

34879-9

NO. _____

FILED
COURT OF APPEALS
DIVISION II

06 JUN -1 AM 9:39

STATE OF WASHINGTON

BY CA
CERITY

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

In re The Personal Restraint

Petition of:

MICHAEL JOHN REISE,

Petitioner.

RECEIVED
COURT OF APPEALS
DIVISION II
06 MAY 31 AM 7:52
BY C. J. HERRITT
CIRKX

REPLY TO THE RESPONSE TO
PERSONAL RESTRAINT PETITION

X Michael Reise
MICHAEL J. REISE
Petitioner, Pro Se
#882766, C-Unit
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

TABLE OF CONTENTS

	<u>page</u>
A. IDENTITY OF PETITIONER.....	2
B. RELIEF REQUESTED.....	2
C. ISSUES PRESENTED.....	2
D. STATEMENT OF THE CASE.....	2
E. FACTS RELEVANT TO PETITION.....	4
F. QUESTIONS PRESENTED FOR REVIEW.....	5
G. LAW & ARGUMENT.....	6
H. CONCLUSION.....	14

TABLE OF AUTHORITIES

Constitutional Law

U.S. Const. Amend. V, XIV...	...13
Wash. Const. art. I, sec. 3...	...13

Statues

RCW 9.95.011...	...8
RCW 9.92.151...	...9

Court Rules

	<u>page</u>
ER 101...	...6
ER 1101...	...6
ER 901...	...6
ER 802...	...6
ER 1005...	...6
ER 401...	...7
ER 410...	...7
RAP 16.9...	...6

Case Law

Boykin v. Alabama, 395 U.S. 238 (1969)...	...13
Discipline of Bonet, 144 Wn.2d 502 (2001)...	...11
In re PRP of Montoya, 109 Wn.2d 270 (1987)...	...13
In re PRP of Keene, Wn.2d 203 (1981)...	...14
In re Peters, 50 Wn.App. 702 (1982)...	...14
State v. Acevedo, 137 Wn.2d 179 (1999)...	...8, 9, 10
State v. Cameron, 30 Wn.App. 229 (1981)...	...13
State v. Cook, No. 30610-7-II (2004)...	...13
State v. Dyson, 90 Wn.App. 433 (1997)...	...12
State v. Haydel, No. 51279-0-I (2004)...	...12
State v. James, 121 Wn.2d 220 (1993)...	...12

page

State v. Johnston, 17 Wn.App. 486 (1977)... ..12
State v. Kissee, 88 Wn.App. 817 (1997)... ..13
State v. Osborne, 102 Wn.2d 87 (1984)... ..13
State v. Ross, 129 Wn.2d 279 (1996)... ..12
Sate v. S.M., 100 Wn.App. 401 (2000)... ..13
State v. Taylor, 83 Wn.2d 594 (1974)... ..13
State v. Frye, 738 F.2d 196 (1984)... ..12
U.S. v. Timmereck, 441 U.S. 780 (1979)... ..14
U.S. v Russel, 686 F.2d 35 (1982)... ..14
McCarthy v. U.S., 459 U.S. 466 (1969)... ..20
Wood v. Morris, 87 Wn.2d 501 (1976)... ..13

A. IDENTITY OF PETITIONER

The Petitioner, MICHAEL J. REISE, is currently confined within the DOC at the Clallam Bay Correction Center based on a faulty guilty plea out of Thurston County Superior Court. Mr. Reise seeks the relief requested in part B. herein.

B. RELIEF REQUESTED

Mr. Reise RESPECTFULLY ASKS that this Court withdraw the guilty plea imposed, and, remand the case back to the Superior Court for a trial by jury.

C. ISSUES PRESENTED

1. Ineffective assistance of counsel/manifest injustice; and
2. Newly Discovered Evidence

D. STATEMENT OF THE CASE

The relevant statement of the case is that Mr. Reise acted in self defense on 10/26/2004, which resulted in the death of Austin G. Hardison. Mr. Hardison was in a meth induced state of psychosis which had resulted in Mr. Hardison not only attacking Mr. Reise, but another individual just prior. Mr. Reise, fearing for the safety of the customers (Mr. Reise and his wife

Leased and Managed the restaurant adjoining the Hotel) attempted to detain Mr. Hardison for Police. It should be noted this was the second time the assistance of Police was needed to deal with Mr. Hardison's psychotic behavior induced by the meth being used and distributed by Jeremiah W. Soeby from room 112. (see Petitioners Exhibit A hereto).

