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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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THOMAS WILLIAM SINCLAIR RICHEY

Appellant,

v.

SANDRA DIMMEL,

Appellee.

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STATE OF WASHINGTON

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*Appellant's Brief*

APPEAL TO THE SUPREME COURT  
Under the authority of RAP 4.2(a)(1) & RCW 7.36.140

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Tom WS Richey #929444  
Stafford Creek Corr. Ctr  
191 Constantine Way  
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## I. INTRODUCTION

This is a case of first impression that calls for this court to clarify the meaning of a statute that conflicts with another statute and with a right guaranteed by the constitution. RCW 7.36.130 bars habeas corpus petitions one year after conviction, but this directly conflicts with RCW 7.36.140 that mandates this court to consider federal questions raised in any petition for habeas corpus, and it conflicts with Art. I, §13 of our State Constitution that guarantees that the habeas corpus shall never be suspended.

Mr Richey properly filed a habeas corpus in the Clallam County Superior Court that contained the federal constitutional question of whether a trial court can lawfully obtain a conviction without providing constitutionally protected due process as required by the 5th and 14th Amendments of the US Constitution. The state conceded that Mr Richey's conviction for Attempted Premeditated Murder was obtained without due process but argued that his habeas corpus petition was time barred under RCW 7.36.130. Although the superior court previously held that a statutory rule cannot trump a right guaranteed by the constitution, it contradicted itself, finding that Mr Richey's petition is time-barred thereby holding that a statutory rule does trump the constitution.

But even if the statutory time-bar rule did trump the Supremacy Clause, an untimely habeas corpus petition is not barred when the conviction being challenged was obtained in violation of due process. Prior to his plea of guilty, Mr Richey was assured in writing that the alternative charge of Attempted Murder by Premeditated Intent was

dismissed: the elements were omitted by agreement from the plea form, the trial judge never discussed those elements with him as required by law to ensure he understood them, the proposed Judgment & Sentence notified him he was solely being convicted of Murder and Attempted Murder by Felony means, and Mr Richey denied premeditation in his written plea statement. Any one of these things would demonstrate a failure to satisfy constitutional due process. Adding or inserting a conviction of Attempted Murder by Premeditated means to Mr Richey's Judgment & Sentence 23 years following his conviction for Murder and Attempted Murder by Felony means is unlawful without satisfying due process; such a conviction cannot be time-barred.

## II. ASSIGNMENTS OF ERROR

1. The superior court erred in finding that a statutory rule trumps a right guaranteed by the constitution.
2. The court erred in applying the statutory time-bar to a Constitutional Writ of Habeas Corpus; the statutory rule only applies to statutory writs of habeas corpus, not constitutional writs.
3. The court erred in applying the time-bar rule to a petition that challenges a conviction that was obtained without satisfying due process requirements.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can a statutory rule trump the Supremacy Clause? (Assignment of Error 1)

2. Have our courts distinguished a difference between statutory writs and constitutional writs and created different rules for each? (Assignment of Error 2).
  
3. Mr Richey was assured he would not be convicted of Attempted Murder by Premeditated means; an alternative charge to which he denied in his written plea statement. 23 years later, the trial court altered his Judgment & Sentence to reflect a conviction for Attempted Premeditated Murder. If due process was never satisfied in 1987 to support a knowing plea of guilty for Attempted Premeditated Murder, is it lawful to later alter a Judgment & Sentence to reflect such a conviction without satisfying due process? (Assignment of Error 3).
  
4. Mr Richey was charged by alternative means. During the plea process, he denied premeditation and was assured he was solely being convicted of Murder and Attempted Murder by Felony means. Does ambiguity in the plea process favor the State or the defendant? (Assignment of Error 3).
  
5. Is it lawful to apply the time-bar to a petition that challenges restraint that is unlawful because it is based on a conviction that was obtained without constitutionally protected process as required by the 5th and 14th Amendments of the US Constitution? (Assignment of Error 3).

