

FILED

MAR 23, 2016

Court of Appeals
Division III
State of Washington

COA No. 31701-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN ANTHONY CASTRO,

Appellant.

REPLY BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. COUNTER-STATEMENT OF FACTS.....1
II. ARGUMENT.....2
III. CONCLUSION.....5

Table of Cases

In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d
801 (2004).....4
In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d
380 (2000).....4
State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).....5
State v. Mendoza, 63 Wn. App. 373, 819 P.3d 387 (1991).....3
State v. Soto, 177 Wn. App. 706, 309 P.3d 596 (2013).....2, 3, 4, 5
State v. Hutton, 7 Wn. App. 726, 502 P.2d 1037 (1972).....5

Statutes

RCW 9.94A.030.....5
RCW 9.94A.030(33)(t).....4
RCW 9.94A.533.....3
RCW 9.94A.533(3).....3
RCW 9.94A.825.....4

I. COUNTER-STATEMENT OF FACTS

Pursuant to a plea bargain, John Anthony Castro pleaded guilty in 2008 to conspiracy to deliver a controlled substance with a deadly weapon enhancement. (Ex. A, Statement of Defendant on Plea of Guilty). The original charge was delivery of a controlled substance. (Ex. B, Information). The information was amended to charge conspiracy to deliver a controlled substance with a deadly weapon enhancement. (Ex. C, Amended Information). The State seems to suggest the court or a jury made a “finding” the defendant was armed with a deadly weapon during the commission of the offense, so the 2008 conviction did not really have a deadly weapon enhancement at all. (Brief of Resp. at 25). Not only is that contention unsupported by the record, but it is a distinction without a difference.

The statement of defendant on plea of guilty recited the prosecuting attorney would make the following recommendation to the judge:

0 months followed by 6 month deadly weapon enhancement with credit for time already served, . . . (Ex. A at 3).

The plea bargain contemplated and reflected a deadly weapon enhancement on an unranked offense, conspiracy to deliver a

controlled substance. Mr. Castro initialed that he understood the offense to which he was pleading guilty included a deadly weapon enhancement. (*Id.* at 6). Following the recommendation, the court sentenced Mr. Castro to 6 months confinement on the deadly weapon enhancement only. (Ex. D, Judgment and Sentence, at 8).

I. ARGUMENT

Mr. Castro's challenge to the second strike, accomplished by improperly adding a deadly weapon enhancement to an unranked offense, must prevail because *State v. Soto*, 177 Wn. App. 706, 714, 309 P.3d 596 (2013), is directly on point and supports his position.

Soto involved a bench trial where the court found the defendant guilty of first degree animal cruelty and first degree unlawful possession of a firearm. The court also found that in committing the animal cruelty offense, the defendant was armed with a firearm. It imposed an 18-month firearm enhancement running consecutive to concurrent sentences of 12 months for animal cruelty and 48 months for unlawful firearm possession. 177 Wn. App. at 709. On appeal, he challenged, as pertinent here, the trial court's authority to impose a firearm enhancement on a conviction for the unranked crime of animal cruelty. *Id.*

The opinion explained:

“Unranked offense” is the term commonly applied to offenses that have not been assigned a seriousness level and whose standard sentencing range cannot be determined on the Table 1 sentencing grid or drug offense sentencing grid. 177 Wn. App. at 711.

The firearm enhancement in RCW 9.94A.533(3) added time to the standard sentence range for “any felony defined under any law as a . . . felony.” After engaging in a statutory construction analysis, the court determined:

Reading all subsections of RCW 9.94A.533 in the context of the statute, we conclude that the statute does not apply to unranked offenses. . .

Because we conclude that RCW 9.94A.533(3) does not apply to unranked offenses, the trial court’s 18-month increase of Mr. Soto’s sentence imposed for the animal cruelty conviction was unauthorized and void.

We reverse the firearm enhancement and remand to the trial court to strike the enhancement from Mr. Soto’s judgment and sentence. 177 Wn. App. at 714, 716.

Likewise here, it is undisputed conspiracy to deliver a controlled substance is an unranked offense. *State v. Mendoza*, 63 Wn. App. 373, 378, 819 P.3d 387 (1991). Under *Soto*, the court cannot impose a deadly weapon enhancement on this unranked offense. 177 Wn. App. at 716. Mr. Castro pleaded guilty to a

nonexistent crime. Not only is the resulting sentence without authority of law, but so is the underlying enhancement. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801 (2004). And it makes no difference that the defendant pleaded guilty. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The enhancement must be stricken as it is unauthorized and void. *Soto*, 177 Wn. App. at 716.

The State apparently argues RCW 9.94A.030(33)(t), defining a “most serious offense” for persistent offender purposes, supports use of the conspiracy with a deadly weapon enhancement as a strike because it includes “[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825.” But there was neither a deadly weapon verdict for the 2008 conspiracy conviction nor a finding of fact by the trial court whether the accused was armed with a deadly weapon at the time of commission of the crime as required by RCW 9.94A.825. This was a plea, pure and simple. Interestingly enough, in his recitation of the State’s evidence that would have been presented at trial, the deputy prosecutor made no mention of Mr. Castro being armed with a deadly weapon. (Ex. E, 2/15/08 Plea and Sentence Hearing, at 9-10).

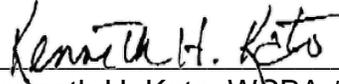
Mr. Castro pleaded guilty to a deadly weapon enhancement that was void since it did not apply to conspiracy to deliver a controlled substance, an unranked offense. As in *Soto*, the enhancement must be stricken. This leaves a conviction only for conspiracy, which is not a most serious offense. RCW 9.94A.030. There is no second strike. Mr. Castro was unlawfully sentenced to life without the possibility of parole as a persistent offender as he only had one strike. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *Soto*, 177 Wn. App at 716. This case must be remanded for resentencing.

With respect to the other responses by the State, Mr. Castro rests on his brief.

III. CONCLUSION

Mr. Castro respectfully asks this court (1) to reverse his convictions and remand for new trial or (2) to remand for resentencing within the standard range as the 2008 conspiracy conviction is not a second strike and his sentence of life without the possibility of parole is unlawful and void.

DATED this 23rd day of March, 2016.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on March 23, 2016, I served the reply brief of appellant by USPS on John Castro, # 849936, 1313 N. 13th Ave., Walla Walla, WA 99362; and by email, as agreed by counsel, on Brian O'Brien at SCPAAppeals@spokanecounty.org.

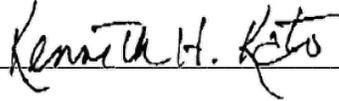


EXHIBIT A

STATEMENT OF DEFENDANT ON PLEA OF
GUILTY

FILED

FEB 15 2008

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	NO. 07-1-04594-6
)	
vs.)	
	)	STATEMENT OF DEFENDANT ON
JOHN CASTRO,	)	PLEA OF GUILTY TO NON-SEX OFFENSE
Defendant.	)	(STTDFG)
)	

1. My true name is: JOHN CASTRO.
2. My age is: 23.
3. The last level of education I completed was GED.
4. **I Have Been Informed and Fully Understand That:**
 - (a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
 - (b) I am charged with: Conspiracy to deliver marijuana with a deadly weapon.

The elements are: Contained in the Amended Information.
5. **I Understand I Have the Following Important Rights, and I Give Them All Up by Pleading Guilty:**
 - (a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;
 - (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
 - (c) The right at trial to hear and question the witnesses who testify against me;
 - (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;

15

- (e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial.

6. **In Considering the Consequences of my Guilty Plea, I Understand That:**

- (a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	COMMUNITY CUSTODY RANGE (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f).)	MAXIMUM TERM AND FINE
1	N/A	0 – 12 Months	6 Months	0 – 18 Months	Up to 12 Months	5 Yrs 10 K

* (F) Firearm, (D) other deadly weapon, (V) VUCSA in protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8).

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.
- (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.
- (e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.
- (f) ~~For crimes committed prior to July 1, 2000: In addition to sentencing me to confinement, the judge may order me to serve up to one year of community supervision if the total period of confinement ordered is not more than 12 months. If this crime is a drug offense, assault in the second degree, assault of a child in the second degree, or any crime against a person in which a specific finding was made that I or an accomplice was armed with a deadly weapon, the judge will order me to serve at least one year of community placement. If this crime is a vehicular homicide, vehicular assault, or a serious violent offense, the judge will~~

~~order me to serve at least two years of community placement. The actual period of community placement, community custody, or community supervision may be as long as my earned early release period. During the period of community placement, community custody, or community supervision, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.~~

For crimes committed on or after July 1, 2000: In addition to sentencing me to confinement, under certain circumstances the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the community custody range established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.728 is longer, that will be the term of my community custody. If the crime I have been convicted of falls into more than one category of offense types listed in the following chart, then the community custody range will be based on the offense type that dictates the longest term of community custody.

