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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 34879-9-II

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

In Re The Personal Restraint
Petition Of:

MICHAEL JOHN REISE,
Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF,
PERSONAL RESTRAINT PETITION

Michael John Reise #882766
Petitioner, Pro Se
S.C.C.C. H3 / A-79U
191 Constantine Way
Aberdeen WA 98520-9504

A. IDENTITY OF PETITIONER:

The Petitioner, MICHAEL JOHN REISE, is currently confined within the Department of Corrections (DOC), at the Stafford Creek Corrections 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. The Court may also find, if necessary, to order a Reference Hearing suggested by the State.

C. ISSUES PRESENTED:

That Newly Discovered Evidence: (1) will probably change the results at a Trial; (2) was discovered since the guilty plea was entered; (3) could not have been discovered before trial by the exercise of due diligence; * could only have been discovered upon thorough investigation by W.S.P. Crime Lab Forensics, Lacey Police, and counsel. (4) Is material; and (5) is not merely cumulative or impeaching.

D. STATEMENT OF THE CASE:

I, MICHAEL JOHN REISE, Defendant, being first duly sworn, upon oath, do hereby certify that I am over the age of 49 years, will be giving the following statement and argument under penalty of perjury. That I am competent to give such a statement and do testify in matter herein. I have personal knowledge of the matters herein as follows in my Supplemental Brief and argument in my Motion for the withdrawal of the guilty plea.

The relevant statement of the case is that Mr. Reise acted in self-defense on 10/26/04, which resulted in the death of Austin Hardison. After taking what the petitioner knows now to be an unknowing plea was sentence to 15 years in prison, plus 24-48 months of Community Custody on May 12, 2005 for murder in the second degree.

In November of 2005, seven months after his conviction, Mr. Reise was brought back to Thurston County from Clallam Bay Corrections Center for a restitution hearing. Because of Mr. James Dixon (Attorney of record) removing himself from the case Mr. Reise was left with no legal representation for the restitution hearing or appeals. Mr. Reise remained in the custody of Thruston County Jail for the next 6 months well into 2006 as he was ordered to 4 separate hearings under 4 different judges and 2 different public defenders. These hearings were for the same matter of restitution. In a related case the Court of Appeals held that a court does not have authority to enter an Order Setting Restitution hearing under 9.94A.142(1) more than 180 days after sentencing.

In that time line, in the month of February, 2006 Mr. Reise was approached by a Mr. Gillaspie who proceeded to introduce himself. Mr. Gillaspie stated that he had witnessed the incident which took place at Bailey's on 10/26/04. Mr. Gillaspie stated that he witnessed that attack where Mr. Reise had to defend himself from the assailant. Mr. Gillaspie continued, saying he lived at Bailey's Motel and that he worked on the grounds on a daily basis. Mr. Gillaspie came forth with his declaration on what he witnessed that day at Baileys on 2/15/06, because as he stated, he wanted to do the right thing. Evidence will show that Mr. Gillaspie's declaration is not only credible, but the truth, signed by Mr. Gillaspie under penalty of perjury. See exhibit F, pages 1-3 in petitioner's Personal Restraint Petition.

E. FACTS RELEVANT TO THE BRIEF:

- (1) Mr. Reise would have never accepted any plea deal to a murder charge, as his counsel advised him to do, but would have insisted to go to trial had Mr. Gillaspie been discovered during that time.

- (2) Had Mr. Gillaspie been discovered during the initial investigation the original charge of first degree murder may have been reduced or at best, dropped.

- (3) Mr. Reise, under the advice of his counsel took the plea bargain thinking that was the only option at the time, for him and his family, pointed out by his lawyer Mr. Dixon.
- (4) The State has claimed the petitioner has changed his story several times in the state's response to his PRP. When Mr. Reise was taken into custody he was interrogated for more than four hours. During the interrogation Mr. Reise asked for a lawyer several times throughout the interrogation wherein no lawyer was granted and the questioning continued. The following morning on 10/28/04 the interrogation continued without legal representation. Mr. Reise finally allowed detectives to record his story under great duress, again without legal representation. The newly discovered evidence will prove Mr. Reise has been consistent, saying from the beginning that he acted in self-defense.
- (5) The petitioner's counsel was only focused on getting the petitioner to accept a plea bargain, which kept both parties from doing a complete and thorough investigation in the findings of the facts and the truth. See page 10 of Reply to the State's Response of PRP, 2nd paragraph.
- (6) The State concurs that the newly discovered evidence was not present, or available while this case was pending trial as stated in response to petitioner's PRP pg 14.
- (7) The State agrees that Gillaspie's declaration under oath and under penalty of perjury, consistent with his testimony would be evidence to be found material, and not just cumulative or impeachment. See pg. 15 of the State's response to Petitioner's PRP.
- (8) On page 15 in the State's response to PRP says, they are not sure whether this evidence could have been discovered before the defendant accepted the plea bargain, under the

advice of his counsel. The witness, Mr. Gillaspie lived at Bailey's Motel and worked on the grounds doing lawn work, maintenance, painting, etc.. This witness should have been discovered during a proper and thorough investigation and discovery process.

