

Original

No. 35785-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Chm

STATE OF WASHINGTON,

Respondent,

v.

JAKE WAYNE VIGIL-CROSS,

Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 04-1-05089-0

THE HONORABLE KATHERINE M. STOLZ,

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760

P. O. Box 7718
Tacoma, Washington 98406
email: slarnold2002@yahoo.com
(253)759-5940

TABLE OF CONTENTS

	<u>Page(s)</u>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1-2
III. STATEMENT OF THE CASE.....	2-5
1. Procedural History.....	2-3
2. The Plea Hearing.....	3-5
IV. ARGUMENT.....	6-15
A. MR. VIGIL-CROSS' GUILTY PLEAS LACKED A SUFFICIENT FACTUAL BASIS BECAUSE THE MATERIALS UPON WHICH THE TRIAL COURT RELIED DID NOT ESTABLISH THAT A RATIONAL JURY COULD HAVE FOUND THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.....	6
B. MR. VIGIL-CROSS' GUILTY PLEAS WERE BASED ON AN INADEQUATE UNDERSTANDING OF THE NATURE OF THE CHARGES BECAUSE HE WAS NOT MADE AWARE OF THE STATE'S BURDEN TO DISPROVE SELF-DEFENSE BEYOND A REASONABLE DOUBT.....	10-11

TABLE OF CONTENTS (continued)

	<u>Page(s)</u>
V. CONCLUSION.....	15

APPENDIX

- A. Declaration for Determination of Probable Cause**
- B. Prosecutor’s Statement Regarding Amended Information**

TABLE OF AUTHORITIES

Washington Cases

	<u>Page(s)</u>
<u>In re Hilyard</u> , 39 Wn.App. 723,726,695 P.2d 596 (1985).....	7
<u>In re Keene</u> , 95 Wash.2d 203,209,622 P.2d 360 (1980).....	8
<u>In re Montoya</u> , 109 Wn.2d 270,744 P.2d 340 (1987).....	13,14
<u>In re Personal Restraint of Franklin Keene</u> , 95 Wash 2d 203,204,622 P.2d 360 (1980).....	11
<u>In re Taylor</u> , 31 Wn.App.254,259,640 P.2d 737 (1982).....	7
<u>In re Vensel</u> , 88 Wash.2d 552, 564 P.2d 326 (1977).....	12
<u>Personal Restraint of Malcolm G. Lundeen</u> , 20 Wash.App.68, 578 P.2d 552 (1978).	12
<u>State v. Arnold</u> , 81 Wn.App. 379,383,914 P.2d 762 (1996).....	9
<u>State v. Barton</u> , 93 Wn.2d 301,305,609 P.2d 1353 (1980).....	5
<u>State v. Crawford</u> , 159 Wash.2d 86,147 P.3d 1288 (2006).....	5
<u>State v. Haydel</u> , 122 Wash.App.365,95 P.3d 760 (2004).....	14,15
<u>State v. Hubbard</u> , 106 Wash.App. 149,22, P.3d 296 (2001).....	13
<u>State v. Iredale</u> , 16 Wash.App. 53,553 P.2d 1112 (1976).....	8
<u>State v. Marshall</u> , 144 Wn.2d 266,281,27 P.3d 192 (2001).....	6
<u>State v. McDermond</u> , 112 Wn.App.239,245,47 P.3d 600 (2002).....	5
<u>State v. Newton</u> , 87 Wash.2d 363,552 P.2d 682 (1976).....	2,7,8,13

TABLE OF AUTHORITIES

Washington Cases (continued)

Page(s)