OFFENSE TYPE	COMMUNITY CUSTODY RANGE
Serious Violent Offenses	24 to 48 months or up to the period of earned release, whichever is longer.
Violent Offenses	18 to 36 months or up to the period of earned release, whichever is longer.
Crimes Against Persons as defined by RCW 9.94A.411(2)	9 to 18 months or up to the period of earned release, whichever is longer.
Offenses under Chapter 69.50 or 69.52 RCW (not sentenced under RCW 9.94A.660)	9 to 12 months or up to the period of earned release, whichever is longer.

During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions.

(g) The prosecuting attorney will make the following recommendation to the judge:

0 months followed by 6 month deadly weapon enhancement with credit for time already served, standard fines and cost, 12 months of community custody. *and not file State agrees to Dismiss Cause # 07104443-5 charges from*

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences: *Report # 07-320739*

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

- (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
- (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.
- (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

I understand that if a standard range sentence is imposed, the sentence cannot be appealed by anyone. If an exceptional sentence is imposed after a contested hearing, either the State or I can appeal the sentence.

- (i) If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
- (j) I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.
- (k) I understand that I will be ineligible to vote until that right is restored in a manner provided by law. If I am registered to vote, my voter registration will be cancelled. Wash. Const. art. VI, § 3, RCW 29A.04.079, 29A.08.520.
- (l) Public assistance will be suspended during any period of imprisonment.
- (m) I understand that I will be required to have a biological sample collected for purposes of DNA identification analysis. For offenses committed on or after July 1, 2002, I will be required to pay a \$100.00 DNA collection fee, unless the court finds that imposing the fee will cause me undue hardship.

Notification Relating to Specific Crimes. If Any of the Following Paragraphs Do Not Apply, They Should Be Stricken and Initialed by the Defendant and the Judge.

- [n] This offense is a most serious offense or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole. Jx Cr
- [o] ~~The judge may sentence me as a first-time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days' confinement, and up to two years community supervision if the crime was committed prior to July 1, 2000, or up to two years of community custody if the crime was~~

committed on or after July 1, 2000, plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.

- [p] If this crime involves a kidnapping offense involving a minor, I will be required to register where I reside, study or work. The specific registration requirements are set forth in the "Offender Registration" Attachment.
- [q] If this is a crime of domestic violence, I may be ordered to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.
- [r] If this crime involves prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.
- [s] The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660. Even if I qualify, the judge may order that I be examined by a licensed or certified treatment provider before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison-based alternative or a residential chemical dependency treatment-based alternative. If the judge imposes the prison-based alternative, the sentence will consist of a period of total confinement in a state facility for one half of the midpoint of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of at least one half of the midpoint of the standard range.

~~If the judge imposes the residential chemical dependency treatment-based alternative, the sentence will consist of a term of community custody equal to one half of the midpoint of the standard sentence range or two years, whichever is greater, and I will have to enter and remain in a certified residential chemical dependency treatment program for a period of *three to six months*, as set by the court. As part of this sentencing alternative, the court is required to schedule a progress hearing during the period of residential chemical dependency treatment and a treatment termination hearing scheduled three months before the expiration of the term of community custody. At either hearing, based upon reports by my treatment provider and the department of corrections on my compliance with treatment and monitoring requirements and recommendations regarding termination from treatment, the judge may modify the conditions of my community custody or order me to serve a term of total confinement equal to one half of the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.715.~~

~~During the term of community custody for either sentencing alternative, the judge could prohibit me from using alcohol or controlled substances, require me to submit to urinalysis or other testing to monitor that status, require me to devote time to a specific employment or training, stay out of certain areas, pay \$30.00 per month to offset the cost of monitoring and require other conditions, such as affirmative conditions, and the conditions described in paragraph 6(e). The judge, on his or her own initiative, may order me to appear in court at any time during the period of community custody to evaluate my progress in treatment or to determine if any violations of the conditions of~~

~~the sentence have occurred. If the court finds that I have violated the conditions of the sentence or that I have failed to make satisfactory progress in treatment, the court may modify the terms of my community custody or order me to serve a term of total confinement within the standard range.~~

- [t] **If I am subject to community custody and the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.** JxC
- [u] ~~If this crime involves the manufacture, delivery, or possession with the intent to deliver methamphetamine, including its salts, isomers, and salts of isomers, or amphetamine, including its salts, isomers, and salts of isomers, a mandatory methamphetamine clean-up fine of \$3,000 will be assessed. RCW 69.50.401(2)(b).~~
- [v] **If this crime involves a violation of the state drug laws, my eligibility for state and federal food stamps, welfare, and education benefits may be affected. 20 U.S.C. § 1091(r) and 21 U.S.C. § 862a.** JxC
- [w] ~~If this crime involves a motor vehicle, my driver's license or privilege to drive will be suspended or revoked.~~
- [x] ~~If this crime involves the offense of vehicular homicide while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, committed on or after January 1, 1999, an additional two years shall be added to the presumptive sentence for vehicular homicide for each prior offense as defined in RCW 46.61.5055(8).~~
- [y] ~~The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[n].~~
- [z] ~~I am being sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.~~
- [aa] ~~I understand that the offense(s) I am pleading guilty to include a Violation of the Uniform Controlled Substances Act in a protected zone enhancement or manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture enhancement. I understand these enhancements are mandatory and that they must run consecutively to all other sentencing provisions.~~
- [bb] **I understand that the offense(s) I am pleading guilty to include a deadly weapon, firearm, or sexual motivation enhancement. Deadly weapon, firearm, or sexual motivation enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon, firearm, or sexual motivation enhancements.** JxC
- [cc] ~~I understand that the offenses I am pleading guilty to include both a conviction under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and one or more convictions for the felony crimes of theft of a firearm or possession of a stolen firearm.~~

~~The sentences imposed for these crimes shall be served consecutively to each other. A consecutive sentence will also be imposed for each firearm unlawfully possessed.~~

[dd] ~~I understand that if I am pleading guilty to the crime of unlawful practices in obtaining assistance as defined in RCW 74.08.331, no assistance payment shall be made for at least six months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW 74.08.290.~~

[ee] ~~The judge may authorize work ethic camp. To qualify for work ethic authorization my term of total confinement must be more than twelve months and less than thirty six months, I can not currently be either pending prosecution or serving a sentence for violation of the uniform controlled substance act and I can not have a current or prior conviction for a sex or violent offense.~~

7. I plead guilty to:

Count 1: Conspiracy to deliver marijuana with a deadly weapon
in the amended information. I have received a copy of that amended information.

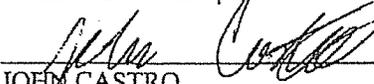
8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

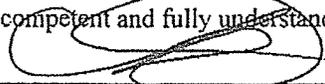
11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: In re Barr plea.

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

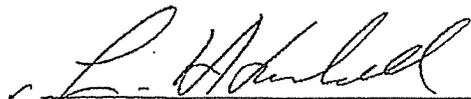


JOHN CASTRO
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.



TODD PORTER
Defendant's Lawyer WSBA No. 31710



MARK CIPOLLA
Prosecuting Attorney WSBA No. 27826

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- (a) The defendant had previously read the entire statement above and that the defendant understood it in full;
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is attached.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated: 2-15-08



Judge

SALVATORE F. COZZA

EXHIBIT B
INFORMATION

FILED

DEC 06 2007

**THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE**

STATE OF WASHINGTON)

Plaintiff,)

v.)

JOHN ANTHONY CASTRO)

BM 07/06/84)

KELSEY K. PEONE)

WF 04/18/89)

Defendant(s).)

INFORMATION

(INFO)

No.