(9) Mr. Gillaspie states in his declaration under penalty of perjury on pg. 2 of 3 that a Lacey Police Officer at the scene took down his name and motel room where he lived early evening of the day of the incident. No Crime Scene Investigators nor detectives ever followed-up on getting a statement or to question Mr. Gillaspie.

F. INEFFECTIVE COUNSEL:

Having new knowledge and knowing now what the Defendant could not have possibly known before, the Defendant claims counsel was deficient. Counsel was deficient for not adequately investigating all relevant factors in regards to the probable cause statement in terms of discovery. By way of declaration, Mr. Gillaspie, was actually made available by way of newly discovered evidence, but in hindsight, was a material witness.

Mr. Gillaspie states, by declaration, that he was identified at the crime scene by a Lacey Police Officer, but never questioned as to the actual knowledge of events that led to the crime scene investigation. A thorough investigation by counsel, upon review of police reports and probable cause statements should have been discovered that this person may have been an obvious witness. In Mr. Gillaspie's declaration he states he actually lived and worked on the premises of the crime scene.

Mr. Gillaspie, by way as tenant/landlord monetary documentation can prove his residency by way of rental payment records. Had counsel properly investigated all aspects or relevant information gathered at the crime scene this manifest injustice could have been avoided.

Trial would have been the best available option as opposed to a faulty plea agreement. Surely the plea agreement was the best option for counsel, not the defendant. The exercise of due

diligence is unclear due to deficient performance by counsel and police crime scene investigation.

G. POLICE PHOTOGRAPHS:

Evidence will show through initial police records, and photographs taken of Mr. Reise's injuries, that the defendant was the victim of a physical assault by the assailant Mr. Hardison. Mr. Hardison advanced on Mr. Reise and knocked him down on the concrete stairwell using a 4ft. club. Photographs were taken by detectives on the morning of 10/28/04 during the interrogation, again having no legal counsel. Photographs were taken of injuries to both elbows and arms of the defendant. Mr. Reise also sustained an injury to the back of his head which occurred during the fall on the concrete. As previously referenced the defendant was a victim of assault initially. A city electrician, Art Riley actually pulled that assailant off Mr. Reise while the assailant had the club across the defendant's neck while sitting on top of his chest trying to choke him to death. Mr. Riley immediately left the scene as soon as he and Mr. Reise were able to get out of the stairwell. Mr. Riley will testify to these facts under oath.

H. CLAIMS THAT DEFENDANT MAY HAVE BEEN OR APPEARED TO BE INTOXICATED:

The defendant was not intoxicated the day of the incident, or any other day operating Bailey's Restraunt. Mr. Reise does not take drugs and only has on occasional beer and does not drink hard-liquor of any kind. Testimony under oath given by defendant's manager (Denny Quinn), family members, and other employees that worked at Bailey's for Mr. Reise will prove the defendant was not intoxicated on 10/26/04 at Bailey's restraurant or any other day running the restaurant. Mr. Reise along with his common law wife, Cheryl Fahlgren, leased Baileys restaurant under a one year contract starting 4/2004 to 5/2005 from Steve and, Young Kang. The State has mentioned Mr. Reise was worker at Bailey's, then referred that Mr. Reise was the manager, but in actuality Mr. Reise was leasing the restaurant, and had full responsibility

of the operation of Bailey's restaurant on a daily basis on 1 year lease.

I. AUTOPSY EVIDENCE/POLICE EVIDENCE:

Autopsy results showed the assailant, Mr. Hardison positive for illicit substances through the toxicology report on page 2 of 2, Appendix H in State's response to Petitioner's PRP. On page 4 of the autopsy report under toxicology reports that blood for ethanol and urine for drug screen are submitted to the state toxicology laboratory. This report is not specific, or clear on which illicit substances, and the amount of illicit substances were found in the assailants system. This brings into question, was WSP forensic chemist and crime scene investigation present at the scene? This could be evidence that would explain the assailants (Mr. Hardison) psychotic behavior which led to his attacks on the defendant.

This also brings to question of counsels deficient performance by not properly investigating this evidence. There is also the question that police may have known that Mr. Hardison had outstanding warrants for his arrest in King and Pierce Counties when he was incarcerated in Thurston County Jail days, or a couple of weeks before the incident while being held on other charges. The detectives told Mr. Reise that Mr. Hardison was a known gang member called "Red."

