alleging he did not realize he had agreed to recommend a sentence at the top of the sentencing range, and because he was misinformed about the mandatory minimum for assault in the first degree. CP 113-27; 3RP 59-63. The trial court held a full hearing

[1] RCW 9.94A.540(1)(b) provides that "An offender convicted of the crime of assault in the first degree ... where the offender used force or means likely to result in death ... shall be sentenced to a term of total confinement not less than five years."

with live testimony from Aldridge and his trial lawyer, Donald Minor. New counsel argued that the plea was deficient because the factual statement in paragraph 11 did not explicitly admit that the manner and means of the assault would likely result in death. He argued that such an express admission was required "even if it is a recitation of facts that are very obvious to the parties." 2RP 62.

Mr. Minor testified that he told Aldridge that any sentence must include a five-year mandatory minimum term, which meant that Aldridge would not receive earned early release credit during those five years. 2RP 54-55. He also explained that mandatory minimum would effectively add about six months to his actual prison sentence. Minor did not specifically tell Aldridge that only certain assault in the first degree convictions trigger a mandatory minimum sentence because Mr. Minor believed Aldridge's assault was done in a manner likely to cause death. 2RP 58.

The trial court denied Aldridge's motion. It found that Aldridge was fully advised of the law and its consequences for his case. The court ruled that Mr. Minor had fully advised him of the consequences of the mandatory minimum sentence, and that counsel did not have a duty to advise him that the mandatory

minimum would not apply under different circumstances, because it clearly applied to these facts. 2RP 66-67.

Several weeks later the court imposed the sentence recommended by the parties. 3RP 65-67, 98-99; CP 92, 102-03. However, neither the parties nor the court addressed the mandatory minimum sentence at the sentencing hearing, and the Judgment and Sentence does not reflect it. CP 89-98. Thus, Aldridge is now serving a sentence for assault in the first degree that does *not* include a mandatory minimum, so he is earning full credit for time served.[2]

2. APPEAL

Aldridge appealed, arguing among other things that he should be allowed to withdraw his guilty plea because he was misinformed that a five-year mandatory minimum sentence would automatically be imposed, when that mandatory minimum is not automatic and was not imposed in his case. Reply Brief of Appellant at ("ALDRIDGE WAS MISADVISED OF A DIRECT CONSEQUENCE OF HIS PLEA BECAUSE THE MANDATORY MINIMUM SENTENCE WAS NOT APPLIED TO HIM"). The Court

[2] The State failed to notice this error and did not appeal the sentence. Thus, the State does not now seek to impose the five-year mandatory minimum sentence.

of Appeals initially rejected the argument, holding that Aldridge necessarily admitted the facts triggering the mandatory minimum. State v. Aldridge, No. 71313-2-I, 2015 WL 1205315 at *4-5 (March 16, 2015). (Appendix A).

Aldridge filed a motion for reconsideration based on two Washington decisions cited in his opening brief: In re Pers. Restraint of Tran, 154 Wn.2d 323, 329, 111 P.3d 1168 (2005) and Division Two's decision in State v. McChristian, 158 Wn. App. 392, 241 P.3d 468 (2010). The Court of Appeals directed the State to respond. Shortly after filing the motion to reconsider, Aldridge filed a Statement of Additional Authorities that cited a decision from the Ninth Circuit Court of Appeals. The State addressed the legal theory raised in the motion to reconsider but did not address the two cases cited as "additional authorities."

The Court of Appeals thereafter filed a new decision changing the result of the original decision, but not on the theory contained in the motion to reconsider. Division One based its decision on the case cited as "additional authority." State v. Aldridge, No. 71313-2-I, 2015 WL 2358568 (May 11, 2015) (Appendix B). The court summarized its holding as follows:

> A defendant who pleads guilty to first degree assault is not necessarily subject to a five-year mandatory minimum sentence. To justify a mandatory minimum, the defendant *must admit facts* equivalent to the facts the State would have had to prove at trial: that the defendant "used force or means likely to result in death or intended to kill the victim." In this case, the defendant admitted less than the State would have had to prove. Because he was misinformed that a mandatory minimum sentence was a direct consequence of his plea, he must be allowed to withdraw the plea.

