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80070-7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
Respondent,)
v.)
THOMAS WS RICHEY,)
Petitioner)

35212-5

NO. 86-1-00658-5

MOTION TO VACATE JUDGMENT
AND SENTENCE, AND TO WITHDRAW
PLEA OF GUILTY

PERSONAL RESTRAINT PETITION

I. IDENTITY OF PETITIONER

Petitioner, Thomas William Sinclair Richey, acting pro-se, was convicted in 1987, following a guilty plea to First Degree Murder, RCW 9A.32.30(1)(c), and Attempted First Degree Murder, RCW 9A.32.30(1)(c)+.020. The petitioner has served over twenty years in prison and, pursuant to CrR 7.8(b), now moves for the relief requested in Part II of this motion.

II. STATEMENT OF RELIEF REQUESTED

The petitioner motions this court to vacate his Judgment and Sentence and to allow him to withdraw his plea of guilty for the following reasons: The petitioner pled guilty to, and was specifically found guilty of, Attempted Felony Murder, which is a nonexistent crime; petitioner's exceptional

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sentence was based on this nonexistent crime. Further, petitioner's exceptional sentence was supported by reasons that, prior to Mr Richey's sentencing, were ruled as unlawful reasons to support an exceptional sentence. Mr Richey also asserts that his plea was involuntary and that his plea agreement was breached by the state. Finally, Mr Richey asserts ineffectiveness of counsel. For the foregoing reasons, Mr Richey's Judgment and Sentence is invalid on its face and, therefore, this motion is not time-barred by RCW 10.73.090.

III STATEMENT OF THE CASE

In 1986, Mr Richey entered a Tacoma appliance store with the intent to buy a TV as he had tried to do at another store an hour before. Mr Richey, then an eighteen-year-old Army Ranger, carried a .22 caliber handgun that he had used for target practice earlier at Fort Lewis. In the store, Mr Richey became upset over the disputed price of a TV. He pulled out his gun and ordered employee, Arlene Koestner, to a stockroom where another employee, Scott Sanford, stood. As both Ms Koestner and Mr Sanford entered the stockroom, petitioner asked where the money was. However, before any reply could be made, Mr Sanford turned, startling the petitioner, and petitioner shot Mr Sanford then instantaneously shot Ms Koestner. During the commission of these crimes, Mr Richey had been under the influence of LSD.

Petitioner was originally charged with Aggravated Murder and Attempted Murder. However, during plea negotiations, the state conceded that there was a substantial question of whether they could prove the element of premeditated intent, so they dropped this element and reduced Mr Richey's charge of Aggravated Murder to First Degree Murder, RCW 9A.32.30(1)(c), which is actually felony murder. Mr Richey was subsequently advised in his plea agreement that he was pleading guilty to Count I and Count II, and that the

elements for these crimes, as it regards to Count II, were:

COUNT II: that on or about March 28, 1986, in Pierce County, WA., the defendant did shoot Scott Jacob Sanford attempting to cause the death of Scott Jacob Sanford while committing or attempting to commit the crime of robbery in the First Degree or in the cause of or furtherance of such crime. Scott Jacob Sanford was not a participant in such crime.

Exhibit--1

The elements described informed Mr Richey that he was pleading guilty to Attempted First Degree Murder with a robbery predicate. The elements of a premeditated intent predicate were not described as an element to which Mr Richey was pleading guilty to in his plea agreement, and no evidence supported the predicate of premeditated intent. Further, Mr Richey's statement upon his plea of guilty denied any element of premeditation.

The court set forth the following findings: "The defendant has been convicted of the following current offense(s) upon a plea of guilty: Count I, MURDER IN THE FIRST DEGREE RCW 9A.32.30(1)(c); Count II, ATTEMPTED MURDER IN THE FIRST DEGREE RCW 9A.32.30(1)(c)+.020; This court has jurisdiction of the defendant and subject matter. It is ADJUDGED that the defendant is guilty of the current offenses set forth above." Exhibit-2..

Mr Richey was thereby specifically convicted, in Count I, of Felony Murder, and in Count II, of Attempted Felony Murder. However, Attempted Felony Murder is not a crime, though it is the crime which Mr Richey pled guilty to and which the court decreed him guilty of. The Judgment and Sentence of the court, as prepared by and thoroughly review by, the state, specifically enumerated that Mr Richey was convicted of, in Count II, Attempted Murder with a robbery predicate (RCW 9A.32.30(1)(c) referring to Felony Murder and +.020 referring to the Attempt statute). See Amended Information, Exhibit-3.

In addition to being convicted of a non-existent crime, Mr Richey was sentenced to an exceptional term of 65 years that the court supported with aggravating factors that the Washington Supreme Court had ruled in prior cases were unlawful factors to support exceptional sentences. It is true that Mr Richey stipulated to the recommendation of the exceptional term, but this stipulation was not used as a reason itself to support Mr Richey's exceptional sentence, and Mr Richey stipulated to the recommendation of the exceptional term based on assurances that the aggravating sentence factors were lawfully proper. He relied on this assurance to his detriment.

Mr Richey's defective Judgment and Sentence is based on a plea agreement that is equally defective on its face. It was made without the knowledge that, in pleading guilty to Attempted Felony Murder in the Amended Information, Mr Richey was also pleading guilty to the alternate charged crime of Attempted Premeditated Murder, RCW 9A.32.030(1)(a)+ 9A.28.020. See Exhibit-3. Mr Richey believed he entered an agreement where he was only pleading guilty to Felony Murder and Attempted Felony Murder. This is reflected in the plea agreement by both Mr Richey's Statement that completely denies premeditation and by the elements in the plea agreement Mr Richey pled guilty to that describe, not premeditated intent, but attempted murder during the course of a robbery (Attempted Felony Murder). Exhibit-1. The Judgment and Sentence supports Mr Richey's understanding of his plea. He was convicted of Felony Murder and Attempted Felony Murder. Exhibit-2.