07104594-6

G MARK CIPOLLA

Deputy Prosecuting Attorney

PA# 07-9-30524-1

RPT# 002-07-0808508

RCW 69.50.401(1)(2)(A/B)D-F (#56014)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendants, JOHN ANTHONY CASTRO and KELSEY K. PEONE, as actors and/or accomplices, in the State of Washington, on or about November 01, 2007, did knowingly deliver a controlled substance, to-wit: crack cocaine,



Deputy Prosecuting Attorney
WSBA #22202

DEFENDANT INFORMATION: JOHN ANTHONY CASTRO

Address: 1618 W MAXWELL AVE SPOKANE WA 99201-2721

Height: 6'00"

Eyes: Bro

SID #: 018275224

Weight: 155

DOL #:

DOC #: 849936

Hair: Blk

State:

FBI NO. 441170DB5

EXHIBIT C
AMENDED INFORMATION

FILED

FEB 15 2008

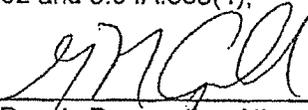
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	AMENDED
	)	INFORMATION
Plaintiff,)	
	)	No. 07-1-04594-6
v.	)	G MARK CIPOLLA
	)	Deputy Prosecuting Attorney
JOHN ANTHONY CASTRO)	
BM 07/06/84	)	PA# 07-9-30524-1
	)	RPT# 002-07-0808508
	)	RCW 69.50.401(1)(2)(A/B)DCO-F (69.50.407)
Defendant(s).	)	(9.94A.602) (#56017)
	)	(AMINF)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, committed as follows: That the defendant, JOHN ANTHONY CASTRO, in the State of Washington, on or about November 01, 2007, did knowingly and unlawfully conspire with at least one person other than the intended recipient to deliver a controlled substance, to-wit: marijuana, proscribed by RCW 69.50.407 and 69.50.401(1), and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4).



Deputy Prosecuting Attorney
WSBA # 22202

DEFENDANT INFORMATION:	JOHN ANTHONY CASTRO	
Address:	3825 E LONGFELLOW AVE SPOKANE WA 99217-6718	
Height:	6'00"	Weight: 155
Eyes:	Bro	DOL #:
SID #:	018275224	DOC #: 849936
		Hair: Blk
		State:
		FBI NO. 441170DB5

AMENDED INFORMATION
AMINF

SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
SPOKANE, WA 99260 (509) 477-3662

14

EXHIBIT D

JUDGMENT AND SENTENCE

COURT COSTS 200.-
 VICTIM ASSESS 500.-
 RESTITUTION _____
 FINE _____
 ATTY FEES _____
 SHERIFF COSTS _____
 METH _____
 DNA FEE _____
 CRIME LAB _____
 OTHER COST _____
\$ 700.-

FILED
FEB 15 2008
 THOMAS R. FALLQUIST
 SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
 COUNTY OF SPOKANE
 STATE OF WASHINGTON)

Plaintiff,)

v.)

JOHN ANTHONY CASTRO
 BM 07/06/84)

Defendant.)

SID: 018275224)

No. 07-1-04594-6
 PA# 07-9-30524-1
 RPT# 002-07-0808508
 RCW 69.50.401(1)(2)(A/B)DCO-F (69.50.407)
 (9.94A.602) (#56017)
 FELONY JUDGMENT AND SENTENCE (FJS)
 Prison RCW 9.94A.712 Prison Confinement
 Jail One Year or Less RCW 9.94A.712
 Prison Confinement
 First Time Offender
 Special Sexual Offender Sentencing Alternative
 Special Drug Offender Sentencing Alternative
 Clerk's Action Required, para 4.5 (SDOSA),
 4.7 and 4.8 (SSOSA) 4.1, 5.2, 5.3, 5.6 and 5.8

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 2-15-08
 by plea jury verdict bench trial of:

Count No.: 1 CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE - MARIJUANA
RCW 69.50.401(1)(2)(A/B)DCO-F (69.50.407) (9.94A.602) (#56017)
 Date of Crime November 01, 2007
 Incident No. 002-07-0808508

FELONY JUDGMENT AND SENTENCE (JS)
 (RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2007))

08901318-9 PAGE 1
 \$256-5-08 DOC

as charged in the Amended Information.

Additional current offenses are attached in Appendix 2.1.

The jury returned a special verdict or the court made a special finding with regard to the following:

- The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712.
- The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____ RCW 9.94A. _____
- The offense was predatory as to Count(s) _____ RCW 9.94A.836.
- The victim was under 15 years of age at the time of the offense in Count(s) _____ RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count(s) _____ RCW 9.94A.838, 9A.44.010.
- The defendant acted with sexual motivation in committing the offense in Count(s) _____ RCW 9.94A.835
- This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a firearm in the commission of the offense in Count(s) _____ RCW 9.94A.602, 9.94A.533.
- The defendant used a deadly weapon other than a firearm in committing the offense in Count(s) I RCW 9.94A.602, 9.94A.533.
- Count _____, Violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401 and RCW 69.50.435 took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count(s) _____ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant committed vehicular homicide vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by the operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030
- The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) _____ involve(s) domestic violence. RCW 10.99.020.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: (RCW 9.94A.525):

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
ATT TO ELUDE	111403	FELONY TRAFFIC	A	SPOKANE CO, WA	030404
MAL MIS 1	111403	NV	A	SPOKANE CO, WA	030404
ROBBERY 2	071503	V	A	SPOKANE CO, WA	022704
ASSAULT 2 DW	011403	V	A	SPOKANE CO, WA	030104
ASSAULT 2 DW	011403	V	A	SPOKANE CO, WA	030104
DCS	120402	DRUG	A	SPOKANE CO, WA	012004
DCS	112102	DRUG	A	SPOKANE CO, WA	012004
RIOT	101602		A	SPOKANE CO, WA	121702
ATT TO ELUDE	040101	FELONY TRAFFIC	J	SPOKANE CO, WA	050301
ASSAULT 3	040101	NV	J	SPOKANE CO, WA	050301
ASSAULT 3	040101	NV	J	SPOKANE CO, WA	050301
DRIVE BY SHOOTING	082999		J	SPOKANE CO, WA	102099
MAL MISCHIEF 2	050196	NV	J	SPOKANE CO, WA	110796

- Additional criminal history is attached in Appendix 2.2
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The following prior offenses require that the defendant be sentenced as a Persistent Offender (RCW 9.94A.570):
- The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

CT NO	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus enhancements*	Total Standard Range (including enhancements)	Maximum Term
1	UNPAID		0-12M	6M	6M-18M	5yr

--	--	--	--	--	--	--

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

Additional current offense sentencing data in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows:

- 2.4 **EXCEPTIONAL SENTENCE:** The Court finds substantial and compelling reasons that justify an exceptional sentence:
- within below the standard range for Count(s) _____.
 - above the standard range for Count(s) _____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.
- Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

- 2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing; the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753
- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____

III. JUDGMENT

- 3.1 The defendant is **GUILTY** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1
- 3.2 The defendant is found **NOT GUILTY** of Counts _____
- The Court **DISMISSES** Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

FELONY JUDGMENT AND SENTENCE (JS)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2007))

4.1 Defendant shall pay to the Clerk of this Court

JASS CODE

RTNR/JN \$ _____ Restitution to: _____
\$ _____ Restitution to: _____
\$ _____ Restitution to: _____
(Name and Address-address may be withheld and provided confidentially to Clerk's Office)

PCV \$500.00 Victim Assessment RCW 7.68.035
\$ _____ Domestic Violence Assessment RCW 10.99.080
CRC \$200.00 Court costs, including: RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
Criminal Filing fee \$ _____ FRC
Witness costs \$ _____ WFR
Sheriff service fees \$ _____ SFR/SFS/SFW/SRF
Jury demand fee \$ _____ JFR
Extradition costs \$ _____ EXT
Other _____ \$ _____

PUB \$ _____ Fees for court appointed attorney RCW 9.94A.760
WRF \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760

FCMMTH \$1000 Fine: RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [1] VUCSA
Waive additional fine deferred due to indigency RCW 69.50.430

MTH \$ _____ Meth/Amphetamine Cleanup Fine, \$3000. RCW 69.50.440,
69.50.401(a)(1)(ii)

CDF/LDV \$ _____ Drug enforcement fund of _____ RCW 9.94A.760

FGD/NTF/SAD/SDI
CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690
\$ _____ Felony DNA collection fee of \$100 not imposed due to hardship RCW
43.43.7541
\$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide only,
\$1,000 maximum) RCW 38.52.430
\$ _____ Other costs for: _____
\$ 700 TOTAL RCW 9.94A.760

[] The above total does not include all restitution or other legal financial obligations,
which may be set by later order of the court. An agreed restitution order may be
entered. RCW 9.94A.753. A restitution hearing:
[] shall be set by the prosecutor
[] is scheduled for _____

[] RESTITUTION. Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:
NAME of other defendant CAUSE NUMBER (Victim Name) (Amount\$)

RJN

The Department of Corrections or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25 per month commencing 6/5/08 RCW 9.94A.760.

The defendant SHALL report to the Spokane County Superior Court Clerk's Office immediately after sentencing if out of custody or within 48 hours after release from confinement if in custody. The defendant is required to keep an accurate address on file with the Clerk's Office and to provide financial information when requested by the Clerk's Office. The defendant is also required to make payments on the legal-financial obligations set by the court. Failure to do any of the above will result in a warrant for your arrest. RCW 9.94A.760(7)(b).