Aldridge, slip op. at 1 (italics added). Essentially, the court held that a statement of defendant on plea of guilty to assault in the first degree must include an express admission from the defendant that he committed facts that make him eligible for a mandatory minimum sentence. The State moved to reconsider the new decision, but that motion was denied. (Appendix C).

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

This Court may review a decision of the Court of Appeals that conflicts with this Court's or other appellate court decisions, or which presents a significant question of law under the Constitution, or if the decision involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). The decision below conflicts with binding Washington precedent on an issue of substantial public interest.

Aldridge admitted through his guilty plea that he had committed assault in the first degree using force or means likely to result in death. The facts before the court supported that plea. He was told – unequivocally and correctly – that this plea would result in a five-year minimum sentence. However, the trial court erroneously failed to impose that sentence, so he has received a windfall and is not actually serving a mandatory minimum sentence.

The Court of Appeals held that the plea was involuntary because the personal statement of the defendant in the plea form did not include an express reference to the "likely to result in death" manner of committing assault in the first degree. This was error. Washington law has previously held that no such express reference is required in the defendant's plea statement, as long as he has knowingly pled guilty to an information charging that prong. The Court of Appeals appears to have confused the "factual basis" for a guilty plea with the requirements for voluntariness and has thus transformed a rule-based requirement into a constitutional one.

The constitution requires that a guilty plea be knowing, intelligent and voluntary. Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976). Any fact that mandates an increase in the minimum or maximum sentence must be pled and proved to a jury, or

admitted by the defendant through his guilty plea. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013).

As the State pointed out in its response brief, "in pleading guilty, Aldridge stated that he was pleading guilty '*as charged in the information*' ... [and so] he admitted to all of the elements of the charged crime, whether or not he specifically admitted the element in his [Statement of Defendant on Plea of Guilty]." Br. of Respondent at 7 (citing In re Pers. Restraint of Fuamaila, 131 Wn. App. 903, 923, 131 P.3d 318 (2006) and McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 419 (1969)). In other words, Aldridge's plea was an admission to everything alleged in the information, so no other express admissions were required.

This conclusion follows from settled law. In Fuamaila, the Court of Appeals held that a defendant could be punished for second-degree murder where he pleaded guilty to an information charging murder in the second degree under both the intentional murder and felony murder prongs. Fuamaila, 131 Wn. App. at 918-20. The court specifically rejected Fuamaila's argument that,

because his Statement of Defendant on Plea of Guilty addressed only felony murder, he had pleaded guilty to only felony murder.[3] *See also* In re Pers. Restraint of Mayer, 128 Wn. App. 694, 117 P.3d 353 (2005).

This Court adopted this reasoning in In re Pers. Restraint of Richey, 162 Wn.2d 865, 175 P.3d 585 (2008). Richey pleaded guilty to an information that charged both attempted first-degree felony murder and attempted first-degree intentional murder. Richey, 162 Wn.2d at 868. He argued that his plea was invalid because attempted first-degree *felony* murder was not a crime in Washington. This Court agreed that attempted first-degree *felony* murder was not a crime, but it refused to allow withdrawal of his plea because attempted first-degree *intentional* murder is a crime. Because intentional murder was properly charged in the information, and because Richey's plea was clearly as to both prongs of the information, the plea of guilty included a first-degree murder charge recognized under Washington law, and was therefore valid. Richey, at 871-72.

[3] The difference was significant because second degree felony murder was later invalidated by the Washington Supreme Court in In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), as corrected (Oct. 29, 2002), as amended on denial of reconsideration (Mar. 14, 2003).

The reasoning of these cases is based on even earlier decisions from both this Court and the United States Supreme Court. In State v. Bowerman, 115 Wn.2d 794, 799, 802 P.2d 116 (1990), the court held that a defendant pleads guilty to all means charged in an information; he has no right to plead to only one charged means. In McCarthy v. United States, supra, the Supreme Court held that a defendant need not expressly admit all conduct constituting the elements of a crime because the guilty plea itself "is an admission of all the elements of a formal criminal charge...." Fuamaila, at 923 (citing McCarthy, 394 U.S. at 465).[4]

The Court of Appeals seemed to apply this reasoning in its first opinion.