State v. Powell, 29 Wash. App.163,627 P.2d 1337 (1981).....7,8

State v. Rigsby, 49 Wn.App.912,915,747 P.2d 472 (1987).....11

State v. Saas, 118 Wn.2d at 437

State v. Zhao, 157 Wash.2d 188,192,137 P.3d 835 (2006).....9

Wood v. Morris, 87 Wash.2d 501,554 P.2d 1032 (1976).....12

Young v. Konz, 91 Wash.2d 532,536,588 P.2d 1360 (1979).....11

Washington Court Rules and Statutes

CrR 4.2 (d).....11,12

RCW 9.94A.030 29 (b), 33 (a)(i).....5

RCW 9.94A.570.....5

Federal Cases

Boykin v. Alabama, 395 U.s. 238, 23 L.Ed 2d. 274,
89 S.Ct. 1709 (1969).....13

McCarthy v. United States, 394 U.S. 459,467,22 L.Ed.418,
426, 89 S.Ct. 1166 (1969).....8,11,12,13

North Carolina v. Alford, 400 U.S. 25,27, L.Ed.2d 162,
91 S.Ct. 160(1970).....2

Santobello v. New York, 404 U.S.257,30 L.Ed.2d 427,
92 S.Ct.495 (1971).....8

TABLE OF AUTHORITIES

Page(s)

Federal Court Rules

Fed.R. Crim. P.11.....12

I. ASSIGNMENTS OF ERROR

1. The appellant's statement on plea of guilty, combined with the Declaration of Probable Cause and the Prosecutor's Statement Regarding Amended Information, presented an insufficient factual basis for the trial court to determine that a jury would find beyond a reasonable doubt that Mr. Vigil-Cross did not act in self-defense.

2. Mr. Vigil-Cross was not made aware that, had he gone to trial, the State would have been required to prove the absence of self-defense, because the evidence clearly supports a self-defense claim.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by finding a sufficient factual basis for Mr. Vigil-Cross' guilty pleas where the materials presented were insufficient to establish that a jury would conclude beyond a reasonable doubt that the State proved the absence of self-defense? (Assignment of Error Number One.)

2. Did the trial court err by accepting guilty pleas when Mr. Vigil-Cross was not made aware of the legal ramifications of a self-defense claim, and where the record supported the availability of self-

defense? (Assignment of Error Number Two.)

III. STATEMENT OF THE CASE

1. Procedural History

On November 1, 2004, the defendant/appellant, Jake Wayne Vigil-Cross, was charged by Information with one count of First Degree Murder with a firearm sentencing enhancement (Count I), and two counts of First Degree Assault with firearm sentencing enhancements (Counts II & III). CP 1-4.

On October 9, 2006, Mr. Vigil-Cross entered Alford/Newton¹ pleas to the charges set forth in the Second Amended Information, which included one count of Second Degree Manslaughter (Count I), one count of First Degree Assault (Count II), and one count of Second Degree Assault (Count III). CP 24-25; CP 28-36.

Mr. Vigil-Cross proceeded to sentencing on December 8, 2006. The trial court imposed a high end standard range sentence of one hundred and twenty (120) months on Count I, three hundred and eighteen months (318) months on Count II, and eighty-four (84)

1

North Carolina v. Alford, 400 U.S. 25,27, L.Ed.2d 162,91 S.Ct. 160(1970); State v. Newton, 87 Wash.2d 363,552 P.2d 682 (1976).

months on Count III, with all counts to run concurrent to one another.
CP 40-52. A timely Notice of Appeal was filed on January 3, 2007.
CP 53-54.

2. The Plea Hearing

In the Statement of Defendant on Plea of Guilty Mr. Vigil-Cross' written proclamation concerning the acts constituting the offenses stated as follows:

I do not believe I have committed these crimes. However, after reviewing the evidence with my attorney I believe there is a substantial likelihood the jury would find me guilty of these crimes. I am pleading guilty to accept the State's agreement to reduce the charges and the sentencing recommendation. CP 28-36 at p.7.

The statement was written by defense counsel and signed by Mr. Vigil-Cross. CP 28-36 at p.7.