The Court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: _____ (JLR) RCW 9.94A.760

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.1b Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754 FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.

HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340 FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.

The victim, based upon their request, shall be notified of the results of the HIV test whether negative or positive. (Applies only to victims of sexual offenses under RCW 9A.44.) RCW 70.24.105(7)

4.3 No Contact: The Defendant shall not have contact with _____

_____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence.)

Domestic Violence No-Contact Order or Anti-Harassment No-Contact Order or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER _____

4.5 JAIL ONE YEAR OR LESS. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the county jail:

6 (days) (months) on Count No. I; on D/W only.
____ (days) (months) on Count No. ____;
____ (days) (months) on Count No. ____.

Actual number of ~~days~~/months of total confinement ordered is: 6 mos

All counts shall be served concurrently, except for the following which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589

Confinement shall commence immediately unless otherwise set forth here: _____

PARTIAL CONFINEMENT. Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions: _____

- work crew RCW 9.94A.725
- home detention RCW 9.94A.731, .190
- work release RCW 9.94A.731

CONVERSION OF JAIL CONFINEMENT (Nonviolent and Nonsex Offenses). RCW 9.94A.680(3). The county jail is authorized to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.

ALTERNATIVE CONVERSION. RCW 9.94A.680. _____ days of total confinement ordered above are hereby converted to _____ hours of community restitution (service) (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections (DOC) to be completed on a schedule established by the defendant's community corrections officer but not less than _____ hours per month.

Alternatives to total confinement were not used because of: _____

criminal history failure to appear (finding required for nonviolent offenders only) RCW 9.94A.680

(b) CONFINEMENT. RCW 9.94A.712 (Sex Offense, only): The defendant is sentenced to the following term of confinement in the custody of the DOC:
Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth by the court: ~~70 days~~ 107 days
CETS

4.6 COMMUNITY SUPERVISION CUSTODY. RCW 9.94A.505, .545. The defendant shall serve 12 months (up to 12 months) in community supervision or community custody.

The court may order community custody under the jurisdiction of DOC for up to 12 months if the defendant is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime. For offenses committed on or after June 7, 2006, the court shall impose a term of community custody under RCW 9.94A.715 if the offender is guilty of failure to register (second or subsequent offense) under RCW 9A.44.130(11)(A).]

COMMUNITY CUSTODY for count(s) _____, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

The defendant shall report to DOC, located at West 1717 Broadway -Second Floor, Spokane, Washington 99201, 568-3123 not later than 72 hours after release from custody; and the defendant shall perform affirmative acts necessary as required by DOC to confirm compliance with the orders of the court and shall abide by any additional conditions of community custody imposed by DOC under RCW 9.94A.720. For sex offenses, defendant shall submit to electronic monitoring if imposed by DOC. The defendant shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community supervision or community custody and any other conditions of community supervision or community custody stated in this Judgment and Sentence. The defendant shall:

remain in prescribed geographic boundaries specified by the community corrections officer. notify the Community Corrections Officer of any change in defendant's address or employment.

not reside within 880 feet of the facilities and grounds of a public or private school (a community protection zone). RCW 9.94A.030(8).

1. That the defendant be required to observe a curfew of ___ PM to ___ AM, unless gainfully employed during these hours. During the period of the curfew, the defendant is required to be physically at his/her residence, as approved by

the Department of Corrections (DOC). The DOC-approved residence must have operational residential telephone service.

2. That the Defendant not be allowed to have any association or contact with known felons or gang members or their associates. ~~A specific list will be provided to the defendant by DOC and updated as required by the assigned Community Corrections Officer (CCO).~~

3. That the Defendant shall have no new law violations. The term law violations includes any cases heard by any city, state or federal courts.

4. That the defendant shall not initiate any contact, directly or indirectly, with any person listed as a witness, victim, law enforcement officer or court official, excluding his/her defense attorney, as a result of this case.

5. That the defendant shall not be in any of the specific locations or areas as noted below: _____

6. That the defendant shall not wear clothing, insignia, medallions, etc., which are indicative of gang lifestyle. Furthermore, that the defendant shall not obtain any new or additional tattoos indicative of gang lifestyle.

7. That the defendant shall notify the CCO of any vehicles owned or regularly driven by him/her.

8. That the defendant shall diligently seek and maintain ~~part-time or full-time~~ employment at a business approved by the CCO, ~~or be~~ enrolled in and attending a ~~part-time or full-time~~ educational or vocational program.

9. That the defendant Substance abuse eval & follow-up
tx. No known drug offenders. UAF & BAs
authorized. No weapons.

Other conditions: Transfer of supervision to Oregon
IS authorized.

[] For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

The community supervision or community custody imposed by this order shall be served consecutively to any term of community supervision or community custody in any sentence imposed for any other offense, unless otherwise stated. The maximum length of community supervision or community custody pending at any given time shall not exceed 24 months, unless an exceptional sentence is imposed. RCW 9.94A.589.

The conditions of community supervision shall begin immediately unless otherwise set forth here: _____

4.7 **OFF LIMITS ORDER** (Known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections _____

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for the purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606
- 5.4 **RESTITUTION HEARING.**
[] Defendant waives any right to be present at any restitution hearing (sign initials):

- 5.5 **COMMUNITY CUSTODY VIOLATION.** (a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school

6. **Registration by a Person Who Does Not Have a Fixed Residence.** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours, excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. **Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least 5 years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. **Application for a name change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

- 5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.
- 5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.
- 5.10 OTHER: _____

DONE in Open Court in the presence of the defendant this 15th day of February, 2008.

SF Coon
JUDGE Print name:

L-H Herbell
For G MARK CIPOLLA
Deputy Prosecuting Attorney
WSBA# 22202 / 27826

[Signature]
TODD M. PORTER
Attorney for Defendant
WSBA# 31710

[Signature]
JOHN ANTHONY CASTRO
Defendant

VOTING RIGHTS STATEMENT: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.
Defendant's signature: [Signature]

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. 018275224

Date of Birth 07/06/1984

(If no SID take fingerprint card for State Patrol)

FBI No. 441170DB5

Local ID No. 0252131

PCN No.

Other

DOB 07/06/1984

Alias name.

Race:

Ethnicity:

Sex:

Asian/Pacific
Islander

Black/African-
American

Caucasian

Hispanic

Male

Native American

Other: _____

Non-
hispanic

Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court: [Signature], Deputy Clerk. Dated: 2/15/08
THOMAS R. FALLQUIST, County Clerk

DEFENDANT'S SIGNATURE: [Signature]

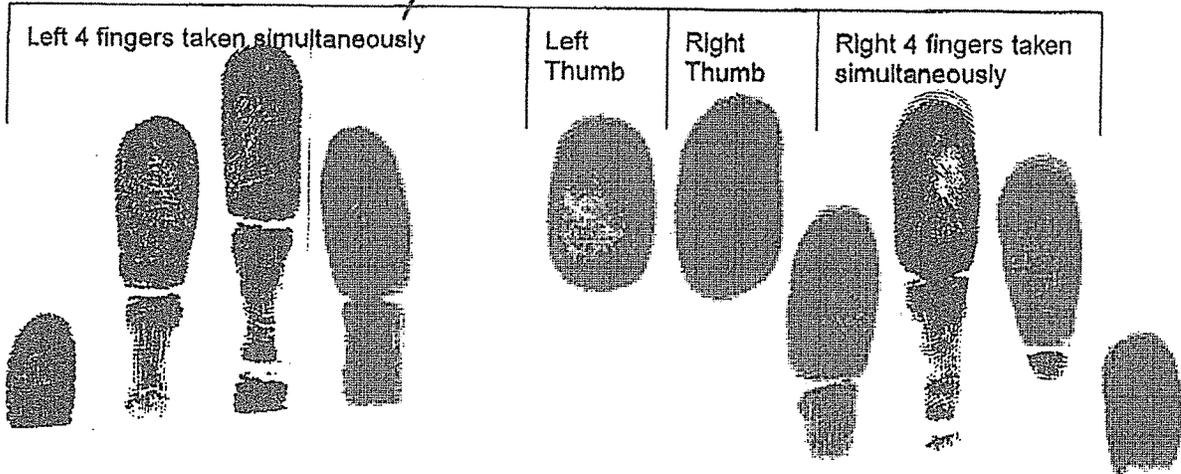


EXHIBIT E

PLEA AND SENTENCE HEARING

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.
IN AND FOR THE COUNTY OF SPOKANE

FILED

FEB 16 2012

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
JOHN ANTHONY CASTRO,)
)
Defendant.)
)

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

NO. 07-1-04443-5
NO. 07-1-04594-6

VERBATIM REPORT OF PROCEEDINGS

Plea and Sentence

THE COURT: The Honorable Salvatore F. Cozza

DATE: 15 February 2008

REPORTER: Samantha A. Drummond, CSR, RPR
West 1116 Broadway, Department 6
Spokane, WA 99260-0350
(509) 477-4413

APPEARANCES

FOR THE PLAINTIFF:

FOR THE DEFENDANT:

Mr. Larry Haskell
Deputy Prosecuting Attorney
County City PSB
Spokane, WA 99260

Mr. Todd Porter
Attorney at Law
1116 West Broadway, GBR
Spokane, WA 99260

O - R - I - G - I - N - A - L

Exhibit One

1 VERBATIM REPORT OF PROCEEDINGS

2

3 THE COURT: Counsel.

4 MR. HASKELL: Thank you, Your Honor.

5 May it please the Court, counsel. This is the
6 date and time set for plea and sentencing in two matters
7 involving the State of Washington and John A. Castro.
8 Mr. Castro is present represented by Todd Porter. Larry
9 Haskell for Mark Cippola and Matt Duggan for the State.
10 The cause numbers are 07-1-04594-6 and 07-1-04443-5.