> Aldridge pleaded guilty to assault in the first degree "as charged in the information." The information specifically alleged that Aldridge assaulted the victim with "force and means likely to produce great bodily harm or death." "Great bodily harm" is defined, among other things, as "bodily injury which creates a probability of death." RCW 9A.04.110(4)(c). The words "a probability of death" mean the same thing as "likely to result in death." By admitting that he assaulted the victim with force and means likely to produce either great bodily harm (bodily injury which creates a probability of death) or death itself, Aldridge necessarily admitted that he

[4] This Court has recognized, in a decision examining the comparability of out-of-state convictions, that California follows a rule similar to Washington's. State v. Olsen, 180 Wn.2d 468, 479, 325 P.3d 187, cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014) ("Under California law, even where the statutory elements are in the disjunctive, if the charging document presents them in the conjunctive, a guilty plea admits each of the elements.") (citations omitted).

> "used force or means likely to result in death"—the fact which, according to the statute, triggers a mandatory minimum sentence.

State v. Aldridge, slip op. at 4 (filed March 16, 2015 – now withdrawn) (Appendix A).

In its new decision, however, the Court of Appeals relied instead on the reasoning of United States v. Guerroro-Jasso, 752 F.3d 1186, 1191 (9th Cir. 2014). In Guerroro-Jasso, the court held that "when either 'A' or 'B' could support a conviction, a defendant who pleads guilty to a charging document alleging 'A and B' admits only 'A' or 'B'." 752 F.3d at 1191. As support for this holding, the Ninth Circuit court cited Young v. Holder, 697 F.3d 976, 988 (9th Cir. 2012) (*en banc*). Young made clear that, until recently, there were two lines of authority in the Ninth Circuit regarding how to interpret a guilty plea when a defendant pleads to an information that charged two alternative means. Young, 697 F.3d at 986. One line of cases held that the plea admitted both alternatives, whereas the other line held that the plea admitted only one theory of conviction. Id. The majority of judges sitting *en banc* in Young chose to adopt the rule that a plea to an information charging multiple alternatives admits only one alternative. Id. But this

holding was predicated on federal law and on practicalities, not on any constitutional mandate.

> We hold that federal law principles determine the effect of a guilty plea under the modified categorical approach. To apply the disparate rules of the many possible convicting jurisdictions—potentially from each of the 50 states, the territories, and many foreign countries—would undermine the principles of uniformity and simplicity that led the Supreme Court to adopt the categorical approach in Taylor. ... Moreover, applying federal principles rather than state law rules to determine the effect of a guilty plea conserves judicial resources and prevents inter-circuit splits over the interpretation of state procedural rules.

Id. at 985. Thus, the holding in Young is not constitutionally based, so it does not call into question Fuamaila or Richey, but the rule in Guerroro-Jasso is certainly contrary to the rule set forth in Fuamaila and Richey. The Court of Appeals erred in relying on federal authority rather than the binding state precedent.

The Court of Appeals appears to have confused the concept of voluntariness with the separate rule-based requirement that there be a factual basis for a guilty plea. And the Court of Appeals misapplied the factual basis requirement. The factual basis for a plea is analytically distinct and is not constitutionally required. CrR 4.2(f) provides that:

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making

> such inquiry as shall satisfy it that there is a factual basis for the plea.

This Court long ago held that the factual basis for a guilty plea "may be established from any reliable source" as long as that source is made a part of the record; it need not come from a direct admission by the defendant. State v. Newton, 87 Wn.2d 363, 369-70, 552 P.2d 682 (1976). Indeed, in Newton, this Court approved of Alford[5] pleas wherein the defendant expressly professes his innocence and agrees to *no* facts at all. Here, the trial court had before it the Certification for Determination of Probable Cause, which described how the defendant shot his victim with a firearm in the groin. Plainly, there was a factual basis to conclude that Aldridge assaulted his victim in a manner and means likely to result in death, so the trial court properly found the plea met the requirements of CrR 4.2. The Court of Appeals erred in requiring an express statement from the defendant that he had committed an assault likely to result in death; this fact was evident from the record before the court.