Mr Richey's plea agreement is further in disrepair at paragraph-13, where, in boilerplate language, it states that Mr Richey retained his right to appeal his exceptional sentence. No time deadlines appear in this contractual document between parties; nothing that would warn Mr Richey of time limits for

the filing of an appeal. See Exhibit-1. The paragraph clearly states, in relevant part, that, "If the court goes outside the standard sentence range, either I or the state can appeal that sentence."

Washington law in fact places a time restriction on criminal appeals, so the clause at paragraph-13 of Mr Richey's plea agreement that implies no time restriction on an appeal contradicts the law, and renders the plea agreement invalid on its face. A time restriction on an appeal is a direct consequence of Mr Richey's plea agreement and the appeal filing deadline should have been contained in the plea agreement.

For all of the foregoing, Mr Richey was denied effective assistance of counsel. Mr Richey's trial counsel should have advised him that he was pleading guilty to a nonexistent crime and should have advised Mr Richey that the aggravating factors used to support his exceptional sentence had been ruled as unlawful sentencing enhancers by earlier court decisions.

IV. ARGUMENT

A. MR RICHEY PLED GUILTY AND WAS CONVICTED OF THE NONEXISTENT CRIME OF FELONY MURDER. THIS IS IMPERMISSIBLE UNDER STATE STATUTORY LAW AND STATE AND FEDERAL CONSTITUTIONAL LAW.

Mr Richey was originally charged in an Information in 1986, that alleged one count of Attempted First Degree Murder and one count of Aggravated First Degree Murder. The state's theory was that Mr Richey had entered a store to buy a TV and then, in the course of what the state contends was an attempted robbery, Mr Richey shot two store employees, killing one and maiming the other. A notice of special sentencing proceeding was also filed. Thereafter,

the notice of special sentencing proceeding was stricken and an Amended Information was filed in 1987, without the Aggravated Murder count. Exhibit-3.

The Amended Information charges not just felony murder in Count I—which is certainly a crime—but also charges Attempted Felony Murder in Count II. This latter charge is not a crime.

Count II, purporting to charge attempted felony murder, reads in relevant part:

...do accuse THOMAS WILLIAM SINCLAIR RICHEY of the crime of ATTEMPTED MURDER IN THE FIRST DEGREE,... committed as follows:

That THOMAS WILLIAM SINCLAIR RICHEY, in Pierce County, Washington, on or about the 28th day of March, 1986, did unlawfully and feloniously with premeditated intent to cause the death of another person, did shoot Scott Jacob Sanford, thereby attempting to cause the death of Scott Jacob Sanford, a human being, and/or while committing or attempting to commit the crime of Robbery in the First Degree, and in the course of or furtherance of said crime or in immediate flight therefrom, did shoot Scott Jacob Sanford, a human being not a participant in such crime, thereby attempting to cause the death of Scott Jacob Sanford, contrary to RCW 9A.28.020 and 9A.32.30(1)(a)(c), and against the peace and dignity of the State of Washington.

Amended Information, Count II, page 2.

The emphasized material in this second count charges two different types of murder crimes in the same paragraph. The first one is an attempt (referring to the attempt statute, RCW 9A.28.020) to commit premeditated murder (per RCW 9A.32.030(1)(a)). Certainly, that is a crime in the State of Washington.

But it is not the crime to which Mr Richey pled guilty. There is no factual basis for a premeditated crime against Mr Sanford in Mr Richey's case. The Statement on Plea of Guilty (Exhibit-1) contains in paragraph 18 the factual statement of the defendant, which the court must consider in deciding whether the facts are sufficient to accept the guilty plea. It completely

denies any element of premeditated intent to kill---it states, instead, that Mr Richey's sole intent was "to buy a TV" and that the shots were "instantaneous" [sic] rather than premeditated. The factual statement reads as follows:

On March 28th, 1986, I went into Military TV/Stereo store, with the intent to buy a TV as I had tried to do in a previous store that day. Prior to going into the store I had taken LSD. During negotiations to buy the TV something clicked in my head, and I took Arlene Koestner to the back room and when I got there Scott Sanford was already present. I asked him where the money was and then he turned around, startling me. I then shot him once in the head then shot Arlene in the head. Both shots were instantaneous [sic]. On my way out of the store, I took stereo equipment and a contract with my signature on it. This happened in Pierce County.

(emphasis added)

There is nothing in here to support the element of premeditated intent to kill, which would be necessary for a plea of guilty to Attempted Premeditated Murder. This factual statement denies premeditated intent. This is compounded further by the plea agreement entered between parties. The elements in the plea agreement that Mr Richey pled guilty to do not describe Attempted Premeditated Murder. Indeed, this element was dropped by the state at least as it pertained to Ms Koestner, and it is illogical to claim the elements of premeditated intent exist for one victim and not the other when both crimes happened together, within an instant.

In a recent case, In re PRP of Fuamaila, Docket Number 53698-2-I, filed March 13, 2005, the Court of Appeals held that it is permissible to charge two alternate predicate crimes in the same count and, "[a] defendant does not have the right to plead guilty to just one of the alternative means." Slip Opinion at page 4, citing State v. Bowerman, 115 Wn.2d 794, 799 (1990).