### III. STATEMENT OF THE CASE

1. On April 10, 1987, the state charged Mr Richey by Amended Information with 1<sup>o</sup> Murder under RCW 9A.32.030(1)(c) [Felony Intent] and 1<sup>o</sup> Attempted Murder under RCW 9A.32.030(1)(a) and/or RCW 9A.32.030(1)(c) [Felony Intent].

2. On April 23, 1987, he attended a plea hearing. During this hearing, the judge asked if he understood that the elements of the crimes he was pleading guilty to were contained on page one of his plea agreement. CP-109. The elements described on page one of his plea agreement solely describe Felony Murder and Attempted Felony Murder. CP-88. The elements to support the alternative charged means of premeditation were omitted.<sup>1</sup> At no time did the judge ask Mr Richey if he understood the elements of the crimes he was pleading guilty to nor asked if he understood he was pleading guilty to the alternative charged means of premeditation. CP-85 & CP-95 through 128.

3. Mr Richey believed he was not pleading guilty to the alternative charged means of premeditation. CP-85 & 86. This is further supported by his written plea statement that denied premeditation. He stated that he entered the store "with the intent to but a TV," and that when he shot both victims following a dispute over the price of a TV, both shots were "instantaneous" [sic] rather than premeditated. CP-92. In addition, prior to pleading guilty, he reviewed the Judgment & Sentence

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<sup>1</sup> Premeditation is an essential element of [Attempted] Murder in the First Degree. RCW 9A.32.030(1)(a); State v. Neshund, 50 Wash App 531, 538, review denied, 110 Wn.2d 1025 (1988); State v. Allens, 107 Wn.2d 848, 850 (1987).

with his attorney, Mr Nichols, that was being proposed to the court for finalization. CP-122. The Judgment & Sentence assured him that the alternative charged means of premeditation had been dismissed and that the court was only considering accepting his guilty pleas for Murder and Attempted Murder under RCW 9A.32.030(1)(c) [Felony Intent]. CP-80. No one told him otherwise. CP-95 & 86. He entered his plea of guilty based on his understanding and the assurance that he was not being convicted of the alternative means of Attempted Murder under RCW 9A.32.030(1)(a) [Premeditated intent]. CP-85.

4. On April 23, 1987, the trial court endorsed the Judgment & Sentence, adjudging him guilty of Murder and Attempted Murder under RCW 9A.32.030(1)(c) [Felony means]. CP-80.

5. In 2008, this court ruled that Attempted Felony Murder is not a crime in Washington. CP-53. However, this court also held that, under the rule created in State v. Bowerman, 115 Wn.2d 794 (1990), Mr Richey also pled guilty to the alternative means charged. CP-53. This court did not address whether his plea of guilty to this alternative charged means was knowing, voluntary, and intelligent. CP-50 through 55.

6. Following this court's decision in 2008, Mr Richey filed a motion to strike the invalid conviction of Attempted Felony Murder from his Judgment & Sentence. This led to a ruling from this court's commissioner on June 8, 2010, that instructed the superior court to remove all references to the invalid conviction of Attempted Felony Murder from his Judgment & Sentence. CP-125 & 126. The commissioner did not order the superior court to add a conviction for Attempted Premeditated Murder. Id.

7. On July 28, 2010, the superior court altered the substance of

his Judgment & Sentence by entering a nunc pro tunc order to remove the criminal statute for Attempted Felony Murder and insert the statute for Attempted Premeditated Murder. CP 60-61.

8. Mr Richey was denied an appeal and his numerous collateral challenges to the court's nunc pro tunc order have been dismissed as time-barred.

9. On January 8, 2013, he filed a petition for a Constitutional Writ of Habeas Corpus in the Clallam County Superior Court. CP-68. He requested permission from the court to perform service on the respondents by mail. The court denied this. CP-67. He then filed a motion for reconsideration, claiming that the statutory rule denying service by mail effectively suspended the privilege of the habeas corpus. CP-64. The court agreed, holding that a statutory rule cannot trump a right guaranteed by the constitution. CP-62.