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[5] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) ("[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

It should be noted that the difference between the Ninth Circuit's recent approach to guilty pleas and Washington law is not merely academic. Under Fuamaila and Richey, a Statement of Defendant on Plea of Guilty need not contain an express admission in the defendant's own words to each alternative means charged in an information, as long as the record makes clear that the defendant is knowingly pleading guilty to an information that charges the multiple prongs. However, under the Guerroro-Jasso approach, it seems that a Statement of Defendant on Plea of Guilty *must* contain an express admission from the defendant that he committed both prongs. Because the Washington approach has been followed for decades, superior courts have routinely accepted guilty pleas that will not meet the Guerroro-Jasso standard. And the Guerroro-Jasso rule is not limited to guilty pleas to assault in the first degree; it applies to all crimes. Thus, if the Guerroro-Jasso standard newly-adopted in the Ninth Circuit is applied in Washington, thousands of guilty pleas that complied with the existing standard will be needlessly called into question.

E. **CONCLUSION**

The Court of Appeals decision conflicts with precedent from this Court on a question of substantial public interest. Review is warranted under RAP 13.4(b).

DATED this 18th day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Jennifer P. Joseph #35042 for
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 71313-2-I
v.	)	DIVISION ONE
MARLON ROBERTO ALDRIDGE, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: March 16, 2015

2015 MAR 16 AM 10: 22
COURT OF APPEALS DIV I
STATE OF WASHINGTON

BECKER, J. — A defendant who pleads guilty to first degree assault is subject to a five-year mandatory minimum sentence when he admits that he shot the victim with force and means likely to produce great bodily harm or death. The facts so admitted are the equivalent of the facts the State would have to prove at trial in order to justify the mandatory minimum that applies to a defendant who, in the language of the pertinent statute, "used force or means likely to result in death."

Late one night in July 2012, two men got into a fight in downtown Seattle. Appellant Marlon Aldridge approached them, and one of the men struck Aldridge in the face and knocked him down. Aldridge hit his head on the curb. Moments later, Aldridge got up, followed the man, and shot him in the groin. The State charged Aldridge with one count of first degree assault with a firearm enhancement. Because Aldridge had three prior felony convictions for controlled

substances (the most recent in 2005), the State also charged him with one count of unlawful possession of a firearm.

After a jury was selected, the State offered to dismiss the firearm enhancement if Aldridge pleaded guilty and agreed to make a joint recommendation for a high-end standard range sentence of 171 months. Aldridge accepted the offer.

Before sentencing, Aldridge—represented by new counsel—moved to withdraw his plea on the ground that he was misinformed that a five-year mandatory minimum applies automatically to assault in the first degree. The trial court denied the motion. Aldridge appeals.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. CrR 4.2(d); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Once a guilty plea is accepted, the trial court may allow withdrawal of the plea only to correct a manifest injustice. CrR 4.2(d). An involuntary guilty plea constitutes a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A plea is involuntary where the defendant is misinformed of a direct consequence of his plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). A mandatory minimum sentence is a direct consequence of a guilty plea. Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976). The above-cited case law establishes that Aldridge is entitled to withdraw his plea if he was misinformed that he was subject to a mandatory minimum sentence.

It is undisputed that Aldridge was informed that his plea would necessarily subject him to a mandatory minimum sentence of five years. This is evident from the testimony given at the plea withdrawal hearing by the attorney who represented Aldridge at the time he entered the plea. He was asked if he informed his client "that assault one has a mandatory minimum sentence of at least five years of confinement?," and he answered, "Correct." He then testified that he did not tell Aldridge that not all convictions for first degree assault result in a mandatory minimum sentence:

> Q. And did you explain to Mr. Aldridge that that is not—that is not an absolute state of affairs? That in other words the statutory minimum period of confinement attaches only in certain cases when certain findings are made?
> A. I did not do that in this case because I believe those circumstances do exist.

If Aldridge was misinformed, he does not have to establish that the information he was given was material to his decision to plead guilty. Mendoza, 157 Wn.2d at 590. The court does not "engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain." Mendoza, 157 Wn.2d at 590-91. Although it may seem that concern about a five-year mandatory minimum is pointless in the context of an agreed recommendation for a 171-month sentence, the State does not make that argument. The State forthrightly acknowledges that "even though Aldridge was aware that he would serve more than five years, the five-year mandatory minimum has additional consequences"—namely, the offender does not earn early release credit during the five-year period. RCW 9.94A.540(2).