For its determination of a factual basis for the charges the trial court considered the Declaration for Determination of Probable Cause filed on November 1, 2004, as well as the Prosecutor's Statement Regarding Amended Information. RP I 9; CP 1-4; CP 26-27.² (The

2

The Verbatim Reports of Proceedings are unnumbered. For purposes of Appellant's Opening Brief the VRPs are designated as follows:

RP I = October 9, 2006 (Plea Hearing)

RP II = December 8, 2006 (Sentencing Hearing)

Vigil-Cross, Jake Wayne - Opening Brief COA No. 35785-2-II

Declaration for Determination of Probable Cause is attached as Appendix A and incorporated by reference herein; the Prosecutor's Statement Regarding Amended Information is attached as Appendix B and incorporated by reference herein.)

The Declaration for Determination of Probable Cause stated, in summary, that Mr. Vigil-Cross shot into a group of people killing Nathaniel Allen and injuring Anthony Po-Ching and Tina Attinello. The shootings occurred at a party. A verbal confrontation had preceded the shootings. The police believed that only one gun was fired, and that eight or more shots were fired. Mr. Vigil-Cross admitted to the shootings, but stated that Nathaniel Allen had first pulled out a firearm and was pointing it at Mr. Vigil-Cross' head. Although Mr. Vigil-Cross' statement was not corroborated at this point, the declaration averred that the investigation was incomplete.

The Prosecutor's Statement Regarding Amended Information supplemented the above information. In summary, victim Nathaniel Allen was armed, was wearing a bullet-proof vest, and was holding a gun in his hand at the time he was shot. Mr. Allen's friends and family had removed the gun he was holding prior to the arrival of the police.

Mr. Allen's friends and family lied to the police about this.

Tina Attinello, who was shot in the leg, was uncooperative with law enforcement and could not be counted on to appear to testify.

The prosecutor wrote that the additional facts discovered during law enforcement's continuing investigation lended "some support to the defendant's self-defense argument." CP 26-27.

At the plea hearing no discussion was held concerning the legal aspects of a self-defense claim. Nor did the plea form contain any information concerning self-defense.

Additionally, the plea form stated that the crime of second degree assault is not a most serious offense, but rather is a violent offense. At neither the plea nor the sentencing hearing was Mr. Vigil-Cross advised that second degree assault is a strike offense. He was advised that only first degree assault is a strike offense.³

3

Second degree assault is a "most serious offense" and a strike offense. RCW 9.94A.030 29 (b), 33 (a)(i); RCW 9.94A.570. Unfortunately, the fact that Mr. Vigil-Cross was not advised that second degree assault is also a strike offense does not constitute reversible error because, although this constitutes a consequence of his plea, it is likely not a "direct consequence." Direct consequences are those that have a "definite, immediate and largely automatic" effect on a defendant's sentence range. *State v. Barton*, 93 Wn.2d 301,305,609 P.2d 1353 (1980). "Collateral consequences," on the other hand are ancillary results that do not alter the standard of punishment, such as sex offender registration, deportation, habitual criminal proceedings, and parole revocation. *State v. McDermond*, 112 Wn.App.239,245,47 P.3d 600 (2002). See also *State v. Crawford*, 159 Wash.2d 86,147 P.3d 1288 (2006). (Pretrial notice of possible POAA sentence is not constitutionally mandated.)

Vigil-Cross, Jake Wayne - Opening Brief COA No. 35785-2-II

IV. ARGUMENT

A. MR. VIGIL-CROSS' GUILTY PLEAS LACKED A SUFFICIENT FACTUAL BASIS BECAUSE THE MATERIALS UPON WHICH THE TRIAL COURT RELIED DID NOT ESTABLISH THAT A RATIONAL JURY COULD HAVE FOUND THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

Superior Court Criminal Rule 4.2(f) allows withdrawal of a guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” *State v. Zhao*, 157 Wash.2d 188,192,137 P.3d 835 (2006).

Manifest injustice includes instances where “(1) the plea was not ratified by the defendant, (2) the plea was not voluntary, (3) effective assistance of counsel was denied, or (4) the plea agreement was not kept.” *Id.* citing *State v. Marshall*, 144 Wn.2d 266,281,27 P.3d 192 (2001).