The issues in Fuamaila appear similar to Mr Richey's, but they are

factually different. Fuamaila was charged with Second Degree Murder committed by the alternative means of Intentional Murder and Felony Murder predicated on Assault. Even though the latter was a nonexistent crime following the Andress decision, the language in Fuamaila's Statement in his plea agreement supported the valid charged elements of Intentional Murder. Also, the elements of Intentional Second Degree Murder were described in Fuamaila's plea agreement. Further, Fuamaila's Judgment and Sentence convicted Fuamaila of both alternative means of committing Second Degree Murder. Therefore, the Court of Appeals determined that a factual basis existed to support the valid alternate crime in which Fuamaila was convicted of in his Judgment and Sentence.

In Mr Richey's case, no factual basis exists to support premeditated intent. Mr Richey's Statement denied premeditation, and the elements in his plea agreement described Attempted Felony Murder. Mr Richey's Judgment and Sentence reflects these facts. It states, "The defendant has been convicted of the following current offense(s) upon a plea of guilty: MURDER IN THE FIRST DEGREE, RCW 9A.32.030(1)(c)" and "ATTEMPTED MURDER IN THE FIRST DEGREE, RCW 9A.32.030(1)(c)+.020 (+.020 referring to the attempt statute cited in the Amended information)...It is ADJUDGED that the defendant is guilty of the current offenses set forth above." It is clear that no factual basis for premeditated intent existed and the court did not convict Mr Richey of Attempted Premeditated Murder.

The state may still argue that Mr Richey did plead to Attempted Premeditated Murder. In order for the state to sustain such an argument, this would render Mr Richey's plea agreement involuntary and unknowing because the elements in the plea agreement to which he was pleading guilty describe,

in Count II, Attempted Felony Murder. There must be a factual basis to support a plea of guilt and it must be determined whether the defendant understands the relationship of his conduct to the charge. See In re Barr, 102 Wn.2d 265 (1984); McCarthy v. United States, 394 US 459 (1969). It is clear from the record that Mr Richey was never questioned whether he understood the charge of Attempted Premeditated Murder nor whether he understood whether his conduct supported such a crime.

Given Mr Richey's Statement and the elements describing Attempted Felony Murder in his plea agreement, and the record in this case, if Mr Richey did plead guilty to Attempted Premeditated Murder, it was clearly unknowing and this would justify a withdrawal of his plea. State v SM, 100 Wn App 401 (2000) ("guilty plea may be withdrawn to correct a manifest injustice, if the plea was involuntary").

Mr Richey did not plead guilty to Attempted Premeditated Murder, nor was he convicted of this crime. He did not admit premeditation nor even an intent to kill.

The charge to which Mr Richey pled guilty to and was convicted of, in Count II, was RCW 9A.32.30(1)(c) + 9A.28.020, Attempted Felony Murder. This crime seems to be a charge of committing a felony but failing to commit a murder in the course of that felony---rather than of successfully committing murder in the course of that felony.

It is true that attempted robbery can form the basis for a First Degree Felony Murder charge in Washington. RCW 9A.32.30(1)(c). But Mr Richey's charge goes further. It charges not just an attempted robbery, but also a resulting survival---not a resulting death; an attempted death.

No statute in Washington describes such a crime. Washington's felony murder law allows a defendant to be convicted of a murder committed by another, provided that the defendant was sufficiently involved in a felony that led to the murder. A person is guilty of First Degree Felony Murder when:

He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree,... and in the course of or furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: ...

Wash. Rev. Code 9A.32.030(1)(c)(emphasis added).

As the initial emphasis shows, the state can charge an attempt to commit robbery as the underlying crime. In fact, the state is not required to prove any specific intent with regard to felony murder other than the intent required for the underlying crime, whether it be a completed or uncompleted attempted robbery. State v. Frazier, 99 Wn.2d 180, 192 (1983).

As the latter emphasis shows, however, the consequence that must follow is "causes the death" of another. Not "attempts to cause the death." This means an actual, though unintended, death.

This interpretation of the statute's plain language is consistent with this state's long-standing rule that First Degree Felony Murder has two elements: (1) a homicide; and (2) commission in the course or furtherance of robbery (or other listed predicate crime). State v. Bottrell, 103 Wn. App. 706, 718 (2000), review denied, 143 Wn.2d 1020 (2001).

The state's general attempt statute cannot be read to permit a charge of felony murder when there is no death, either. It provides: "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1)(emphasis added). It thus requires the intent to

commit a specific crime. Felony Murder is based on the intent to commit the specific underlying felony, so one can attempt that. But the consequence of homicide is wholly unintended---that is precisely the purpose of this vicarious liability statute. See generally In re the Personal Restraint of Andress, 147 Wn.2d 602, 615 (2002); State v. Bottrel, 103 Wn. App. 706, 720. Thus, one cannot "attempt" that unintended consequence, not just because it would be illogical, but also because "attempting" that unintended consequence does not fit within the language of the attempt statute that limits the attempt theory to unintended acts.

Almost every other jurisdiction that has considered this question has come to precisely this conclusion. See State v. Briggs, 218 Wis.2d 61, 66 (Ct. App. 1998)(because felony murder does not include an intent element, one cannot "attempt" felony murder); State v. Kimbrough, 924 S.W.2d 888, 892 (Tenn. 1996)(reversing conviction of attempted felony murder because one cannot "intend to accomplish the unintended"); People v. Stephenson, 30 P.3d 715 (Colo. App. 2000), cert. denied as improvidently granted, Apr. 9, 2002 (reversing conviction of "attempted felony murder" because it is a nonexistent offense and plea of guilty to nonexistent offense is invalid); State v. Burns, 979 S.W.2d 276 (1998), cert. denied, 527 US 1039 (1999)(state concedes that attempted felony murder is not a crime and that those convictions must be reversed and dismissed).