A five-year mandatory minimum sentence applies to offenders convicted of first degree assault only under two conditions: where the offender "used force or means likely to result in death or intended to kill the victim." RCW 9.94A.540(1)(b). This sentencing statute "indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent." In re Pers. Restraint of Tran, 154 Wn.2d 323, 329-30, 111 P.3d 1168 (2005). If the prosecution of Aldridge had proceeded to trial, the State would have had to prove at least one of these conditions to the finder of fact in order to obtain a mandatory minimum sentence. The State acknowledges these principles as the starting point of the analysis.

Aldridge argues that the mandatory minimum cannot be applied to him because there was no jury finding that he either "used force or means likely to result in death" or "intended to kill the victim." But as the State points out, Aldridge waived the right to jury fact-finding by pleading guilty. The question is whether, given the facts that Aldridge admitted by pleading guilty, a mandatory minimum sentence was a direct consequence of his plea.

Aldridge pleaded guilty to assault in the first degree "as charged in the information." The information specifically alleged that Aldridge assaulted the victim with "force and means likely to produce great bodily harm or death." "Great bodily harm" is defined, among other things, as "bodily injury which creates a probability of death." RCW 9A.04.110(4)(c). The words "a probability of death" mean the same thing as "likely to result in death." By admitting that he

assaulted the victim with force and means likely to produce either great bodily harm (bodily injury which creates a probability of death) or death itself, Aldridge necessarily admitted that he "used force or means likely to result in death"—the fact which, according to the statute, triggers a mandatory minimum sentence.

Because Aldridge was correctly informed that the five-year minimum would be a consequence of his plea, the trial court did not err by refusing to permit him to withdraw it.

In his reply brief, Aldridge asserts that the mandatory minimum was not, in fact, applied to him in the judgment and sentence. Because this argument is made for the first time in his reply brief, we need not consider it. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, Aldridge does not explain what bearing the actual judgment and sentence have on the issue of the voluntariness of his plea.

Aldridge also argues that remand for resentencing is required because the trial court erroneously believed it had no discretion to deviate from the agreed recommendations of the parties at sentencing.

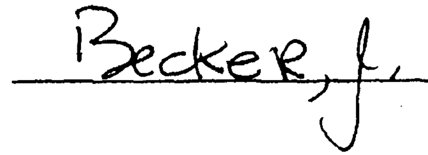
The court imposed the 171-month sentence both parties had agreed to recommend after hearing how deeply Aldridge regretted the plea:

> Okay. Thank you, sir. Okay, well I appreciate everybody's thoughts about this. I feel really constrained, though, to follow the parties' agreement and so I will sentence in accordance with the parties' agreement of 171 months on count 1 and 48 months and count 2, followed by a period of 36 months of community service.

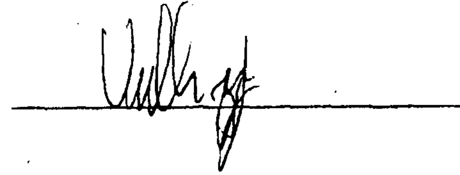
A trial court fails to exercise sentencing discretion when it erroneously believes it has none. State v. McGill, 112 Wn. App. 95, 98-99, 47 P.3d 173

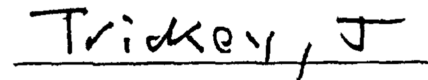
(2002). The court's remarks quoted above, however, do not indicate a belief that a court must always impose the sentence that the parties to a plea agreement have agreed to recommend. We are confident that the experienced trial judge knew he could impose a different sentence if he found there was a good reason to do so.

Affirmed.



WE CONCUR:





Appendix B

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

STATE OF WASHINGTON, Respondent, v. MARLON ROBERTO ALDRIDGE, Appellant.	No. 71313-2-I ORDER WITHDRAWING OPINION AND SUBSTITUTING OPINION

Appellant, Marlon Aldridge, moved for reconsideration of this court's opinion filed on March 16, 2015. Respondent, State of Washington, filed an answer to appellant's motion for reconsideration.

The court has determined that the opinion filed on March 16, 2015, shall be withdrawn and a substitute opinion be filed. Now, therefore, it is hereby

ORDERED that the opinion filed on March 16, 2015, is withdrawn and a substitute opinion be filed.