Mr. Reise **NEVER** intended to hurt anyone. Had Mr. Reise known that Mr. Hardison was going to force Petitioner to shoot in self defense (to ward off another attack), Mr. Reise would have never returned to the area to see if the customer safety was an issue. Mr. Reise was in shock afterwards and reacted without thinking. Mr. Reise left the scene before police arrived; however, Mr. Reise did not ever have any unlawful intent but felt after leaving the scene that he would need an attorney. Consequently, Mr. Reise was arrested and charged based on leaving the scene and the false testimony of Soeby (who had an interest in misleading police to take the focus off the fact that he had been selling meth out of room 112, and, had supplied Mr. Hardison with the meth that made Mr. Hardison become psychotic). In hind sight, Mr. Reise sees how this whole case snowballed out of control; however, at the time, Mr. Reise just reacted without thinking and fled the scene in shock at what had just taken place. (see Petitioners Exhibit A hereto).

Mr. Reise's wife hired Mr. James Dixon for \$10,000.00. Mr. Reise has never before been in any type of trouble with the Law

and believed in and trusted Mr. Dixon. Mr. Dixon did NOT make a proper independent investigation of the facts of the case and only pushed Petitioner into a plea bargain. It is noteworthy that the only real eyewitness (Gelaspie) was in the police record this whole time. Surely if Mr. Dixon was truly working for the defense, Mr. Gilaspie would have been known long before now... The bottom line is that Mr. Dixon provided Petitioner and Petitioner's family with totally bogus information to secure a plea 'deal' for the prosecution. If NOT for the false information, Mr. Reise would have never accepted the plea 'deal' of the prosecutions. (see Petitioner's Exhibit A hereto, along with the affidavits of Michael Reise JR., Cheryl Fahlgren, and the declaration of Gilaspie).

E. FACTS RELEVANT TO PETITION

1. The Petitioner would have never accepted the prosecutors 'deal' if he would have been told the truth, in that there is no parole in "a couple of years", nor is there 1/3 off for goodtime. (see Petitioner's Exhibit A hereto, along with the Declaration of Michael John Reise and the affidavit of Cheryl Fahlgren).

2. The Respondent has used incorrect and/or false statements of fact and law. (see Petitioner's Exhibit A; also see part G.

herein).

3. There is no need for a "reference hearing" on the newly discovered evidence as this evidence should be heard by a jury upon the withdrawal of the guilty plea due to the fact that Petitioner would have never pled guilty if he had NOT of been misinformed by his attorney. (see Petitioners Exhibit A hereto along with the Declaration of Michael John Reise, Michael Reise JR., and Cheryl Fahlgren).

F. QUESTIONS PRESENTED FOR REVIEW

1. Should the facts of Respondent that stem from unsigned, unauthenticated evidence, and, at best, hearsay, be disregarded by this court?

2. Has Respondent used misquoted material in the response to personal restraint petition?

3. Should there be a reference hearing on the newly discovered evidence on the testimony of the only 'real' eyewitness?

4. Is the Petitioner entitled to have the guilty plea withdrawn due to the fact that the plea 'deal' is based on

false information in which the Petitioner would have NEVER agreed to if he had known the truth of the actual consequences of that 'deal'?

G. LAW & ARGUMENT

1. ANY AND ALL FACTS STEMMING FROM THE UNSIGNED AND UNAUTHENTICATED EVIDENCE/DOCUMENTS, WHICH IN IT'S SELF IS REALLY NOTHING MORE THAN HEARSAY, SHOULD BE DISREGARDED BY THIS COURT.