As the court summarized in State v. Lea, 126 N.C. App. 440, 450 (1997) of this virtually unanimous state of the law:

We conclude that a charge of "attempted felony murder" is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result. Accordingly, the offense of "attempted felony murder" does not exist in North Carolina. Our research

indicates that almost every court addressing this issue has agreed that the crime of "attempted felony murder" cannot exist. As the Supreme Court of Tennessee summarized in State v. Kimbrough, 924 S.W.2d 888 (Tenn. 1996): Every jurisdiction that has addressed the question whether attempted felony murder exists as an offense has, with but a single exception, held that it does not exist. People v. Patterson, 209 Cal. App.3d 610 (1989); State v. Gray, 654 So.2d 552 (Fla. 1995); State v. Pratt, 125 Idaho 546 (1993); People v. Viser, 62 Ill.2d 568 (1975); Head v. State, 443 N.E.2d 44 (Ind. 1982); State v. Robinson, 256 Kan. 133 (1994); Bruce v. State, 317 Md. 642 (1989); State v. Dahlstrom, 276 Min. 301 (1967); State v. Darby, 200 N.J. Super 327 (1984); State v. Price, 104 N.M. 703 (1986); People v. Burress, 122 A.D.2d 588 (1986); Commonwealth v. Griffin, 310 Pa. Super. 39 (1983); State v. Bell 785 P.2d 390 (Utah 1989); State v. Carter, 44 Wis.2d 151 (1969). But see State v. White, 266 Ark. 499 (1979) (upholding the offense of attempted felony murder in that jurisdiction).

There is no reason in logic or Washington law to come to a different conclusion here. Mr Richey is currently convicted of a nonexistent crime in Count II. See Judgment and Sentence, Exhibit-2. Following Address, Supra, and In re the Personal Restraint of Hinton, 100 P.3d 801 (2004), it is clear that a conviction of a nonexistent crime is void. This result is also consistent with the long standing holdings of courts in all jurisdictions, in a variety of contexts, that one cannot be convicted of a nonexistent crime. Adams v. Murphy, 653 F.2d 224, 225 (5th Cir. 1981), cert. denied, 455 US 920 (1982) (criminal defendant cannot be convicted of a nonexistent crime); State v. Tatum, 61 Wn.2d 605 (1955); People v. Stephenson, 30 P.3d 715 (defendant cannot be convicted of a nonexistent crime, even if he pleads guilty). In sum, conviction of a nonexistent crime does not just violate state statute and state law, it also violates the due process protections of the state and US constitutions.

A constitutionally invalid guilty plea gives rise to actual prejudice, In re Personal Restraint of Montoya, 109 Wn.2d 270, 277 (1987), and Count II in

Mr Richey's Judgment and Sentence must be vacated. The time bar enumerated in RCW 10.73.090 cannot serve as a procedural block. A Judgment and Sentence is invalid on its face if it exceeds the duration allowed by statute or the alleged defect is evident on the face of the document without further elaboration. See In re PRP of Hemenway, 147 Wn.2d 529, 532 (2002).

It should be noted that the Judgment and Sentence shows that Mr Richey was sentenced to two concurrent 65-year terms, one for each count. But the error must still be remedied. The US Supreme Court has conclusively discarded the "concurrent sentence" doctrine, which previously precluded review of invalid criminal convictions where the sentences for those crimes were concurrent with valid criminal convictions. The consequence of conviction itself is sufficiently adverse to permit a challenge to that conviction, even if the sentence on that conviction runs concurrently with a sentence on another conviction. United States v. Ball, 470 US 856 (1985).

Further, Mr Richey's sentence would not necessarily remain the same if his conviction in Count II were vacated. It is true that his sentence was an exceptional one. But a sentence that is based in any part on consideration of a separate conviction that was unconstitutionally obtained is itself unconstitutional. Townsend v. Burke 334 US 736, 741 (1948)(unconstitutional prior convictions are inadmissible, "materially untrue" information); United States v. Tucker, 404 US 443, 447 (1972). In fact, here the exceptional term given on each count rested in part on the nature of the crime described in the other count. Since consideration in any way of the nonexistent crime in Count II is unconstitutional, the exceptional sentence is unconstitutional, also.

B. EVIDENCE SUPPORTS THAT MR RICHEY'S PLEA OF GUILTY TO, AND CONVICTION OF, A NONEXISTENT CRIME, IS A JUDICIAL ERROR AND IT MUST BE VACATED

In accordance with CrR 7.8(a), a Superior Court has the authority to amend a Judgment and Sentence only to correct a clerical error. An error is clerical if the original Judgment and Sentence either contains language that did not correctly convey the intention of the court or omitted language the court intended to include; and the court's intent must show in the record made at the time of the original Judgment and Sentence. See Presidential Estate Apartment Assoc. v. Barret, 129 Wn.2d 320, 324-25 (1996). Under Presidential, if the court didn't state its intent on the record, the error is not correctable.

The state will likely argue that Mr Richey's Judgment and Sentence contains a clerical error; that Count II should reference the Attempted Premeditated Murder statute, RCW 9A.32.30(1)(a)+.020. Of course, it should be noted that the state reviewed and completed this document for the court. TR @ 28. The trial court, however, did not state its intent to convict Mr Richey of Attempted Premeditated Murder; RCW 9A.32.30(1)(a)+.020. Thus this should end any further inquiry as to whether the error in Mr Richey's Judgment and Sentence is clerical or judicial, and this court should move to vacate Count II of Mr Richey's Judgment and Sentence. But let's take it further.