10. On February 28, 2013, the Appellee filed a Response to Mr Richey's habeas corpus petition. CP-4. The Appellee did not dispute Mr Richey's facts nor claims, thereby conceding them. Id. Instead, the Appellee argued that Mr Richey was time-barred by RCW 7.36.130 and 10.73.090. CP-2 & 3.

11. Following a hearing before the Clallam County Superior Court, an order was issued dismissing Mr Richey's petition as time-barred pursuant to RCW 7.36.130 and RCW 10.73.090. This contradicted the court's earlier holding that a statutory rule cannot trump a right guaranteed by the constitution (CP-62).

12. Mr Richey now appeals to this court as a matter of right pursuant to RAP 4.2(1)(a) & RCW 7.36.140.

#### IV. ARGUMENT

##### 1. A STATUTE OF LIMITATIONS CANNOT SUSPEND A RIGHT OUR CONSTITUTION GUARANTEES WILL NOT BE SUSPENDED

Although dealt with in both state and federal statutes, the habeas corpus is antecedent to statute and is recognized in both the US and Washington constitutions. Whatever its other functions, the great and central office of the writ of habeas corpus is to test the legality of detention. Toliver v. Olsen, 109 Wn.2d 607 (1987). It should not matter if a defendant's illegal detention is based on an unlawful process that occurred 30 years ago or 30 days ago; the detention is still illegal if it is based on a conviction that was unlawfully obtained.

Here, the facts demonstrate that the trial court never discussed the elements of premeditation with Mr Richey to determine whether he understood them. CP-109. That is a mandatory due process requirement. CrR 4.2(d); Henderson v. Morgan, 426 US 637, 647 (1976). Understanding the charges is necessary for a guilty plea to be knowing, voluntary, and intelligent. Bousley v. United States, 523 US 614 (1998). The court merely referred Mr Richey to page one of his plea agreement and asked whether he understood that the elements of the charges he was pleading guilty to were contained there. CP-109. But the elements contained on page one of his plea agreement solely describe Felony Murder and Attempted Felony Murder, which is not a crime. The elements to support the alternative charged means of premeditation had been omitted, which indicated that this alternative means had been dismissed, which is also echoed by Mr Richey's written plea statement that denies premeditation. CP-92. Logically, he could not knowingly plead guilty to the means of premeditation if he was

denying premeditated actions. That would be illogical and contradictory. Perhaps any confusion could have been clarified by the proposed Judgment & Sentence prepared by the state that informed Mr Richey of the criminal statutes he was being convicted of violating following his plea of guilty. He certainly reviewed the Judgment & Sentence before the court ratified it. CP-122. However, it assured him in writing that he would be convicted of Murder and Attempted Murder, both by Felony means (RCW 9A.32.030(1)(c)). Not Attempted Murder by Premeditated means (RCW 9A.32.030(1)(a)). CP-80.

The Appellee did not dispute these facts in her Response. CP-4. These facts are important because, without the required due process protections being satisfied prior to a defendant's plea of guilty, a conviction is obtained illegally because the plea cannot be knowing, voluntary, and intelligent. The Appellee's only argument could have been that the Amended Information contained the critical elements of Premeditation. However, if that is all that is required for a plea to be knowing and voluntary, there would be no requirement for a court to enter a colloquy with a defendant to ensure he fully understands the critical elements of the crimes he is agreeing to plead guilty to. Mandatory due process protections were simply never afforded to Mr Richey.

If the trial court had made any effort to extend due process protections then it later would have had competent jurisdiction to alter the Judgment & Sentence to reflect a knowing plea of guilty and conviction for Attempted Murder by Premeditated means. The court's nunc pro tunc order on July 28, 2010, was simply wrong because due process requirements were never satisfied. Thus, the court effectively obtained the conviction

for Attempted Murder under Premeditated means in violation of the 5th and 14th Amendments of the US Constitution.

Mr Richey attempted to appeal the nunc pro tunc order but the courts of this state denied him the right, claiming that the court had merely made a typographical correction. Mr Richey's numerous collateral challenges were all dismissed as time-barred.