CrR 4.2 (d) provides for the “voluntary” factor mentioned above:

Voluntariness. The court shall not accept a plea of guilt, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not

enter a judgment upon a plea of guilty unless it is satisfied that there is a *factual basis* for the plea.

Accordingly, voluntariness encompasses both a cognitive awareness-of-the-charge component and a factual basis component.

The factual basis requirement is satisfied if “the facts admitted amount to the violation charged.” *In re Taylor*, 31 Wn. App. 254,259,640 P.2d 737 (1982). A factual basis for a guilty plea exists if there is sufficient evidence for a jury to conclude beyond a reasonable doubt that the defendant is guilty. e.g., *State v. Saas*, 118 Wn.2d at 43 (citing *State v. Newton*, 87 Wn.2d at 370). The factual basis must appear on the record at the time the plea is taken. *In re Hilyard*, 39 Wn.App. 723,726,695 P.2d 596 (1985).

The factual basis requirement helps to guarantee a truly knowledgeable and voluntary plea: “It projects the admitted misconduct against the backdrop of the violated statute, allowing a thorough and final check on the understanding of the defendant.” *Taylor*, 31 Wn.App. at 258.

This Court stated the purpose of the factual basis requirement in *State v. Powell*, 29 Wash. App.163,627 P.2d 1337 (1981):

The purpose behind the factual basis requirement is to protect

a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. *Id.* at 164 citing McCarthy v. United States, 394 U.S. 459,467,22 L.Ed.418,426, 89 S.Ct. 1166 (1969). Quoting from Fed.R.Crim. P.11, Notes of Advisory Committee on Criminal Rules.

The Powell Court explained the proper interpretation of CrR

4.2(d) in the following passage:

In interpreting that rule and its federal counterpart, Fed.R.Crim. P. 11, courts have frequently reiterated that the trial judge must develop on the record that there is a factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge. Santobello v. New York, 404 U.S.257,30 L.Ed.2d 427,92 S.Ct.495 (1971); accord In re Keene, 95 Wash.2d 203,209,622 P.2d 360 (1980); or by other reliable sources made part of the record. State v. Newton, 87 Wash.2d 363,552 P.2d 682 (1976). The factual basis must be developed on the record at the time the plea is taken and may not be deferred until sentencing. State v. Iredale, 16 Wash.App. 53,553 P.2d 1112 (1976). Id.

The factual basis may be established from any reliable source, including the prosecutor's recital of the evidence the State will offer, witness affidavits, and the presentence report. State v. Newton, 87 Wn.2d 363,369-70,552 P.2d 682 (1976). The requirement that the material relied upon by the trial court be made part of the record at the time the plea is taken is satisfied if the material the court relied upon was filed of record at the time of the plea hearing and the trial court

acknowledges on the record that it reviewed and considered the material prior to accepting the plea. *State v. Arnold*, 81 Wn.App. 379,383,914 P.2d 762 (1996).

Significantly, “[e]ven where a defendant does not admit guilt, CrR 4.2 (d) requires that the trial court find a factual basis supporting the plea.” *State v. Zhao, Supra* at 192.

Here, Mr. Vigil-Cross entered an Alford/Newton plea to each count. The trial court considered his plea statement, the Declaration in Support of Probable Cause, and the Prosecutor’s Statement Regarding Amended Information to make its determination of a factual basis supporting the pleas. Mr. Vigil-Cross’ statement indicates that he does not believe he is guilty. The declaration states that Mr. Vigil-Cross told the police his actions were in self-defense. The prosecutor’s statement supports Mr. Vigil-Cross’ claim by averring that at least one of the victims was holding a gun when he was shot, and he was wearing a bullet proof vest. Additionally, the State’s witnesses’ credibility were in grave question. Not only had Mr. Alen’s family and friends tampered with the evidence by removing the gun from Mr. Allen’s hand, but they had also lied to the police. Moreover, a second

shooting victim was inexplicably uncooperative and did not appear willing to testify at trial.