11 Your Honor, I put forward a proposed amendment to
12 the information on the 594-6 matter. That will be a
13 plea to the amended information. In exchange for that
14 and the recommendation to the Court, the State will also
15 pass forward an order dismissing the 443-5 matter.

16 THE COURT: All right. Mr. Porter, have you
17 and your client received a copy of the amended
18 information?

19 MR. PORTER: We have, Your Honor, and we
20 have had an opportunity to review that. We will waive
21 the twenty-four-hour rule, and we are ready to plead
22 guilty to that charge.

23 THE COURT: Thank you.

24 Sir, is your true and correct name John Anthony
25 Castro?

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1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: You are twenty-three with a date
3 of birth of 7/6 of '84?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: You have acquired a GED?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Have you been able to go over
8 the guilty plea statement and discuss it with Mr.
9 Porter?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: Do you have any questions about
12 your rights?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: Do you understand that the
15 charge you are proceeding on today is one count of
16 conspiracy to deliver a controlled substance, and that
17 means that, here in Spokane County, you did knowingly
18 and unlawfully conspire with at least one other person
19 other than the recipient to deliver a controlled
20 substance, in this case being marijuana, and at that
21 time you had a deadly weapon or a firearm, a deadly
22 weapon as classified under Washington law? Do you
23 understand that?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: All right. Now, do you

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1 understand that by pleading guilty today, you give up
2 some of your rights, which include: The right to a
3 speedy and public trial by a jury here in Spokane
4 County, the right to remain silent before and during
5 trial and you don't have to testify against yourself,
6 you have the right at trial to hear and question
7 witnesses who testify against you and the right to call
8 your own witnesses at no cost. You are presumed
9 innocent of the charges until they are proven beyond a
10 reasonable doubt or you plead guilty, and if you plead
11 guilty, you give up all these rights, including the
12 right to appeal. Do you understand that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you understand that also --
15 Well, do you understand that in your case, the standard
16 range would call for a sentence of zero to twelve months
17 of confinement plus a six-month enhancement for a total
18 of up to eighteen months of confinement followed by up
19 to twelve months of community custody? Do you
20 understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you understand that there are
23 also some financial assessments; there is a \$500
24 assessment to the state Crime Victim Compensation Fund
25 along with court costs of \$200, there is also the

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1 possibility of attorney's fees, drug fines, lab fees,
2 and that sort of thing? Do you understand that?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: When I spoke about community
5 custody, that is a period of time where, after you get
6 out of jail, you will have to report to a corrections
7 officer, abide by various conditions, and if you don't
8 follow the conditions, it can result in additional time
9 in jail. Do you understand that?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. Now, do you
12 understand that in exchange for your plea, the
13 prosecutor is going to recommend that you serve,
14 basically, the six-month period that is called for
15 because of the deadly weapon with credit for time
16 served, have the standard court costs, and you serve
17 twelve months of community custody. They also agree
18 they won't file any other charges coming out of the
19 report number where they are agreeing to dismiss the
20 other charge. Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Is that your understanding, Mr.
23 Porter?

24 MR. PORTER: Yes, Your Honor. I apologize;
25 I passed that forward before I was trying to locate the

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1 report number on the charge that the State has agreed
2 not to file. I have that report number.

3 THE COURT: Okay.

4 MR. PORTER: It is 07320739.

5 THE COURT: Okay.

6 MR. PORTER: Thank you.

7 THE COURT: I have written that in. Thank
8 you.

9 All right. Now, Mr. Castro, you understand that
10 I don't have to follow anybody's recommendations; I can
11 impose any sentence authorized by law. Do you
12 understand that?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Now, do you understand that you
15 can't own, possess or control any firearms or ammunition
16 until your rights are restored?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Do you understand that you can't
19 vote until your rights are restored?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Okay. Does this count as a
22 strike?

23 MR. HASKELL: Yes, Your Honor.

24 THE COURT: Now, this offense is classified
25 under Washington law as a most serious offense or

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1 strike. Washington law says that if you ever get to the
2 point that you receive a third strike or a third most
3 serious offense, you would be subject to a mandatory
4 sentence of life in prison without parole. Do you
5 understand that?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Do you understand that if the
8 Court finds you have a chemical dependency that
9 contributed to the offense, you can be ordered into
10 treatment?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Do you understand that since
13 this involves a violation of the state drug laws, it can
14 affect your eligibility for federal and state food
15 stamps, welfare and education benefits?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Do you understand that on the
18 deadly weapon enhancement, that calls for a period of
19 time that can't be suspended? You do have to serve
20 that. Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: To the charge of conspiracy to
23 deliver a controlled substance, along with a deadly
24 weapon enhancement, what is your plea?

25 THE DEFENDANT: Guilty.

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1 THE COURT: Do you make that plea of your
2 own free will?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Has anybody threatened you?

5 THE DEFENDANT: No, Your Honor.

6 THE COURT: Has anybody promised you
7 anything extra to get you to do this?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Is this your signature here, Mr.
10 Castro?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: There is one final thing. This
13 is called a Barr plea. A Barr plea means that,
14 technically, there is one or more elements of the charge
15 that can't be satisfied. You are willing to waive that
16 because this is part of a plea agreement, and you
17 believe it is in your best interests to do that. Is
18 that what you understand you are doing?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: You have talked to Mr. Porter
21 about this?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Any questions about that?

24 THE DEFENDANT: No, Your Honor.

25 THE COURT: All right. If you will have a

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152 Wn.2d 853, *; 100 P.3d 801, **;
2004 Wash. LEXIS 834, ***

codefendant's conviction, construing the statute by its plain terms to mean that only operating without a permit violated the statute. Thereafter, the defendant unsuccessfully sought to have his conviction overturned in state courts and then sought federal habeas relief. The United States Supreme Court first noted that the Pennsylvania high court had ruled in answer to a certified question that the interpretation of the statute in the codefendant's case determined what the statute had meant at the time of the defendant's conviction. The Court therefore concluded that the question was whether under the *due process clause* Pennsylvania could convict the defendant for conduct that its criminal statute, as interpreted, did not prohibit. *Id.* at 228. The Court held that due process was violated by the failure to prove all of the elements of the crime, i.e., the failure [***8] to prove that the defendant lacked a permit. *Id.* at 228-29; *see also Bunkley v. Florida*, 538 U.S. 835, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003).

The same analysis applies here. This court's construction of former *RCW 9A.32.050* in *Andress* determined what the statute had meant since 1976. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); [*860] *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 436, 842 [*860] P.2d 950 (1992).² Therefore, at the time the petitioners committed the acts for which they were convicted, assault could not stand as the predicate felony for second degree felony murder. The petitioners have thus been convicted of crimes under a statute that, as construed in *Andress* did not criminalize their conduct as second degree felony murder. Because they have been convicted of nonexistent crimes, they have shown fundamental constitutional error that actually and substantially prejudiced them.

2 When this court construes a statute, setting out what the statute has meant since its enactment, there is no question of retroactivity; the statute must be applied as construed to conduct occurring since its enactment. *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996); *see also Bousley v. United States*, 523 U.S. 614, 620-21, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (analysis under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), regarding retroactivity of "new rules" in criminal cases on habeas corpus review does not apply in the case of a substantive decision construing a criminal statute so that it does not reach certain conduct; such a construction "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974)).