It is well established Law as set forth in RAP 16.9 that only "relevant" evidence will be considered. Further, Rule 16.9 requires that "a confirmed copy of the writing" will be used for consideration by the court. Under WASHINGTON RULES OF EVIDENCE (ER), Rule 101 states that: "These rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101." Rule 1101 (c) (3) states: "habeas corpus proceedings". The Rule of RAP 16.3 (a) & (b) provide for a personal restraint petition to be one in the same as a habeas corpus proceeding and both fall under the same rules of evidence.

Any and all evidence that is unauthenticated is NOT admissible under Rule 901. Hearsay is NOT admissible under Rule 802. (Also see Rule 1005). Further, a witness under the

influence of meth can be excluded pursuant to Rule 601. Evidence, and facts stemming therefrom, should NOT be considered under Rule 401. Last, a guilty plea, and statements therefrom, is also inadmissible under ER 410.

Here, Respondent has submitted unsigned, unauthenticated statements that are nothing more than hearsay. (See Respondents Appendix E & F). Respondent then asserts facts of the incident based entirely off this inadmissible evidence, that really has no relevance to the issues herein.(See RESPONSE TO PERSONAL RESTRAINT PETITION, pages 13 through 20). These are NOT the true and correct facts of this case and this court is asked to disregard any and ALL of these facts... Based of the correct evidence of record, the correct and true facts of this case are contained in part D. herein (along with and ALL relevant evidence thereto). Further, it should be noted by this court that the only real relevant issue here is whether or not Petitioner plead guilty based off of incorrect information, and, without that false belief, would the Petitioner have accepted the prosecutions plea 'deal'...(The answer is that Mr. Reise would NOT have accepted any such 'deal' if he [Petitioner] would have known the truth of the real consequences of that plea).

2. RESPONDENT HAS MISQUOTED THE LAW IN THE RESPONSE

In the RESPONSE TO PERSONAL RESTRAINT PETITION, on pages 10

and 11, Respondent points to State v. Acevedo, 137 Wn.2d 179 (1999) and State v. Johnston, 17 Wn.App. 486 (1977) and makes incorrect citations to these two cases. Respondent has misquoted this material as follows:

FIRST: On page 10 of the Response, Respondent states that: "...earned early release time is not a direct consequence [of a guilty plea]" and points to State v. Johnston; however, State v. Johnston is a 1977 case. As Respondent points out on page 12 of the response, "the effective date of the Sentencing Reform Act [known as the SRAs']" was "July 1, 1984". Prior to the SRA there was no "earned early release" as the system in place back in 1977 was the parole board. This case is still on point when correctly quoted in that the Johnston Court held that:

"The Cosequences of a guilty plea should be explained to the defendant. This would include: informing the defendant that his plea waives the right to a jury trial; that the maximum sentence of X years may be imposed; that there is a **minimum sentence** [now referred to as the "minimum term"] (if any); and that previous convictions may be used to determine his sentence."

Johnston at 494.

The "minimum term" of a sentence is set forth in RCW 9.95.011 and have the same requirements prior to July 1, 1984 to the present. The only difference is that the "minimum term" used to be set by the board where now days the "minimum term" is

automatically set by RCW 9.92.151, which sets the "minimum term" by "Early Release for Good Behavior".

Here, Mr. Reise's Attorney misinformed Petitioner of what the "minimum term" would be based on earned early release which the Law requires be correctly explained as part of the "consequences of a guilty plea" mentioned above. Without this incorrect information, Petitioner would have never pled guilty. Further, Petitioner attempted to address this incorrect information with Mr. Dixon as soon as it was discovered; however, Mr. Dixon then dropped the case after being paid \$10,000.00 - instead of working with his client (Mr. Reise) to Correct the error. (see ALL Petitioners Appendices and Exhibits).

SECOND: On pages' 10 & 11 of the Response, Respondent incorrectly states that: "...the defendant cannot rely upon his claim that he was misinformed about good time in order to show that his plea was involuntary. As regards his claim of ineffective assistance of counsel, having claimed that his counsel failed to inform him his potential good time would be no more that ten percent, he must show that had he known of that limit on good time he would not have pled guilty. Acevedo, 137 Wn.2d at 198-199." The correct reading of State v. Acevedo, 137 Wn.2d 179 (1999) states that:

"A defendant must show that defense counsel's performance was deficient. To satisfy the "performance" part of the test, defendant must prove that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of ALL the circumstances." To satisfy the "prejudice" part of the test, a defendant must prove defense counsel's deficient performance prejudiced the defendant, "show[ing] ... there is a reasonable probability that, but for counsel's errors, [defendant] would not have plead guilty and would have insisted on going to trial."