To satisfy the factual basis requirement in the case at bar sufficient evidence/information was required to have been presented that proved the absence of self-defense to the satisfaction of the trial court. The declaration alone would necessarily have raised reasonable doubt, because it stated that the investigation was still in progress and, thus, the complete circumstances were unknown. More facts needed to be uncovered. The prosecutor's statement plainly added evidence that corroborated a self-defense claim.

Given the above information, upon which the trial court relied, the record simply does not support the finding of a factual basis, that is, that the evidence was sufficient for a jury to conclude Mr. Vigil-Cross had not acted in self-defense. The pleas, therefore, cannot be said to have been voluntary under CrR 4.2, and it would be a manifest injustice to allow them to stand.

**B. MR. VIGIL-CROSS' GUILTY PLEAS
WERE BASED ON AN INADEQUATE
UNDERSTANDING OF THE NATURE
OF THE CHARGES BECAUSE HE WAS
NOT MADE AWARE OF THE STATE'S
BURDEN TO DISPROVE SELF-DEFENSE**

BEYOND A REASONABLE DOUBT.

As noted above, the CrR 4.2 voluntariness requirement provides for both a factual basis and an awareness-of-the-charge component. Moreover, the record must demonstrate that the defendant understood the law in relation to the facts of the charged crime. *State v. Rigsby*, 49 Wn.App.912,915,747 P.2d 472 (1987). Under these standards, the record here fails to establish a voluntary plea and it was manifest injustice for the court to have entered judgment on that plea.

A CrR 4.2 (d) error is subject to direct appeal. A guilty plea will not preclude an appeal “as to the circumstances under which the plea was made.” *In re Personal Restraint of Franklin Keene*, 95 Wash 2d 203,204,622 P.2d 360 (1980). See also *Young v. Konz*, 91 Wash.2d 532,536,588 P.2d 1360 (1979).

Formerly, the law in Washington assumed that defense counsel would properly advise criminal clients of the nature of the charges and all consequences associated with the entry of a guilty plea. Likewise, it was assumed that the defendant’s attorney would ascertain that a plea was entered intelligently and voluntarily. Following the United States Supreme Court decision in *McCarthy v. United States*, 394 U.S. 459,22

L.Ed 418 89 S.Ct. 1166 (1969), in which the Court set forth the purpose of the parallel Federal Rule (Fed.R.Crim.P.11), the Washington Supreme Court adopted the reasoning that the purpose of Washington's CrR4.2 is to fulfill the constitutional requirement that a guilty plea be made intelligently and voluntarily. *Wood v. Morris*, 87 Wash.2d 501,554 P.2d 1032 (1976). Subsequently, the Washington Supreme Court interpreted Wood as:

....ordering that in Superior Court a trial judge must make direct inquiry either personally or by a written statement as to whether the defendant understands the nature of the charge and the full consequences of his plea. This was held to be a requirement of our Court Rule, CrR 4.2, and not a constitutionally mandated procedure.

In re Keene, Supra at 205. It is now established Washington law that failure of the trial court to make an affirmative showing that the defendant understands the full nature and consequences of a guilty plea, or failure to establish on the record that the plea is made intelligently and voluntarily, constitutes reversible error. In the matter of the *Personal Restraint of Malcolm G. Lundeen*, 20 Wash.App.68, 578 P.2d 552 (1978). Also see *In re Vensel*, 88 Wash.2d 552, 564 P.2d 326 (1977).

Due process requires that a guilty plea be made knowingly,

Vigil-Cross, Jake Wayne - Opening Brief COA No. 35785-2-II

intelligently, and voluntarily. Boykin v. Alabama, 395 U.s. 238, 23 L.Ed 2d. 274. 89S.Ct. 1709 (1969). As the court stated in Keene, a plea cannot be truly voluntary “unless the defendant possess an understanding of the law in relation to the facts.” In re Keene. Supra at 209, quoting McCarthy v. United States, Supra at 466.