[***9] The petitioners are entitled to relief. It has long been recognized that a judgment and sentence based on conviction of a nonexistent crime entitles one to relief on collateral review. *E.g., Ex parte Lombardi*, 13 Wn.2d 1, 123 P.2d 764 (1942). Moreover, in *In re Personal Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980), the court held that the petitioner was entitled to relief from a sentence not authorized by law, observing that a court "has the power and duty to correct [such an] erroneous sentence." *Carle*, 93 Wn.2d at 33 emphasis omitted) (quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)). Obviously, the same is true where not just the sentence is without authority of law, but the conviction on which that sentence is based is completely without authority of law. The fact that some of the petitioners pleaded guilty does not make any difference. *Thompson*, 141 Wn.2d at 723 (a plea agreement to plead guilty to a nonexistent crime does not foreclose collateral relief because a plea agreement cannot exceed the statutory authority granted to the courts). As this court explained [***10] in [*861] [*805] *In re Pers. Restraint of Goodwin*, [*861] 146 Wn.2d 861, 867-72, 50 P.3d 618 (2002), an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law and thus cannot waive such a challenge. The same necessarily follows as to a plea agreement to plead guilty to a nonexistent crime.

Finally, the 2003 legislative amendment to the statute, Laws of 2003, ch. 3, § 2, cannot be applied retroactively to petitioners' cases because such an application would violate the ex post facto clauses of the state and federal constitutions. U.S. CONST. ART. I, § 10; CONST. ART. 1, § 23. A law that imposes punishment for an act that was not punishable when committed or increases the quantum of punishment violates the ex post facto prohibition. *Stogner v. California*, 539 U.S. 607, 612, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003); *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); *In re Pers. Restraint of Forbis*, 150 Wn.2d 91, 96, 74 P.3d 1189 (2003); *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The amendment added assault to the category [***11] of felonies that can serve as predicate felonies for second degree felony murder. The amendment was clearly substantive, and it increased criminal liability for those committing an assault that unintentionally led to death. *See State v. Hennings*, 129 Wn.2d 512, 919 P.2d 580 (1996); *Weaver v. Graham*, 450 U.S. 24, 28-31, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The petitioners' convictions under former *RCW 9A.32.050* are invalid, and they are entitled to relief. Accordingly, their convictions must be vacated and their cases remanded to the appropriate trial courts for further

lawful proceedings consistent with *Andress* and our decision here. See *Andress*, 147 Wn.2d at 617, 617 n.5.³

3 We deny motions to quash the consolidation and stay petitions in *Matamua*, *Hinton*, and *Martinez*. We also deny requests by petitioners Matamua and Martinez to dismiss their petitions in the event that we do not direct remand for resentencing on second degree assault.

[***12] [*862] The personal restraint petitions are granted, and these cases are remanded for further proceedings.

Alexander, C.J., and Johnson, Sanders, and Fairhurst, JJ., concur.

CONCUR BY: Bobbe J. Bridges

CONCUR

Bridge, J. (concurrency) -- I write separately to express my continued disagreement with this court's deci-

sion in *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), which held that under former RCW 9A.32.050 (1976), a conviction of second degree felony murder could not be based on assault as the predicate felony. However, the principle of stare decisis now compels me to concur with the majority's application of our decision in *Andress*. See *In re Det. of Campbell*, 139 Wn.2d 341, 348, 986 P.2d 771 (1999) (citing *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 882, 983 P.2d 653, (1999)). Under *Andress*, the petitioners' judgments and sentences are necessarily invalid on their face; thus, RCW 10.73.090(1)'s procedural time bar does not apply. Majority at 857-58. I must also agree with the majority's conclusion that the petitioners' due process rights were violated when they were convicted of second degree felony murder without [***13] proof of all the elements of the crime. Majority at 859-60. Therefore, the petitioners are entitled to relief.

Ireland, Chambers, and Owens, JJ., concur with Bridge, J.

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In the Matter of the Personal Restraint of JESSE HINTON, ET AL., *Petitioners.*

No. 73504-2

SUPREME COURT OF WASHINGTON

152 Wn.2d 853; 100 P.3d 801; 2004 Wash. LEXIS 834

October 28, 2003, Oral Argument
November 18, 2004, Filed

SUBSEQUENT HISTORY: Post-conviction relief granted at, Remanded by, Sub nomine at *In re Pers. Restraint of Thayer*, 124 Wn. App. 1044, 2004 Wash. App. LEXIS 3658 (2004)

PRIOR HISTORY: [***1] Date first filed at Supreme Court: 1/21/2003.
State v. Wiggins, 88 Wn. App. 1051, 1997 Wash. App. LEXIS 3296 (1997)
State v. McGee, 88 Wn. App. 1004, 1997 Wash. App. LEXIS 3286 (1997)
State v. Schaffer, 101 Wn. App. 1013, 2000 Wash. App. LEXIS 1281 (2000)
State v. Soler, 91 Wn. App. 1020, 1998 Wash. App. LEXIS 2840 (1998)

SUMMARY:

Nature of Action: Several offenders convicted of second degree felony murder based on assault as the predicate felony sought relief from personal restraint on the claim that they were convicted of an invalid offense.

Supreme Court: Holding that the judgments against the petitioners were invalid because they were improperly convicted of a nonexistent crime, the court *grants* the petitions and *vacates* the petitioners' convictions of second degree felony murder.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Prosecuting Attorneys -- Duties -- Ethical Duties -- Representation of People -- Fairness to Accused** A public prosecutor is a quasi-judicial officer, representing the people of the state, who is presumed to

act impartially in the interest only of justice. While prosecutors have to deal with all that is criminal, coarse, and brutal in human life, the safeguards that the wisdom of the ages has thrown around persons accused of crime cannot be disregarded. Prosecutors must know that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness to the accused, is their highest commendation.

[2] **Personal Restraint -- Petition -- Timeliness -- Statutory Limits -- Exceptions -- Facial Invalidity -- Offense Not Criminal When Committed** A judgment and sentence entered upon a conviction of a nonexistent crime or of an offense that was not criminal at the time it was committed are invalid on their face for purposes of *RCW 10.73.090(1)*, which specifies a one year time limitation on filing a petition or motion for collateral relief from a criminal judgment and sentence unless the judgment and sentence are invalid on their face or were not rendered by a court of competent jurisdiction.

[3] **Homicide -- Felony Murder -- Second Degree Felony Murder -- Assault -- Predicate Offense -- Validity** Assault upon a person who dies as a result of the assault cannot serve as the predicate felony for a charge of second degree felony murder against the perpetrator of the assault under former *RCW 9A.32.050(1)(b)* (1976). Under the law at the time the former statute was in effect, there was no crime of felony murder predicated on assault of the victim of the murder.

[4] **Personal Restraint -- Petition -- Timeliness -- Statutory Limits -- Exceptions -- Facial Invalidity -- Proof -- Related Documents** For purposes of *RCW 10.73.090(1)*, which specifies a one year time limitation on filing a petition or motion for

collateral relief from a criminal judgment and sentence unless the judgment and sentence are invalid on their face or were not rendered by a court of competent jurisdiction, the facial invalidity of a judgment and sentence may be shown by related documents, such as charging instruments, statements on plea of guilty, and jury instructions, as well as the judgments and sentences themselves.

[5] Personal Restraint -- Scope -- Constitutional Error -- Prejudice -- Burden of Proof A personal restraint petitioner raising a claim of constitutional error has the burden of demonstrating by a preponderance of the evidence that the error resulted in actual and substantial prejudice. This showing is required to serve the interests of finality, economy, and integrity of the trial process, in recognition of the fact that the petitioner already has had an opportunity for judicial review.

[6] Personal Restraint -- Grounds -- Conviction of Nonexistent Crime -- Nature of Error -- Right to Relief The conviction of a defendant for an act that was not criminal at the time the act was perpetrated (i.e., the conviction of a defendant of a nonexistent crime) is fundamental constitutional error resulting in actual and substantial prejudice to the defendant for which the defendant is entitled to relief on collateral review in the form of vacation of the conviction, even if the defendant pleaded guilty to the charge.

[7] Statutes -- Construction -- Effect -- Supreme Court Construction The construction of a statute by the Supreme Court operates as though it were incorporated into the statute since its enactment. When the Supreme Court construes a statute, setting out what the statute has meant since its enactment, there is no question of retroactivity; the statute must be applied as construed to conduct occurring since its enactment.

[8] Homicide -- Felony Murder -- Second Degree Felony Murder -- Assault -- Predicate Offense -- Statutory Provisions -- Retroactivity Laws of 2003, ch. 3, § 2, which amended *RCW 9A.32.050* to provide that second degree felony murder may be predicated on assault, may not be applied retroactively without violating the constitutional prohibition against ex post facto laws.