The court adopted the plea resolution by counsel. TR @ 25. This plea resolution included a plea agreement between parties with a stipulation to the recommendation of an exceptional sentence. Specifically, the terms of the plea agreement to which Mr Richey accepted included a description of the elements of the crimes to which he was pleading guilty. At Count II of this plea agreement form, Exhibit-1, the elements of Attempted Premeditated Murder were

absent. Only the the elements of an Attempted Felony Murder were contained in the agreement.

As an apparent result of the absence of the premeditated intent predicate from Mr Richey's plea agreement, the court made no inquiry to determine whether a factual basis existed for this underlying predicate. A trial court certainly has duty to ensure a defendant understands the underlying elements of each crime to which he is pleading guilty, and whether he understands that his conduct satisfies those elements. CrR 4.2(d); In re PRP of Hews, 99 Wn.2d 80, 87-88 (1983); Bousley v. United States, 523 US 614 (1998) (plea invalid when defendant unaware his conduct failed to satisfy element of offense). At no time did the court make any inquiry as to Mr Richey's conduct in relation to the element of premeditated intent.

The only colloquy between the court and Mr Richey regarding the elements of the crimes to which he was pleading guilty was:

THE COURT: The first page of the Statement of Defendant on Plea of Guilty indicates the Amended Information to the count of murder in the first degree or felony murder and attempted murder in the first degree. The elements and the maximum sentence are contained on page one. Do you thoroughly understand that?'

DEFENDANT RICHEY: Yes, yes, I do.

Trial Record @ 15.

It could be argued that this inquiry failed to even satisfy whether Mr Richey understood the elements described in the plea agreement to which he was pleading guilty. The court does not actually inquire as to whether Mr Richey understands the elements but asks only if he understands those elements are contained in the plea agreement form. It has been clearly established that a trial judge must attempt to orally elicit from the defendant a description of either defendant's acts or his state of mind which resulted in the charge to

which he ultimately pleads guilty. See State v. Powell, 29 Wash App 163 (1981).

Certainly, the colloquy between the court and Mr Richey makes no inquiry as to whether he understood any element of premeditated intent, nor does this element appear in Mr Richey's plea agreement. And for Mr Richey to have been convicted of Attempted Premeditated Murder, some evidence has to exist to support such a crime. See State v. Bingham, 105 Wn.2d 820, 826 (1986) ("The evidence [for premeditated intent], whether direct or circumstantial, must support actual reflection or deliberation apart from the commission of the fatal act itself. Mere opportunity to reflect or deliberate is insufficient.").

It is clear from the record that the court relied on Mr Richey's statement to support the elements contained in the plea agreement to which he was pleading guilty:

THE COURT: Paragraph 18 indicates, I believe, in your printing what took place that gave rise to these charges.

DEFENDANT RICHEY: Yes.

THE COURT: Do you understand that?

DEFENDANT RICHEY: Yes.

Trial Record @ 16

Mr Richey's statement did not admit to a pre-conceived plan to commit murder, which would be required to satisfy the element of premeditated intent. See Powell, supra. In fact, the language in Mr Richey's statement completely denies premeditated intent. It supports murder and attempted murder during the course or furtherance of a felony.

The state may make the argument that Mr Richey did plead guilty to Counts I and II as charged in the Amended Complaint, but this is meaningless if the

court made no inquiry as to whether Mr Richey understood each element of the underlying offenses and if there's no factual basis for the same. If Mr Richey did plead guilty to the crime of Attempted Premeditated Murder, he did so unknowingly, and this is reflected by his Statement which denies premeditation. The plea document reflects that Mr Richey was pleading guilty to the elements described in his plea agreement that were charged in the Amended Complaint. The elements described in the plea agreement supported the crimes in the Amended Complaint of Felony Murder and Attempted Felony Murder. Not Attempted Premeditated Murder.

For the state to effectively argue that a clerical error is responsible for the absence of RCW 9A.32.30(1(a))+.020 in Mr Richey's Judgment and Sentence, they would also need to claim clerical error explains why the elements of premeditated intent do not appear in Mr Richey's plea agreement, and that clerical error explains why the language in Mr Richey's Statement denies premeditated intent. Finally, the state would also have to allege that clerical error is responsible for the court's failure to establish any factual basis to support a plea of guilty to premeditated intent.

The only clerical error present in Mr Richey's case is the state's failure to remove the element of premeditated intent from Count II in the Amended Information as it had in Count I. It defies logic and common sense to assert that premeditated intent exists for one crime and not the other when both crimes happened simultaneously.

The error in Count II of Mr Richey's Judgment and Sentence is judicial in nature, and therefore, must be vacated pursuant to CrR 7.8(b).

C. PURSUANT TO THE TERMS OF MR RICHEY'S PLEA AGREEMENT, HE PLED GUILTY TO ATTEMPTED FELONY MURDER, AND TO AMEND HIS JUDGMENT AND SENTENCE TO CONVICT HIM OF ATTEMPTED PREMEDITATED MURDER WOULD VIOLATE THE PLEA BARGAIN HE AGREED TO

Mr Richey accepted a plea bargain, the terms of which included his agreement to plead guilty to certain crimes described in the plea agreement. The elements in Mr Richey's plea agreement described the crimes of Felony Murder (RCW 9A.32.30(1)(c)), and Attempted Felony Murder (RCW 9A.32.30(1)(c); 9A.28.020). As Mr Richey's plea agreement reflects, he only agreed to plead guilty to murder and attempted murder during the course or furtherance of a felony.

By Mr Richey's own statement on plea of guilty, he denied any premeditated intent. Indeed, the attached affidavit, marked as Exhibit-5, states:

I was always truthful and willing to meet my moral obligations by accepting the penalty for my actions. However, from the start, I refused to be convicted of behavior I did not engage in. I did not remorselessly plan nor premeditate shooting either Arlene Koestner not Kenneth Sanford. I refused to admit to this calloused conduct in my statement and I refused to accept a plea agreement that included the elements of premeditated intent. I did not harbor the calculating and heinous state of mind required for premeditated intent.