While an *Alford/Newton* plea is often equivocal in nature, the plea must, nonetheless, be voluntary. A defendant’s understanding is necessarily called into question in *Alford/Newton* pleas. The “Court must exercise extreme care to ensure that [an Alford] plea satisfies constitutional requirements” and is voluntary pursuant to CrR 4.2. State v. Hubbard, 106 Wash.App. 149,22, P.3d 296 (2001). Federal courts have likewise cautioned:

When a defendant seeks to plead guilty while protesting his innocence, the trial judge is confronted with a danger signal. It puts him on guard to be extremely careful that his duties under Rule 11 are fully discharged. United States v. Gaskins, 485 F.2d 1046, (D.C. Cir 1973); accord United States v. Davis, 516 F.2d 574 (7th Cir. 1975).

In Montoya the Court held that the trial court was not required to advise the defendant of the availability of self-defense. There, the evidence showed that the decedent, who witnesses to the killing described as an unarmed peaceable man, tried to stop a fight between

Vigil-Cross, Jake Wayne - Opening Brief COA No. 35785-2-II

Montoya and another person, and had not engaged in any threatening behavior which would make a credible self-defense claim available to Montoya. *In re Montoya*, 109 Wn.2d 270,744 P.2d 340 (1987).

More recently, in the similar case of *State v. Haydel*, 122 Wash.App.365,95 P.3d 760 (2004) Division One held that a defendant must be permitted to withdraw his or her guilty plea where a plea is involuntary based on the defendant's lack of awareness of legal ramifications of self-defense. In *Haydel*, however, withdrawal was not required because *no evidence* of self-defense was presented when the plea was taken. The Court stated: "Because *Haydel* presented no evidence of self-defense, the State had no obligation to inform Haydel of its burden of proof on his purely hypothetical claim at the time of the taking of the plea." *Supra* at 1052.

By contrast, in Mr. Vigil-Cross' case there was compelling evidence of self-defense. The record, however, fails to show that defense counsel or the Court advised Mr. Vigil-Cross that self-defense negates the intent element, was available to defend the murder charge, and possibly the assault charges as well. No showing was made that Mr. Vigil-Cross understood that the State would be obligated to prove

the absence of self-defense. For this reason the pleas cannot be said to have been voluntary under CrR 4.2, and it would be a manifest injustice to allow them to stand.

V. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Vigil-Cross respectfully requests that this Court reverse and remand for withdrawal of his pleas.

RESPECTFULLY SUBMITTED this 30th day of April, 2007.



Sheri L. Arnold
WSBA # 18760
Attorney for Appellant

FILED
APR 30 2007
CLERK OF COURT
SUPERIOR COURT
TACOMA, WASHINGTON

CERTIFICATE OF SERVICE

The undersigned certifies that on April 30, 2007, she hand delivered this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and delivered by U.S. mail to appellant, Jake Wayne Vigil-Cross, DOC # 790067, Monroe Corrections Center, Post Office Box 777, Monroe, Washington 98272, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on April 30, 2007.



Norma Kinter

Vigil-Cross, Jake Wayne - Opening Brief COA No. 35785-2-II

APPENDIX A

Declaration for Determination of Probable Cause

1 NO. 04-1-05089-0
2 DECLARATION FOR DETERMINATION OF PROBABLE CAUSE

3 GERALD T. COSTELLO, declares under penalty of perjury:

4 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police
5 report and/or investigation conducted by the TACOMA POLICE DEPARTMENT, incident number
6 042540150;

6 That the police report and/or investigation provided me the following information;

7 That in Pierce County, Washington, on or about the 10th day of September, 2004, the defendant,
8 JAKE WAYNE VIGIL-CROSS, did shoot into a group of people, killing Nathaniel Allen and injuring
9 Anthony Po-Ching and Tina Attinello.

9 Defendant and several companions arrived at an outdoor party, uninvited, in the early morning
10 hours of September 10th, 2004. The location of the party and the murder was 3220 1/2 E. Roosevelt in
11 Tacoma. A verbal confrontation occurred and defendant and the others were told to leave.