[9] Criminal Law -- Ex Post Facto Law -- What Constitutes -- In General A law that imposes punishment for an act that was not punishable when committed or that increases the quantum of punishment for an act after it was committed is an ex post facto law prohibited by U.S. Const. art. I, § 10 and *Const. art. I, § 23*.

COUNSEL: *Jesse Hinton, Sean Schaffer, Nathaniel Haux, Robert C. Wiggins, Audencio A. Chavez, Jovia D. Martin, Miguel Martinez, Samuel Matamua, Aljeron Pleasant, and Oliver M. Wright, Pro se.*

Jeffrey Ellis (of Ellis Holmes & Witchley); Suzan L. Clark; Sheryl G. McCloud; David Zuckerman and Suzanne L. Elliott; and Michael P. Iaria (of Cohen & Iaria), for petitioners.

Gerald A. Horne, Prosecuting Attorney for Pierce County, and Alicia M. Burton, Deputy; Steven J. Tucker, Prosecuting Attorney for Spokane County, and Kevin M. Korsmo, Deputy; Arthur D. Curtis, Prosecuting Attorney for Clark County, and Richard A. Melnick, Deputy; Norm Maleng, Prosecuting Attorney for King County, and Ann M. Summers and James M. Whisman, Deputies; and Edward G. Holm, Prosecuting Attorney for Thurston County, and Steven Sherman, Deputy, for respondent.

JUDGES: Authored by Barbara A. Madsen. Concurring: Faith Ireland, Bobbe J Bridge, Charles W. Johnson, Gerry L Alexander, Richard B. Sanders, Susan Owens, Tom Chambers, Mary Fairhurst.

OPINION BY: Barbara A. Madsen

OPINION

[**802] [*856] En Banc. Madsen, J. -- Each of the petitioners' convictions in these consolidated cases must be vacated in light of *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). While the facts of each petitioner's conduct are immaterial to the legal [***2] questions we address in this opinion, we are aware that some of these cases involve horrifying conduct, and all involve heartbreaking loss of life. The cost in terms of human anguish is immeasurable. Judges are not immune to these horrors. Yet, to assure lawful and fair treatment of all persons convicted under a statute that did not criminalize their acts as felony murder, all of these petitioners are entitled to relief. Our obligation is to see that the law is carried out uniformly and justly.

[1] We note that the prosecutors in these cases have stressed the nature of the petitioners' conduct and have vigorously argued that their convictions should stand. A public prosecutor is ""a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice."" *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497, 14 N.Y. Cr. 34 (1899))). It is important to remember that such officers

have to deal with all that is . . . criminal, coarse and brutal in human life. But [***3] the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a [**803] spirit of fairness toward the accused, is the highest commendation they can hope for.

State v. Montgomery, 56 Wash. 443, 447, 105 P. 1035 (1909).

[*857] Facts

In *Andress*, the court held that under former *RCW 9A.32.050* (1976) a conviction of second degree felony murder could not be based upon assault as the predicate felony. Each of the petitioners was convicted of second degree felony murder with assault as the predicate felony, either following trial or a plea of guilty. Relying on *Andress*, all of the petitioners filed personal restraint petitions seeking relief from confinement on their second degree felony murder convictions.

Analysis

RCW 10.73.090

[2] [3] [4] We first decide whether the personal restraint petitions are barred by *RCW 10.73.090(1)*, which states that "no petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed [***4] more than one year after the judgment becomes final if the judgment and sentence is valid on its face . . ." The petitioners claim that they were convicted of a nonexistent crime and therefore their judgments and sentences are invalid on their face. We agree.

One of the elements of second degree felony murder is the predicate felony. See 11 *WASHINGTON PATERN JURY INSTRUCTIONS: CRIMINAL* 27.04, at 303 (2d ed. 1994); *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 50, 75 P.3d 488 (2003); *State v. Roberts*, 142 Wn.2d 471, 507, 14 P.3d 713 (2000). No statute established a crime of second degree felony murder based upon assault at the time the petitioners committed the acts for which they were convicted. A conviction under former *RCW 9A.32.050* resting on assault as the underlying felony is not a conviction of a crime at all.

Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face. [*858] *In re Pers. [**858] Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) (conviction of first degree rape of a child, a nonexistent crime at the time of defendant's conduct [***5] alleged to be un-

lawful; judgment and sentence invalid on its face); *In re Habeas Corpus of Frye*, 47 Wn.2d 605, 288 P.2d 850 (1955) (conviction of being an habitual offender invalid because being an habitual offender was not a crime; judgment and sentence void); cf. *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 627 P.2d 1316 (1981) (arrests under municipal ordinance for driving under the influence of intoxicants invalid where ordinance did not make driving under the influence a crime).

The invalidity of the petitioners' judgments and sentences is clearly shown by related documents, i.e., charging instruments, statements of guilty pleas, jury instructions, and the judgments and sentences themselves. Such documentation sufficiently establishes the facial invalidity of the judgments and sentences. See *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). Because the petitioners' judgments and sentences are invalid on their face, their personal restraint petitions are not subject to the one year time limit of *RCW 10.73.090*.¹

1 It is thus unnecessary to reach arguments that several of the exceptions to the one year time bar in *RCW 10.73.090* apply, i.e., *RCW 10.73.100(2)*, (4), (5), and (6).

[***6] Actual and Substantial Prejudice

[5] A personal restraint petitioner asserting constitutional error must establish that the asserted error has resulted in actual and substantial prejudice. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810, 812, 792 P.2d 506 (1990). This showing is required to serve the interests of finality, economy, and integrity of the trial process, as well as in recognition of the fact that the petitioner has already had an opportunity for judicial review. *Isadore*, 151 Wn.2d at 298 (citing [*859] *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994)). Proof is by a preponderance of the evidence. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

[6] [7] [8] [9] [**804] Petitioners have established actual and substantial prejudice resulting from constitutional error. As they point out, the United States Supreme Court has held that it is a fundamental due process violation to convict and incarcerate a person for a crime without proof of all the elements of the crime. *Fiore v. White*, 531 U.S. 225, 228-29, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001). [***7] In *Fiore*, the defendant had been convicted of operating a hazardous waste facility without a permit. The defendant in fact had a permit, but the State successfully argued that he had violated the relevant statute because he had acted outside the permit's terms. The Pennsylvania Supreme Court reversed his

1 seat, I am going to ask Mr. Haskell to give a short
2 summary of the case, and then I will ask you if that is
3 what happened.

4 Mr. Haskell?

5 MR. HASKELL: Thank you, Your Honor.

6 May it please the Court and counsel.

7 If this had gone to trial, State's evidence would
8 have shown that, on the 1st of November of 2007, Spokane
9 Police Detective Barrington did a controlled buy with a
10 CI who was strip searched before and after the purchase
11 and found no unauthorized monies or items. That the CI
12 was given a phone number to call, which was the
13 co-defendant's phone number in this case. During that
14 conversation, the CI was directed to an intersection of
15 Pittsburg and Rockwell in Spokane County. Upon arrival
16 there, the CI made contact with the co-defendant as well
17 as Mr. Castro. During that time, the CI exchanged some
18 cash for some items that later proved to be crack
19 cocaine at the intersection of Napa and Hoffman in
20 Spokane. The CI provided that suspected crack cocaine
21 to the detective. Visual surveillance was maintained
22 throughout. The co-defendant was subsequently arrested.
23 Mr. Castro fled the vehicle and was subsequently
24 arrested nearby with a large quantity of currency in his
25 pocket with serial numbers that matched the pre-recorded

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1 buy money. All these events having occurred in Spokane
2 County.

3 THE COURT: Thank you.

4 Mr. Castro, you have heard the statement of the
5 prosecutor. Is that basically what happened in this
6 case?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Is it still your desire to plead
9 guilty?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: I will make a finding that the
12 statement of defendant on plea of guilty has been read
13 to the defendant in the presence of his attorney and
14 acknowledged here in open court. The Court finds the
15 defendant's plea of guilty is made knowingly and
16 voluntarily, the defendant understands the charges and
17 the consequences of the plea, there is a factual basis
18 for the plea, and the defendant is guilty of the charge
19 of conspiracy to deliver a controlled substance.

20 Thank you.

21 Mr. Haskell?

22 MR. HASKELL: Thank you, Your Honor.

23 May it please the Court, counsel.

24 The recommendation from the State, Your Honor, is
25 that you adopt the joint recommendation, sign off on the

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1 amended information, give Mr. Castro six months on the
2 deadly weapon enhancement only, no time on the
3 conspiracy, credit for time served, fines and costs of
4 \$500 victim assessment, \$200 in court costs, and a
5 \$1,000 drug fine, that the Court place him on twelve
6 months of community custody, that he be required to
7 notify his CCO of changes in address or employment, not
8 associate or have contact with any known felons, gang
9 members or their associates, no new law violations, and
10 that he seek and maintain part- or full-time employment
11 at a CCO approved business, and the rate of the payments
12 to be determined by the Court.