The state may argue that, in pleading guilty, Mr Richey was actually pleading guilty to the entire Amended Information. Certainly, the courts have established that a defendant cannot plead guilty to only one of the underlying predicates of a crime. However, as Mr Richey's plea agreement clearly indicates, this is exactly what transpired. Mr Richey pled guilty, in Count II, to the elements of what is a nonexistent crime, although Mr Richey was unaware of this fact at the time. Mr Richey was not advised of the direct

consequence of pleading guilty to Count II---that such a plea carried the consequence that he was pleading guilty to each underlying predicate. Mr Richey believed he was only pleading guilty to the elements in his plea agreement. Exhibit-1. He had a constitutional right to be advised of the direct consequences of pleading guilty. See State v. Ross, 129 Wn.2d 279, 284 (1996)(A defendant must be informed of all direct consequences of a plea); State v. Walsh, 143 Wn.2d 1, 5-6 (2001)(defendant must understand the nature of the charge and consequences of the plea).

Mr Richey was prejudiced by not being advised of the consequence of pleading guilty to Count II. His plea agreement only informed him that the elements to which he was pleading guilty was murder and attempted murder during the course or furtherance of a felony. This significantly influenced Mr Richey into pleading guilty, particularly given his statement on plea of guilt which completely denied premeditation or even an intent to kill, and his Affidavit statement attached herein.

A plea agreement is a contract, and the state should be held to its terms, even when those terms may conflict with the law. State v. Miller, 110 Wn.2d 528, 536 (1988)("Where the terms of a plea agreement conflict with the law or the defendant was not informed of the consequences of the plea, the defendant must be given the initial choice of remedy to specifically enforce the agreement or withdraw the plea.").

However, because Mr Richey cannot expect the enforcement of an agreement that's founded on a plea of guilty, and conviction, of a nonexistent crime, the proper remedy would be to permit him to withdraw his plea.

D. MR RICHEY'S EXCEPTIONAL SENTENCE IS SUPPORTED BY UNLAWFUL FACTORS AND THEREFORE RENDERS HIS JUDGMENT AND SENTENCE INVALID ON ITS FACE

As part of Mr Richey's plea agreement, he stipulated to the recommendation of an exceptional sentence of 65 years. This stipulated recommendation was not used as a reason itself by the court to support the exceptional sentence, which certainly could have served as a lawful supporting reason. See In re Breedlove, 138 Wn.2d 298, 308 (1999). Instead, the court adopted the findings and conclusions of law prepared by the prosecutor that set forth the reasons for the exceptional sentence.

When a trial court imposes a sentence which is outside the standard range set by the Legislature, it must find a substantial and compelling reason to justify the exceptional sentence. RCW 9.94A.120(2). If the trial court relies on a reason which is not substantial and compelling and which is not consistent with the purposes of the SRA, the sentence is unlawful. In re Breedlove, 138 Wn.2d 298, 304 (1999). To reverse an exceptional sentence, the reviewing court must find: (a) the reasons supplied by the judge are not supported by the record which was before the judge or those reasons do not justify a sentence outside the standard range for that offense; or (b) the sentence imposed was clearly excessive or clearly too lenient. State v. Pryor, 115 Wn.2d 445, 448 (1990)(citing RCW 9.94A.120(3)). Whether a reason given by a trial court justifies an exceptional sentence is a question of law. State v. Gaines, 122 Wn.2d 502, 509 (1993).

The first aggravating factor relied upon by the court to impose Mr Richey's exceptional sentence is that:

- (a) Shooting people directly in the head at close range manifests a deliberate cruelty to victims because the brain is such a vital and vulnerable organ of the body.

Findings of Fact and Conclusions of Law, Exhibit-4

While this statement may be factually correct, it is not legally sufficient. One year before Mr Richey's plea, it was established in State v. Armstrong 106 Wn.2d 547 (1986) and in State v. Nordby, 106 Wn.2d 514 (1986), "the nature of the injuries inflicted are already accounted for in determining the presumptive sentence range; they cannot be counted a second time to justify an exceptional sentence." Armstrong at 551.

"Deliberate cruelty" is gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. State v. Smith, 82 Wash.App. 153, 162 (1996). To constitute a legal justification for imposing an exceptional sentence, the deliberate cruelty must be atypical of the crime. State v. Delaros-Flores, 59 Wash.App. 514, 518 (1990); RCW 9.94A.120(2). The SRA already takes into account the violence of murder by punishing murder more severely than other crimes. See e.g. State v. Payne, 58 Wash.App. 215, 219 (1990)(shooting victim in back and shoulders six times at close range does not go beyond what could be said to be part of any murder); compare State v. Campas, 59 Wash.App. 561, 566 (1990)("The record here supports the finding [in felony murder case] that the defendant killed victim in a deliberately cruel manner by repeated bludgeoning and stabbing, which left her barely alive but in pain and agony until she died."), review granted and cause remanded, 118 Wn.2d 1014 (1992). The first factor in Mr Richey's case is therefore not supported by the record, and it is not legally justified as a matter of law.

The second factor used by the court to support Mr Richey's exceptional sentence is that:

- (b) The concurrent sentencing requirements of RCW 9.94A.400 would result in a punishment far too lenient in light of the Sentencing Reform Act's purposes of ensuring punishments that are commensurate with the crimes committed and that are just under the particular circumstances.