Acevedo, at 198-99.

Here, by the documentation to the Washington State Bar and these proceedings here, shows that Petitioner "would not have plead guilty and would have insisted on going to trial". The documentation of this case speaks for itself, in that, why would Mr. Reise pay \$10,000.00 to his attorney to make a 'deal' for him, only to turn around with in a month and want to withdraw the plea because the information was incorrect (Petitioner had learned that he would NOT be released in "a couple of years" nor receive 1/3 off). There is a big difference in serving "a couple years" and serving over 10 years in prison.

It should also be noted that if Mr. Dixon would have been working on behalf of the defense, the eyewitness Kenneth Gilaspie would have been identified out of the police record. Surely a paid attorney who is actually interested in the defense, and NOT with just making a 'deal', would have investigated ALL the facts and evidence prior to pushing the

plea 'deal'.

As described herein, the correct information of the actual "minimum term" was required in order for the consequences of this plea 'deal' to be legally valid. The Petitioner has demonstrated that if not for this incorrect information he would have NEVER accepted this plea 'deal' of the prosecutions ,and , would have instead insisted upon a trial by jury.

3. THERE IS NO NEED FOR A REFERENCE HEARING ON KENNETH GILASPIE.

The Respondent is calling for a reference hearing on Petitioners eyewitness (Mr. Gilaspie); however, as described in parts 1 and 2 of F. herein, there is no need for a reference hearing due to the fact that this plea should be pulled and Mr. Gilaspie's testimony should be heard in a court of law by a jury. Respondent should NOT attempt to make any 'deal' with Mr. Gilaspie prior to this. (see DISCIPLINE OF BONET, 144 Wn.2d 502 (2001)).

4. THE PLEA 'DEAL' SHOULD NOT BE ALLOWED TO STAND.

It is a "manifest injustice" for defense counsel to secure a plea 'deal' with incorrect and/or false information that in anyway misleads the defendant... By Law, the 'deal' should be withdrawn and the defendant should be scheduled for trial by

jury.

"A plea may be withdrawn if the defendant does not actually know the consequences of the plea. *United States v. Frye*, 738 F.2d 196 (7th. Cir. 1984); *State v. Ross*, 129 Wn.2d 279 (1996). Before pleading guilty a defendant should be made aware of possible defenses, at least where the defendant makes known facts that might form the basis of such defenses. *Frye*, 738 F.2d at 199. A claim of self-defense, however, is available only if the defendant first offered credible evidence tending to prove that theory or defense. *State v. Dyson*, 90 Wn.App. 433, 438 (1997); *State v. James*, 121 Wn.2d 220, 237 (1993)"; quoting *State v. Haydel*, No. 51279-0-I (Wash.App.Div.1 05/24/2004).

Here, there is credible evidence that shows that Mr. Reise acted in self defense. Petitioners Attorney, Mr. Dixon, failed to properly investigate the facts and evidence prior to pushing for this plea deal. Then, Mr. Dixon misinformed and/or misled Petitioner, as well as Petitioners family, to secure the plea 'deal' for the prosecution. Mr. Reise only accepted this 'deal' based on the belief that he would be at home with his family in "a couple of years" without the risk associated with a jury trial. Mr. Reise's family also wanted the same based off the same belief. (see Petitioners Exhibit A hereto, along with the Affidavits of Cheryl Fahlgren and Michael Reise Jr. [Appendices of Petition]).

A manifest injustice may occur if counsel's representation was ineffective or if the plea was not knowing, voluntary and intelligent. State v. S.M., 100 Wn.App. 401, 409 (2000); citing State v. Taylor, 83 Wn.2d 594, 597 (1974).

In order to satisfy the due process requirements of the federal and state constitutions, a guilty plea must be knowing, intelligent, and voluntary. Boykin v. Alabama, 395 U.S. 238 (1969); In re PRP of Montoya, 109 Wn.2d 270, 277 (1987); U.S. Const. Amend. V, XIV; Wash. Const. art. I, sec. 3.