13 Thank you, Judge.

14 THE COURT: Thank you.

15 Mr. Porter.

16 MR. PORTER: Thank you, Your Honor.

17 If it will please the Court, counsel, and Mr.
18 Castro.

19 Your Honor, I would ask that the Court follow the
20 agreement that we have arrived at here today and follow
21 the recommendation that we have outlined. I think it is
22 a fair recommendation, given the agreement of the
23 parties.

24 Your Honor, Mr. Castro is twenty-three years old.
25 He has been a resident of Spokane since 1996. Since his

O - R - I - G - I - N - A - L

1 incarceration, he has found out that he will be a father
2 when he is released -- or he will be released,
3 hopefully, and then find out that he has a child. He
4 also found out that his grandmother has just passed away
5 since he has been in custody. His mother passed away in
6 2000, and his father is currently in a federal prison
7 and has been there since 1993 or 1994. He has three
8 sisters one of whom is also in a federal penitentiary in
9 Texas. He has no other family ties to Spokane. He does
10 have aunts and uncles who live in New York.

11 His intention is to move to Oregon when he is
12 ultimately released on this charge. We would ask the
13 Court to consider an interstate compact to allow him to
14 do that. He would like to move out of Spokane because
15 he obviously made some very bad choices since he has
16 been in Spokane. He recognizes that. He wants to make
17 a fresh start.

18 Your Honor, he is an intelligent young man. I
19 have had the opportunity to talk to him several times.
20 He actually put this plea agreement together and asked
21 that I present it to the State. I was, obviously, very
22 reluctant to offer the State a strikeable offense when
23 Mr. Castro has one prior strike and is not currently
24 charged with a strike. But his range of confinement on
25 the charge as it was filed was sixty to a hundred twenty

O - R - I - G - I - N - A - L

1 months with a twenty-four-month school zone enhancement.
2 The offer from the State was sixty months. Mr. Castro
3 had just got done serving about a six-year prison
4 sentence and was released in July of 2007 and this
5 charge happened in November of 2007. He has been in
6 custody since November of 2007. The State charged him
7 with escape from community custody. The case sat in
8 District Court waiting for it to be flipped over to
9 Superior Court. And then this charge was filed on
10 December 6. So, in essence, I believe he has been held
11 on this charge since November 1st. It was just a stall
12 in the filing process, I guess, that kept him down in
13 District Court on the escape from community custody
14 charge.

15 Your Honor, Mr. Castro has some talents and
16 skills. He is a talented rap artist. He has recorded
17 probably three or four CDs he indicates and had
18 completed a CD before he went into prison the last time
19 and had been working hard to put a CD together since his
20 release.

21 He presented me with information that he was not
22 fully aware, I guess, of what was happening when he was
23 in the car. Apparently, the gang unit -- or the task --
24 drug task force had set their sites on the individual
25 who was driving the vehicle and Mr. Castro was with and

O - R - I - G - I - N - A - L

1 had set up a controlled buy through a confidential
2 informant with that individual. Mr. Castro was a
3 passenger in the vehicle. But money and drugs did
4 exchange hands.

5 Mr. Castro is very regretful that he got himself
6 put in that situation, especially after serving such a
7 long period of incarceration. He took a strike and
8 several other felonies when he agreed to do that
9 six-year sentence. I think faced with the idea of doing
10 another five years was obviously more than he could
11 handle, so he has offered to, essentially, put himself
12 in a very risky situation.

13 He needs to make some serious lifestyle changes,
14 otherwise he is going to put himself in a situation
15 where he is going to regret what he did today. We have
16 talked about that at length. I have given him my legal
17 advice, but I think only Mr. Castro knows what his
18 future holds. Only he can control what his future
19 holds. He maintains very strongly that he is going to
20 pursue a different life. He wants to be a father to his
21 child. I believe that he will do that. He is very
22 sincere about what he is going to do in his life from
23 here forward.

24 Your Honor, I would ask the Court to take into
25 consideration the period of time that he has served in

O - R - I - G - I - N - A - L

1 incarceration and the fact of my appointment. He
2 doesn't really have any job skills, other than his
3 musical talents. I would ask the Court to consider
4 waiving all but the \$500 victim assessment fee and to
5 set up a time payment. I would ask the Court to give
6 him credit for time served from November 1st. I believe
7 that he has been in custody. This charge happened on
8 November 1st. He was arrested, and he has been sitting.
9 It just hadn't been filed and the warrant hadn't been
10 served until December 6.

11 But Mr. Castro is an intelligent young man. He
12 understands what he is up against here. He understands
13 what he is offering to the State. The State is getting
14 a very big chip that they can play later on down the
15 road if Mr. Castro doesn't hold up his end of the
16 bargain and change his life. So I think for both
17 parties it is a fair resolution. He is saving himself
18 right now about two and a-half years of his life with
19 the greater risk at hand if the Court follows the
20 recommendation.

21 THE COURT: Is Kelsey Peone (phonetic)
22 somebody he needs to have any contact with?

23 MR. PORTER: No, I don't believe so.

24 A co-defendant. You don't need to be in contact
25 with her, do you?

O - R - I - G - I - N - A - L

1 THE DEFENDANT: No, I don't have to.

2 THE COURT: Is Castro, is there anything
3 more you want to say?

4 THE DEFENDANT: No, Your Honor.

5 THE COURT: Where did you do most of your
6 time when you were in the institution last time?

7 THE DEFENDANT: Walla Walla.

8 THE COURT: Tough place. When is the baby
9 due?

10 THE DEFENDANT: April.

11 THE COURT: Well, you will probably be out
12 just about in time then.

13 Mr. Castro, like your attorney said, I mean, you
14 are just kind of hanging over the edge of a cliff here.
15 You get yourself in serious difficulty again, you know,
16 no one is going to have much option, you are going to
17 end up going to prison for life. So, you are a smart
18 guy, you got to do whatever it takes to stay away from
19 that.

20 All right. I will go along with the
21 recommendation. Six months, credit for time served.
22 Costs, I will find him basically indigent for purposes
23 of a drug fine. I will impose, however, the \$500
24 assessment to the state crime victim fund and the \$200
25 of court costs. We will say \$25 a month starting June

O - R - I - G - I - N - A - L

1 5th and then the 5th of each month thereafter to the
2 clerk of the court. You got twelve months of community
3 custody when you get out. You got to follow all their
4 rules and regulations of your corrections officer. The
5 main conditions are going to be no non-prescribed
6 substances, no legend drugs, no paraphernalia, none of
7 that. You are subject to monitoring by UAs or whatever
8 other testing. I want you to get a substance abuse
9 evaluation and follow-up treatment. No contact with any
10 known drug offenders per list which your CCO will give
11 you. No weapons.

12 Any questions?

13 THE DEFENDANT: No, Your Honor.

14 THE COURT: All right, sir, if you will have
15 a seat, we will have the paperwork here in just a couple
16 of minutes.

17 MR. PORTER: Your Honor, did you comment on
18 the credit for time served issue?

19 THE COURT: Yeah. Credit for time. When
20 was the actual charge filed on this case?

21 MR. PORTER: I don't know if they booked him
22 right away.

23 MR. HASKELL: The information was December
24 6.

25 MR. PORTER: He was arrested on the charge

O - R - I - G - I - N - A - L

1 on November 1st, but there was an escape from community
2 custody warrant out for his arrest, and then he was
3 arrested when he got picked up on this charge and then
4 --

5 THE COURT: Make it credit for time from
6 November 1st.

7 MR. HASKELL: And I did pen in the transfer
8 authorized to Oregon.

9 THE COURT: Thank you. That was my
10 intention.

11 MR. PORTER: May I approach, Your Honor?

12 THE COURT: Yes.

13 MR. PORTER: I do have the judgment and
14 sentence which I have reviewed with Mr. Castro. He has
15 signed the document. It does accurately reflect the
16 Court's oral ruling. He is informed of his right to
17 collateral attack. Your Honor, if I may, I could go
18 over the order on clerk's legal/financial information
19 with him in the -- and let the other parties move
20 forward.

21 THE COURT: He is going to need to sign this
22 in a minute.

23 The sentencing paperwork appears to be in proper
24 form. I am signing that at this time. The clerk will
25 obtain the fingerprints and the signatures.

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MR. PORTER: Thank you, Your Honor.

(End of Verbatim Report of Proceedings.)

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