10 Defendant pulled out a handgun he carried to the scene and began firing at the victims, who tried
11 to run away. As many as eight or more shots were fired. The police evaluated the crime scene and
12 believe that only one gun was fired.

11 The deceased, Nathaniel Allen was struck multiple times. Victim Anthony Po-Ching was struck
12 multiple times in the back. Victim Tina Attinello was struck in the back of a leg as she tried to escape.
13 Defendant and his friends ran away.

13 Defendant has admitted to a friend that he did the shooting, claiming however, that victim
14 Nathaniel Allen had first pulled out a gun and was pointing it at Defendant's head. No eye witnesses
15 confirm this claim. Two of the shooting victims, so far, have identified Defendant from a photo lineup as
16 the shooter. The investigation is continuing.

15 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
16 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

16 DATED: November 1, 2004
17 PLACE: TACOMA, WA

18
19 
20 GERALD T. COSTELLO, WSB# 15738

21
22
23
24 DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

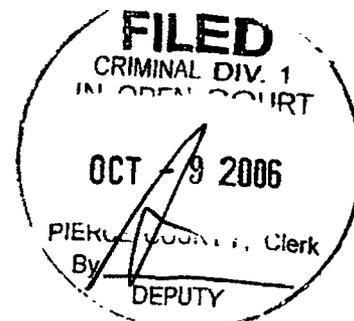
Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

APPENDIX B

Prosecutor's Statement Regarding Amended Information



04-1-05089-0 26277320 STPATTY 10-09-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY OCT - 9 2006

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-05089-0

vs.

JAKE WAYNE VIGIL CROSS,

PROSECUTOR'S STATEMENT
REGARDING AMENDED
INFORMATION

Defendant.

The State requests the Court to consider accepting a plea to the filing of an Amended Information pursuant to RCW 9.94A.431 for the following reasons: There are substantial problems with the State's case as it pertains to some of the charges that have been filed.

The defendant is currently charged in the First Amended Information with Murder in the First Degree with a firearm sentencing enhancement (Count I), Assault in the First Degree with firearm sentencing enhancement (Count II), Assault in the First Degree with firearm sentencing enhancement (Count III), Unlawful Possession of a Firearm in the Second Degree (Count IV), Conspiracy to Commit Murder in the First Degree (Count V), and Solicitation to Commit Murder in the First Degree (Count VI). The proposed Second Amended Information charges the defendant with Manslaughter in the Second Degree (Count I), Assault in the First Degree (Count II), and Assault in the Second Degree (Count III). Under the proposed Second Amended Information, the defendant is facing a sentencing range of 240 to 318 months in the Department of Corrections.

04-1-05089-0

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Regarding the homicide count (Count I), the victim, Nathaniel Allen, was wearing a bullet-proof vest and holding a gun in his hand at the time he was shot. Mr. Allen's friends and family removed the gun from the scene prior to the police arriving and initially denied that Mr. Allen had a gun at the scene. The fact that Mr. Allen was holding a gun at the time he was shot, even though he did not fire a shot, lends some support to the defendant's self-defense argument.

The victim of Count III, Tina Attinello, has not been cooperative with law enforcement in this case. Her presence at trial is not a sure thing. The proposed second amended information reduces Count III from Assault in the First Degree to Assault in the Second Degree. She was the least wounded of the three shooting victims, being struck in the leg.

Counts V and VI are based upon statements that a jail informant provided to police. Subsequent actions by that informant have provided impeachment material for the defense to strongly challenge the credibility of that informant, i.e., the informant has been arrested for and charged with new crimes.

The proposed Second Amended Information is a compromise, which reduces the defendant's potential sentence while still giving him a substantial prison sentence of 20 to 26 years.

The victim has been notified of the amended Information.

The victim has not been notified of the amended Information.

10-4-06
Date


EDMUND M. MURPHY
Deputy Prosecuting Attorney
WSB # 14754