He finally sought relief by filing a petition for a constitutional writ of habeas corpus, which the Clallam County Superior Court dismissed, applying the statute of limitations. But a strict statute of limitations on all habeas corpus petitions would be a derogation of the common law writ and hence, an unconstitutional suspension of the writ. In re pers. Restraint of Runyan, 121 Wn.2d 432 (1993). A statute cannot trump a right guaranteed by the constitution. CP-63. A plain reading of Art I, §13 of our constitution states that the habeas corpus shall not be suspended except during rebellion or invasion. RCW 7.36.130 allows a defendant to file a habeas corpus petition within one year following conviction, but then suspends the writ after one year. This conflicts directly with the Suspension Clause. Moreover, this statute also conflicts directly with RCW 7.36.140 that provides that:

"In the consideration of any petition for a writ of habeas corpus by the Supreme Court or the Court of Appeals, whether in an original proceeding or upon an appeal, if any federal question shall be presented by the pleadings, it shall be the duty of the Supreme Court to determine in its opinion whether or not the petitioner has been denied a right guaranteed by the constitution of the United States."

(emphasis added).

Mr Richey has presented a constitutional issue in this proceeding and RCW 7.36.140 states in plain language that, regardless of any

statutory time-bar, it is this court's duty to consider the constitutional issues raised herein. It would be an abrogation of the constitutional and statutory responsibility of this court to refuse to consider questions raised by petitions for habeas corpus which have not been previously raised and determined. Art. IV, §4 of the State Constitution and RCW 7.36.140; Scraggs v. Rhay, 70 Wn.2d 755 (1967). The questions raised herein have never been addressed by this court. In In Re Personal Restraint of Richey, 162 Wn.2d 865 (2008), this court held that, under the ruling established in State v. Bowerman, 115 Wn.2d 794 (1990), Mr Richey pled guilty to both alternative charged means. But this court never addressed whether his plea was knowing and voluntary; nor whether the trial court afforded him due process protections. Id.

While it may be tempting to dismiss this case because it is so old, the facts are irrefutable. Due process protections were never afforded Mr Richey. His conviction for Attempted Murder under Premeditated means was obtained in violation of due process. His detention is therefore illegal and the habeas corpus, which is intended for testing the legality of detention, cannot be suspended except during invasion or rebellion. The Clallam County Superior Court violated the Suspension Clause in using a statutory time-bar to dismiss his petition.

**2. THE STATUTORY RULES CODIFIED UNDER RCW 7.36 GOVERN  
STATUTORY WRITS OF HABEAS CORPUS WHICH ARE DISTINGUISHABLE  
FROM CONSTITUTIONAL WRITS OF HABEAS CORPUS**

Our courts have recognized a distinction between constitutional and statutory writs of certiorari. See Bridle Trails Community Club v.

Bellevue, 45 Wash App 248 (1986); Clark County Pub. Utility Ditt. No. 1 v. Wilkinson, 139 Wn.2d 288 (2000); and Saldin Securities v. Snohomish County, 134 Wn.2d 288 (1998). Our courts have also distinguished two classes of mandamus; one under the constitution giving Supreme Court original jurisdiction, and the other under RCW and commonly known as the statutory mandamus. See State ex rel. Pacific Bridge Co. v. Washington Toll Bridge Authority, 8 Wash 387 (1941). These distinctive constitutional writs originate from the same paragraph from which the habeas corpus originates. (Art. IV, §4 and §6 Wash State Const.)

The same reasoning our courts have used to distinguish between constitutional and statutory writs of certiorari and mandamus must also logically hold for the writ of habeas corpus too.

The Suspension Clause (Art. I, §13) guarantees that the habeas corpus shall not be suspended. This is recognized by RCW 7.36.140. Its mandatory language states that it shall be the duty of the Supreme Court to consider federal questions raised in any petition for habeas corpus. A federal question is, of course, constitutional in nature. However, RCW 7.36.130 effectively states that the habeas corpus shall be time-barred one year after a defendant's conviction. This statute must refer to statutory writs only, which do not contain issues of a constitutional nature, because this statute cannot suspend what the Suspension Clause of our constitution guarantees shall not be suspended.