Police evidence will also show that 911 was dialed from the Bailey's Motel Manager to ask for assistance on a disturbance at Bailey's involving Mr. Hardison just hours before he attacked Mr. Reise.

J. DEFENDANT'S STATE OF MIND:

Surely the defendant was in fear for his life, and the safety of his family, and the restaurant customers. After the initial encounter with the assailant, instinctively the defendant recovered his cell phone to dial 911. And in fear, retrieved his pistol to retain the assailant, to make a citizens arrest until police arrived. Apparently there was not enough time for the call to

go through, or did not get a signal before the assailant attacked Mr. Reise for the second time with the 4 ft. club.

Clearly, there was no intent to commit Murder. The intent of petitioner was to prevent not only himself from being badly hurt, if not killed, but to prevent any intrusion into the restaurant, where in fact there could have been more victims, including family members.

Only expert testimony could possibly conclude what the post traumatic stress from such an encounter may produce. Adrenaline, fear, and stress from such an encounter might be best explained by the victim and diagnosed by a professional over a period of time. The Defendant never had this opportunity prior to plea or trial.

Naturally the Defendant's first thought was to get legal representation and it was his choice to leave the scene, incorrectly, to sort things out. Unfortunately the Defendant was questioned by police prior to legal representation or professional practitioners who consult traumatized victims.

K. LEGAL REPRESENTATION:

The Attorney of record (Mr. Dixon) removed himself from the case before representing his client (Mr. Reise) to his best professional ability. Mr. Dixon refused to have a mediation between the Washington State Bar Association and Mr. Reise. Mr. Reise was brought back to Thurston County Jail for restitution hearings without legal representation. Through the whole appeal process Mr. Reise has had no legal counsel.

As a right to due process as guaranteed in the United States Constitution, requires that the Defendant be represented on the basis of newly discovered evidence, to withdraw his plea and pursue a trial by jury. In closing, the Defendant would request, by way of counsel motion, an order to subpoena to Superior Court, any and all witnesses necessary to factually confirm the information herein.

L. CONCLUSION:

Petitioner urges the Court to view this evidentiary hearing as an exercise of appellate jurisdiction with the Superior Court acting as an arm of the Appellate Court. This view, however, fails to recognize that in transferring the application for post-conviction relief to the Superior Court, the Court of Appeals loses its jurisdiction over the matter. The evidentiary hearing in the Superior Court is more than a mere reference hearing. The Procedure of transferring applications for post-conviction relief to the Superior Court is designed to present the Court with any remaining issues which have not been fully and fairly determined previously. The Court's findings are not contingent in any way upon acceptance by the Court of Appeals; rather, the determination made by the Superior Court constitutes a final judgment on the merits of the claim for relief. The judgment of the Superior Court is not unlike any other judgment in a criminal proceeding and may be appealed to the Court of Appeals. CrR 7.7(h)

Pursuant to the State's request for a remand for a Reference Hearing, on the basis of newly discovered evidence, said defendant Michael Reise respectfully asks for this Court to allow the Defendant to withdraw his plea of guilty; or at the discretion of this Court, remand to Superior Court for a Reference Hearing. Where in Defendant, by appropriate Motion, may seek adequate representation by counsel to prepare and investigate actual crime scene data as previously addressed.

I, MICHAEL JOHN REISE, hereby certify and/or declare, under penalty of perjury by my signature that all information herein is the truth to the best of my knowledge.

RESPECTFULLY SUBMITTED and signed this 11th day of January, 2007.


Michael John Reise #882766
Petitioner, Pro Se
S.C.C.C. H3 / A-79U
191 Constantine Way
Aberdeen WA 98520-9504

January 11th, 2007

Clerk
Office of the Clerk
Court of Appeals, Div. II
950 Broadway
Suite, 300, MS TB-06
Tacoma, WA 98402-4454

**RE: Personal Restraint Petition of Michael J. Reise
No. 34879-9-II**

Dear Clerk of the Court:

Please find enclosed for filing my SUPPLEMENTAL BRIEF TO PERSONAL RESTRAINT PETITION.

This PRP was transferred from the Washington State Supreme Court under No. 78409-4. Please file the above mention document under the current Court of Appeals number.

Thank you.

Sincerely,



Michael John Reise #882766
Petitioner, Pro Se
S.C.C.C. H3 / A-79U
191 Constantine Way
Aberdeen WA 98520-9504

12/Jan/07
CR

Certificate of Service by Mailing

I, MICHAEL J. REISE, hereby certify and/or declare, under penalty of perjury, by my signature, that on this 11th day of January, 2007, I served via U.S. Mail, postage prepaid, one copy of: SUPPLEMENTAL BRIEF, to the Court of Appeals, Div. II and to the Attorneys' of record:

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

SIGNED this 11th day of January, 2007.

Michael Reise
Petitioner, Pro Se
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