DATED this 11th day of May 2015.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY 11 AM 10: 37

Becker, J

Trickey, J

[signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71313-2-I
Respondent,	)	DIVISION ONE
v.	)	
MARLON ROBERTO ALDRIDGE,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: May 11, 2015

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY 11 AM 10: 37

BECKER, J. — A defendant who pleads guilty to first degree assault is not necessarily subject to a five-year mandatory minimum sentence. To justify the mandatory minimum, the defendant must admit facts equivalent to the facts the State would have had to prove at trial: that the defendant "used force or means likely to result in death or intended to kill the victim." In this case, the defendant admitted less than the State would have had to prove. Because he was misinformed that a mandatory minimum sentence was a direct consequence of his plea, he must be allowed to withdraw the plea.

Late one night in July 2012, two men got into a fight in downtown Seattle. Appellant Marlon Aldridge approached them, and one of the men struck Aldridge in the face and knocked him down. Aldridge hit his head on the curb. Moments later, Aldridge got up, followed the man, and shot him in the groin. The State charged Aldridge with one count of first degree assault with a firearm

enhancement. Because Aldridge had three prior felony convictions for controlled substances (the most recent in 2005), the State also charged him with one count of unlawful possession of a firearm.

After a jury was selected, the State offered to dismiss the firearm enhancement if Aldridge pleaded guilty and agreed to make a joint recommendation for a high-end standard range sentence of 171 months. Aldridge accepted the offer.

Before sentencing, Aldridge—represented by new counsel—moved to withdraw his plea on the ground that he was misinformed that a five-year mandatory minimum applies automatically to assault in the first degree. The trial court denied the motion. Aldridge appeals.

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. CrR 4.2(d); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Once a guilty plea is accepted, the trial court may allow withdrawal of the plea only to correct a manifest injustice. CrR 4.2(d). An involuntary guilty plea constitutes a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A plea is involuntary where the defendant is misinformed of a direct consequence of his plea. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). A mandatory minimum sentence is a direct consequence of a guilty plea. Wood v. Morris, 87 Wn.2d 501, 513, 554 P.2d 1032 (1976). The above-cited case law establishes that Aldridge is entitled to withdraw his plea if he was misinformed that he was subject to a mandatory minimum sentence.

It is undisputed that Aldridge was informed that his plea would necessarily subject him to a mandatory minimum sentence of five years. This is evident from the testimony given at the plea withdrawal hearing by the attorney who represented Aldridge at the time he entered the plea. He was asked if he informed his client "that assault one has a mandatory minimum sentence of at least five years of confinement?," and he answered, "Correct." He then testified that he did not tell Aldridge that not all convictions for first degree assault result in a mandatory minimum sentence:

> Q. And did you explain to Mr. Aldridge that that is not—that is not an absolute state of affairs? That in other words the statutory minimum period of confinement attaches only in certain cases when certain findings are made?
> A. I did not do that in this case because I believe those circumstances do exist.

If Aldridge was misinformed, he does not have to establish that the information he was given was material to his decision to plead guilty. Mendoza, 157 Wn.2d at 590. The court does not "engage in a subjective inquiry into the defendant's risk calculation and the reasons underlying his or her decision to accept the plea bargain." Mendoza, 157 Wn.2d at 590-91. Although it may seem that concern about a 5-year mandatory minimum is pointless in the context of an agreed recommendation for a 171-month sentence, the State does not make that argument. The State forthrightly acknowledges that "even though Aldridge was aware that he would serve more than five years, the five-year mandatory minimum has additional consequences"—namely, the offender does not earn early release credit during the 5-year period. RCW 9.94A.540(2).

A five-year mandatory minimum sentence applies to offenders convicted of first degree assault only under two conditions: where the offender "used force or means likely to result in death or intended to kill the victim." RCW 9.94A.540(1)(b). This sentencing statute "indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent." In re Pers. Restraint of Tran, 154 Wn.2d 323, 329-30, 111 P.3d 1168 (2005). If the prosecution of Aldridge had proceeded to trial, the State would have had to prove at least one of these conditions to the finder of fact in order to obtain a mandatory minimum sentence. The State acknowledges these principles as the starting point of the analysis.