To further support the proposition that our law recognizes the existence of more than one type of habeas corpus petition, the language of RCW 7.36.140 states that it is the duty of this court to consider "any" petition for habeas corpus that raises a constitutional issue. This use of

the word "any" indicates a distinction between more than one type of habeas corpus. This distinction can only be a reference between constitutional writs and statutory writs.

This is an issue of first impression. Our courts have clarified a distinction between other constitutional writs created by our state's constitutional provisions (Art. IV, §4 and §6), but it has yet to make a clear distinction as it applies to the writ of habeas corpus. It should do so here.

**3. IT IS UNCONSTITUTIONAL TO APPLY THE STATUTORY TIME-BAR TO A PETITION THAT CHALLENGES A CONVICTION THAT WAS OBTAINED WITHOUT SATISFYING DUE PROCESS OF LAW**

As the facts herein demonstrate, the trial court did not afford Mr Richey the protections of due process guaranteed under the 5th and 14th Amendments of the US Constitution prior to entering a judgment that convicted him of Attempted Murder under Premeditated means. The Respondent's only argument is that this court held that he pled guilty to both alternative charged means of Attempted Murder. Richey, supra. But this court relied on the rule established in State v. Bowerman and did not address the federal question of whether Mr Richey knowingly pled guilty to both alternative charged means of Attempted Murder.

Any ambiguity in the plea agreement must favor Mr Richey and not the state who prepared it. Brown v. Poole, 337 F<sup>3d</sup>1155, 1159-60 (9th Cir. 2003). Mr Richey denied premeditation, the elements were omitted from the plea agreement, and the Judgment & Sentence notified him he would solely be convicted of Attempted Murder under Felony intent. These facts reasonably favor Mr Richey's claim that he believed he was solely pleading

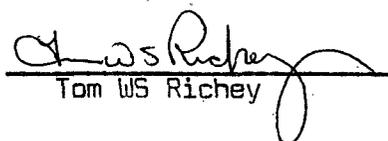
guilty to Murder and Attempted Murder under Felony means, and that due process protections were never afforded him.

The trial court lacked competent jurisdiction to alter the substance of Mr Richey's Judgment & Sentence to add or insert a judgment reflecting a conviction for Attempted Murder under Premeditated means because due process protections were never satisfied. Under CrR 4.2(d), it was the court's duty to make some determination as to whether Mr Richey understood the charge of Attempted Murder under Premeditated means. The court made no effort to do this and the record is not ambiguous regarding that. A court that enters a judgment of conviction without satisfying due process lacks competent jurisdiction to enter the judgment because due process protections are a mandatory constitutional prerequisite prior to the acceptance of a plea. RCW 10.73.090(1) provides an exception to the time bar in such instances. Mr Richey's current detention is founded on a conviction that was obtained without satisfying due process protections and is therefore unlawful. He is entitled to relief.

#### V. CONCLUSION

For the foregoing reasons, this court should grant Mr Richey relief from illegal detention.

Dated this 7th day of September, 2013.

  
Tom WS Richey

CERTIFICATE OF SERVICE BY MAILING

I, Tom WS Richey, over the age of twenty-one and competent to testify herein, do state that I sent a copy of:

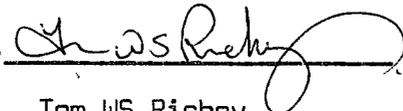
APPEAL TO THE SUPREME COURT

By placing such documents in the Stafford Creek Corrections Center mailbox in a postage prepaid envelope addressed to:

Alex Kostin  
Mandy Rose  
Office of the Attorney General  
Corrections Division  
PO Box 40116  
Olympia, WA 98504

That I mailed the document on the 4th day of October, 2013.

I swear, under the penalty of perjury, that the foregoing is true and correct.

Signed.   
Tom WS Richey

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