In the context of guilty pleas, counsel must 'actually and substantially' assist a defendant in determining whether to plead guilty, and inform of all the direct consequences of a guilty plea[such as whether or not 1/3 goodtime will be used to determine the minimum term, and, whether or not parole is available]. State v. Osborne, 102 Wn.2d 87, 99 (1984); quoting State v. Cameron, 30 Wn.App. 229, 232 (1981); citing State v. Cook, No. 30610-7-II (2004).

"The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. "...[F]ailure to comply fully with 4.2 requires that the defendant's guilty plea be set aside and his case remanded..." Wood v. Morris, 87 Wn.2d 501, 511 (1976) "...[A] guilty plea is

not truly voluntary "unless the defendant possess an understanding of the law in relation to the facts". In re PRP of Keene, Wn.2d 203, 209 (1981); quoting McCarthy v. U.S. 459, 466 (1969).

"Relief is warranted when defendant shows he would not have plead guilty if violations had not occurred. U.S. v. Timmreck, 441 U.S. 780, 784-85 (1979). In re Peters, 50 Wn.App. 702, 707, the court held that: "different considerations may arise when counsel affirmatively misinforms the defendant of the collateral consequences of a guilty plea. U.S v. Russel, 686 F.2d 35 (1982). If "the guilty plea was obtained by threat, deceit, and/or coercion... with defense counsel that covered-up constitutional error; the defendant's guilty plea upon incorrect information provided by defense counsel ... **will not be allowed to stand.**" State v. Kissee, 88 Wn.App. 817, 822 (1997).

H. CONCLUSION

Based off the above facts and authorities, Petitioner MICHAEL JOHN REISE, RESPECTFULLY ASKS that this court withdraw his guilty plea and remand this case for a jury trial.

RESPECTFULLY SUBMITTED this ___ day of May, 2006.

X 
MICHAEL J. REISE
Petitioner, Pro Se

PROOF OF SERVICE

I, MICHAEL J. REISE, hereby certify and/or declare, under penalty of perjury, by my signature, that on this____day of May, 2006, I served via U.S. mail, postage prepaid, one copy of:REPLY TO THE RESPONSE TO PERSONAL RESTRAINT PETITION, to the Attorneys' of record:

Edward G. Holm, Prosecuting Attorney
James C. Powers, Deputy Prosecuting Attorney
Thurston County Prosecuting Attorney's Office
2000 Lakeridge Drive S.W.
Olympia, WA 98502

SIGNED this____day of May, 2006.

MICHAEL J. REISE

EXHIBIT

A

2. In 2004, me and my common law wife Cheryl Fahlgren leased and operated the Baily Family Restaurant that connected to the Baily Motor Inn, although these businesses were independently operated in and by themselves.

3. Prior to my arrest on 10/27/2004, I have never been in any type of trouble with the Law. I have never been arrested. In fact, I have never even had so much as a traffic citation. The truth of the matter is I have always been a hard working, law abiding tax paying citizen who, with the help of my wife Cheryl, have raised two great children who are now full grown.

4. On 10/26/2004, the day of incident, I knew of some drug-dealing from the hotel and had heard reports of attacks in the area. The word around was that the drugs were being sold out of room 112, which later turned out to be Jeremiah W. Soeby. Upon information and belief, It was Soeby who had been supplying the decedent Austin G. Hardison with methamphetamine, which ultimately caused the decedent to become psychotic and attack people out of the blue, which had been investigated by Officer Seig prior to the incident at hand. This would explain why Soeby lied to the police regarding the true facts of actually what took place (in that Soeby lied to mislead police from looking at Soeby for dealing drugs, having Hardison for a runner, and supplying Hardison with meth [which caused Hardison to become psychotic and prone for unprovoked attacks on people]).

5. Also, it should be noted that on 10/26/2004, the day of incident, I had NOT drank any alcohol at all. In truth, I very rarely drink. When I do, it is no more then a beer or two (at most); however, on this day I had NOT drank at all.