Exhibit-4

Again, this "factor" was ruled unlawful to support an exceptional sentence one year prior to Mr Richey's sentencing in Armstrong 106 Wn.2d at 555 ("Merely because this court feels that the presumptive sentences are too lenient does not justify the imposition of harsher sentences."). The fact that the prosecutor and the court disagree with the Legislature's requirement that certain offenses be served concurrently is not legal justification for an exceptional sentence. See State v. Chaddenton, 119 Wn.2d 390, 396 (1992); See also State v. Parker, 132 Wn.2d 182, 186-87 (1997)(the standard range sentence is "a legislative determination of the applicable punishment range for the crime as ordinarily committed.").

Mr Richey also stipulated that the court could consider real facts allegedly supporting an aggravated murder charge. The primary fact relied upon was Mr Richey's act of leading the two victims into the stockroom of the store at gunpoint before shooting them shortly thereafter. Under the Real Facts Doctrine, the court may not consider uncharged crimes as reasons for imposing an exceptional sentence, except upon stipulation. State v. Tierney, 74 Wash.App. 340, 350 (1994), cert. denied, 513 US 1172 (1995); but see also United States v. Castro-Cervantes, 927 F.2d 1079 (1990)("[F]or the court to let the defendant plea to certain charges and then be penalized on charges that have, by agreement, been dismissed is not only unfair, it violates the

spirit if not the letter of the bargain.").

The Findings of fact, attached as Exhibit-4, state that ordering the victims to the back of the store could have permitted a jury to find that Mr Richey had a premeditated intent to kill Ms Koestner. While this is obviously a jury question, it is questionable whether this fact alone could have established premeditation. As the prosecutor noted at sentencing, Trial Record @ pages 4,5 & 20, there was a substantial question whether the state could prove premeditation because, among other things, Mr Richey was hallucinating on LSD while committing the offense. The facts are not particularly compelling. See State v. Brooks, 97 Wn.2d 873, 876 (1982)(premeditation encompasses the mental process of thinking, weighing, or reasoning for a period of time).

In sum, two of the three stated reasons the court used to justify Mr Richey's exceptional sentence are unlawful, and the third is questionable. It is impossible to tell from the record whether the sentencing judge would have imposed the same sentence based solely on the third reason, and Mr Richey is therefore entitled to remand of his sentence. See State v. Pryor, 115 Wn.2d 445, 456 (1990)(remand is required when the reviewing court is not confident that the sentencing judge would have imposed the same sentence when he or she considered only the valid reason).

Washington Rules of Appellate Court entitle a petitioner to collateral relief if his "sentence was imposed or entered in violation of the laws of the State of Washington." RAP 16.4(c)(2); Personal Restraint of Greening, 141 Wn.2d 687, 691 (2000). At least two of the three factors used by the court to support Mr Richey's sentence are facially invalid, and "[i]f a trial court

relies on a reason which is not substantial and compelling and which is not consistent with the purposes of the SRA, the sentence is unlawful." In re Personal Restraint of Vandervlugt, 120 Wn.2d 427, 434 (1992)(vacating a sentence that was based on unauthorized factor).

The state may argue that because Mr Richey stipulated to the recommendation of the exceptional sentence, it constitutes a sufficient basis by itself to support the sentence. However, in each case where the courts have ruled in this direction, the trial court in each defendant's case used the stipulation to sentence as a "factor" to support the exceptional sentence. See Breedlove, supra; State v. Hilyard, 63 Wash.App. 413 (1991); State v. Majors, 94 Wn.2d 354 (1980). This was not so in Mr Richey's case. Indeed, as part of Mr Richey's plea agreement, it was agreed between parties that Mr Richey retained the right to appeal his exceptional sentence. This agreed term was written in boilerplate language at Paragraph-13 of Mr Richey's plea agreement; See Exhibit-1. It would be illogical and would violate the nature of this term of the plea agreement if Mr Richey was barred from challenging his exceptional sentence.

Also, Mr Richey's plea agreement was not voluntarily made because he unknowingly pled guilty to, and was convicted of, a nonexistent crime. Moreover, Mr Richey's stipulation to the recommendation of his exceptional sentence was not knowing and voluntary because he was not advised by the court, nor by his attorney or the state, that at least two of the factors purportedly justifying an exceptional sentence were in fact invalid. Mr Richey had been assured that the aggravating factors were lawfully sufficient to justify imposition of his exceptional sentence, TR @ pages 23 & 25, and

he relied upon this assurance in agreeing to accept the plea agreement and the recommended exceptional sentence. TR @ 23.

Because the invalid factors render Mr Richey's sentence unlawful on its face, this issue is not barred by RCW 10.73.090, and Mr Richey is entitled to remand for resentencing.

E. THE STATE BREACHED MR RICHEY' PLEA AGREEMENT

At paragraph-13 of Mr Richey's plea agreement, attached as Exhibit-1, it states in relevant part: "If the court goes outside the standard sentence range, either I or the state can appeal that sentence." It is an agreed term that partially influenced Mr Richey into accepting the plea agreement.

No deadline or time limit is contained in this paragraph that could warn Mr Richey that his right to appeal his sentence is restricted in some fashion. In fact, no appeal deadline appears anywhere in the entire plea agreement. The plea agreement is certainly a contract, and it must be analyzed in accord with contract principles. State v. Sledge, 133 Wn.2d 828, 838-39 (1977). A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. Martinez v. Miller Industries, Inc. 94 Wash App 935, 944 (1999).

But the provision or term of Mr Richey's contractual plea agreement at paragraph-13 is not ambiguous. It contains direct boilerplate language that tells Mr Richey he has a right to appeal his exceptional sentence, and no deadlines are present. This led Mr Richey to believe that his appeal could be filed at any time. See Affidavit, Exhibit-5.