Aldridge argues that the mandatory minimum cannot be applied to him because there was no jury finding that he either "used force or means likely to result in death" or "intended to kill the victim." But as the State points out, Aldridge waived the right to jury fact-finding by pleading guilty. The question is whether, given the facts that Aldridge admitted by pleading guilty, a mandatory minimum sentence was a direct consequence of his plea.

The State does not argue that Aldridge admitted he intended to kill the victim. The issue is whether he admitted that he used force or means likely to result in death.

Aldridge pleaded guilty to assault in the first degree "as charged in the information." The information specifically alleged that Aldridge assaulted the victim with "force and means likely to produce great bodily harm or death."

"Great bodily harm" means bodily injury which (1) "creates a probability of death," (2) "causes significant serious permanent disfigurement," or (3) "causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4).

Replacing the term "great bodily harm" in the information with its three alternative definitions shows that Aldridge admitted to assaulting the victim using force and means likely to produce (1) bodily injury which creates a probability of death, (2) bodily injury which causes significant serious permanent disfigurement, (3) bodily injury which causes a significant permanent loss or impairment of the function of any bodily part or organ, or (4) death.

Of this list, only (1) and (4) are facts supporting the imposition of the five-year mandatory minimum. Using "force and means likely to produce" "bodily injury" which "creates a probability of death" (the first definition of great bodily harm) is legally indistinguishable from "using force or means likely to result in death" (a fact sufficient to impose the mandatory five-year minimum).

By pleading guilty to a charging document alleging four alternative facts, Aldridge admitted that at least one of those four facts existed, but he did not admit which one. "'[W]hen either "A" or "B" could support a conviction, a defendant who pleads guilty to a charging document alleging "A and B" admits only "A" or "B."'" United States v. Guerrero-Jasso, 752 F.3d 1186, 1191 (9th Cir. 2014), quoting Young v. Holder, 697 F.3d 976, 988 (9th Cir. 2012).

Had Aldridge explicitly admitted to either (1) or (4), he would have admitted facts necessary to impose the mandatory minimum. But he did not.

And the State did not "'seek an explicit admission of any unlawful conduct it seeks to attribute to the defendant' for Apprendi purposes," as was its burden. Guerrero-Jasso, 752 F.3d at 1191, quoting United States v. Hunt, 656 F.3d 906, 912 (9th Cir. 2011).

We conclude that Aldridge did not admit to facts sufficient to support the imposition of the five-year mandatory minimum sentence in RCW 9.94A.540(1)(b). Thus, he was misinformed of a direct consequence of his plea.

Reversed.

Becker, J.

WE CONCUR:

Trickey, J

[signature]

Appendix C

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

STATE OF WASHINGTON, Respondent, v. MARLON ROBERTO ALDRIDGE, Appellant.	No. 71313-2-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, State of Washington, has filed a motion for reconsideration of the opinion filed on May 11, 2015; appellant, Marlon Aldridge, has filed an answer to respondent's motion for reconsideration; and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

DATED this 22nd day of July, 2015.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUL 22 PM 1:14

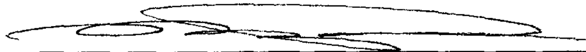
FOR THE COURT:

Becker, J.
Judge

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert (sweigertj@nwattorney.net), the attorney for the appellant, Marlon Roberto Aldridge, containing a copy of the Petition for Review in State v. Aldridge, COA #71313-2-I, in the Supreme Court for the State of Washington.

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



08-18-15

Name | Date

Done in Seattle, Washington

KING COUNTY PROSECUTOR

August 18, 2015 - 2:11 PM

Transmittal Letter

Document Uploaded: 713132-Petition for Review.pdf

Case Name: MARLON ALDREDGE
Court of Appeals Case Number: 71313-2

Party Respresented:
Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
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  Hearing Date(s): ________
- ○ Personal Restraint Petition (PRP)
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- ◉ Petition for Review (PRV)
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Comments:

No Comments were entered.

Sender Name: Ly Bora - Email: bora.ly@kingcounty.gov

A copy of this document has been emailed to the following addresses:

SweigertJ@nwattorney.net
jennifer.joseph@kingcounty.gov
Jim.Whisman@kingcounty.gov
mayovskyp@NWattorney.net