6. On the day of incident, 10/26/2004, I was in the process of checking the furnace fuse box, when I was attacked by a black man with red hair, who had a stick. This man was later identified as the decedent, Austin Gardell Hardison (the same man who had attacked someone else just prior, in which Officer Seig had investigated). I had Arthur Riley with me (I do NOT believe Mr. Riley told police I was intoxicated. I am sure under oath Mr. Riley would correct this misunderstanding). Anyway, Mr. Riley is the one who pulled Mr. Hardison off me. Further, Mr. Riley will testify to the true facts that I did NOT use any racial slurs. Mr. Riley will further testify under oath that it was the decedent Hardison that had a stick - NOT me. Anyway, after being attacked and almost being choked out by Hardison with the stick, Mr. Riley probley saved my life and pulled Mr. Hardison off me. I returned to my office to retrieve my cell phone to call police. For some reason I was disconnected. Fearing for the safety of my costumers, I returned to the area to see if Mr. Hardison was threatening and/or attacking anyone else. Mr. Riley had left back to attend to his normal city job.

7. Upon returning to where I was first attacked, as mentioned herein, I had my cell phone and pistol. My intention was to hold Mr. Hardison for police, to be escorted off the premises - that is if Mr. Hardison had not already left on his own; however, I did find Mr. Hardison a second time. I did NOT use any racial slurs this time either. In truth, if I had known that Mr. Hardison was spun-out and crazy from the meth, and was going to attack me again, even though I was armed with a pistol (causing me to shoot in self defense), I would NOT have even gone back and would have waited for police to arrive. However, that is NOT how it turned out... Mr. Hardison did attack me again and forced me to use the gun in self defense. Thereafter, I panicked and fled the scene. NOT because I felt I did anything wrong but as a reaction to the whole situation. I just reacted without thinking. Then, it ALL seemed like a bad dream. Later on, when I was questioned by police, I felt I had done something wrong by leaving the scene, and so, I was thinking I need to contact an attorney because of that. This is the only reason I did not want to talk to police, as I was not sure what I should do. When I was taken into police custody, I told detectives that I felt I needed an attorney. Detectives told me I didn't need one, that everything would be fine. I was then interrogated for over ten(10) plus(+) hours. Then charged for murder. I then retained the services of Attorney at Law James J. Dixon (WSBA #20257) for \$10,000.00.

8. The whole time I was in the County Jail pending trial, Mr. Dixon only wanted to talk about a plea bargain and NOT about whether I was innocent or guilty. Mr. Dixon really wasn't even concerned with the facts of the case. Now, it turns out that Mr. Dixon did not even make an independent investigation of the case. Had Mr. Dixon investigated, ALL the facts mentioned herein would have been revealed and the identity of the only real eyewitness (Gillaspie).

9. The only reason I accepted the plea agreement was because Mr. Dixon told me I did NOT have a defense, that if I did not accept the "deal", I would get thirty(30) years in prison. Mr. Dixon convinced not only me, but my family as well that if I took this deal for 13 years in prison, I would only have to serve a couple of years, as I would not only get one-third(1/3) off my sentence for goodtime credit, but that I would also be eligible for parole in "a couple years". Mr. Dixon explained that parole was back to relieve over crowding. My family wanted me to take the 'deal' described herein based on what we had been told by Mr. Dixon. Based on the facts mentioned herein, I agreed to the 'deal' described herein.

10. As soon I got to the DOC I found-out that everything Mr. Dixon told me, mention herein, was false. I immediately called Mr. Dixon, who would not take my phone calls. I then wrote

letters. Mr. Dixon would not reply. I then filed the grievance with the bar and agreed to mediation. All Mr. Dixon had to do was correct his own mistake and pull my guilty plea, as shown here, the plea was based entirely on false and/or misleading information. Without this incorrect and/or false information, I would have NEVER plead guilty and would have proceeded to a jury trial.

Michael Reise

MICHAEL J. REISE

SUBSCRIBED AND SWORN TO before me this 9th day of ^{June} ~~July~~, 2006.
MR



Kerri S. Mctarsney
NOTARY PUBLIC in and for the
STATE OF WASHINGTON, at Clallam Co.
My Commission Expires: 7-22-09