However, there are statutory restrictions on criminal appeals. For example, a defendant must file a Notice of Appeal within thirty days in order to preserve his right to appeal. CrR 7.2(b)(3). This 30-day rule is

independent of Mr Richey's plea agreement, which is a contractual document, although it directly relates to the terms of the plea agreement. The 30-day rule should have been contained in the plea agreement to protect Mr Richey's important constitutional right to appeal.

Under contract principles, hidden consequences or terms render a contract fraudulent. A party to a contract must be informed of any consequential restriction of a provision in which he depends on in agreeing to enter the contract. For Example, Party-A purchases a car from an auto dealer for \$30,000, and they enter a contract which tells Party-A that he will own the vehicle once he has paid the \$30,000. But the auto dealer has a company policy to potentially repossess ownership of any vehicle that is not paid after one week of purchase. Party-A pays the \$30,000 one month after purchase, but then the auto dealer repossess the vehicle due to their company policy that Party-A was never advised of. Party-A would have been fraudulently denied of his vehicle.

The principle in Mr Richey's case is no different. For a plea to be knowing, a defendant must be informed of all direct consequences of a plea. State v. Ross, 129 Wn.2d 279, 284 (1996).

Mr Richey did in fact file a Notice of Appeal in January 2005 with the Division II Court of Appeals, No. 32793-7-II. The state objected and it was dismissed as untimely. This violated paragraph-13 of Mr Richey's plea agreement, and it is well established that "when a plea rests on any significant degree on a promise or agreement of the prosecutor... such a promise must be fulfilled." Santabello v. New York, 404 US 257, 236 (1971). This is because a plea agreement includes a waiver by the defendant of several

important constitutional rights. Sledge, at 838-39 n.6.

Mr Richey has a constitutional right to first appeal, and this right was indeed accorded him, without time restrictions, in his plea agreement. The state breached this term of Mr Richey's plea agreement when they opposed Mr Richey's assertion of his right to appeal his exceptional sentence. This court should therefore remedy this violation by allowing Mr Richey a direct appeal as of right or permit him to withdraw his plea.

The state may argue that this issue is time-barred, but Paragraph-13 of Mr Richey's plea document, appearing naked without any time deadlines, conflicts with statutory time limits for appeals and the right of defendants to be advised of the consequences of a plea. For these reasons, the plea document is invalid on its face, and this issue cannot be time barred by RCW 10.73.090.

F. MR RICHEY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. Strickland v. Washington, 466 US 668 (1984). Effective assistance includes reasonable investigation into the law as well as to the facts. State v. Jury, 19 Wash App 256, 263, review denied, 90 Wn.2d 1006 (1978); Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995), cert. denied, 517 US 1111 (1996).

Trial counsel in Mr Richey's case failed to notice that Count II of his plea agreement described elements of a nonexistent crime to which Mr Richey was pleading guilty. Trial counsel also failed to inform Mr Richey that the aggravating factors used to support his exceptional sentence had been ruled as

unlawful in earlier court decisions. Each of these glaring errors showed a lack of reasonable investigation into the law.

The ineffective assistance of counsel extended to the failure to appeal. A defendant is entitled to effective assistance of counsel on his first appeal by both the state and federal constitutions. Evitts v. Lucey, 469 US 387, 395-96 (1985) (first appeal as of right not adjudicated in accord with due process if appellant lacks effective assistance of counsel, whether retained or appointed); State v. Rolax, 104 Wn.2d 129, 135 (1985) (Washington State constitutional right to appeal includes the right to the effective assistance of counsel).

Counsel's failure to raise clearly meritorious issues on appeal thus constitutes ineffective assistance. In United States v. Kissick, 69 F.3d 1048, 1055 (10th Cir. 1995), cert. denied, 519 US 1138 (1997), for example, the Tenth Circuit explained, "In [United States v.] Cook, [45 F.3d 388 (10th Cir. 1995)], we held that an attorney who had failed to raise an issue on appeal that was (in Judge Easterbrooks colorful parlance) 'a dead bang winner' had provided ineffective assistance under Strickland." Cook, 45 F.3d at 395 (citations omitted).

Certainly a manifest injustice exists where a defendant is denied effective counsel. State v. Wakefield, 130 Wn.2d 464, 472 (1996). Mr Richey was prejudiced by his attorney's deficient performance. Mr Richey pled guilty to and was convicted of a nonexistent crime then he was sentenced to an exceptional term based on unlawful aggravating factors. Had he been properly informed, there objectively exists a very reasonable probability that the information would have affected the outcome of Mr Richey's decision to plead

guilty and stipulate to the recommendation of the exceptional sentence. But Mr Richey's attorney's ineffectiveness did not end with the plea process. It carried over to the appeal. Mr Richey had clearly meritorious issues, and his attorney failed to challenge those issues on appeal.

The state may argue that this issue of ineffectiveness of counsel is time barred by RCW 10.73.090. However, the invalidity of the Judgment and Sentence, to include the invalidities on the face of the plea agreement document, evidences the ineffectiveness of counsel. Viewing these deficiencies is the same as viewing a poorly constructed house and knowing that the builder was ineffective. Certainly, an effective attorney would not have allowed his client to plead guilty to a nonexistent crime nor agree to stipulate to an exceptional sentence based on unlawful factors.

Mr Richey is entitled to withdraw his plea of guilty.

V. CONCLUSION

It is clear that Count II of Mr Richey's Judgment and Sentence must be vacated. It is also clear that Mr Richey must be remanded for resentencing. The meritorious issues raised in this motion are not time barred and must be addressed by this court. This court should grant Mr Richey the remedy of withdrawing his plea of guilty or, in the alternative, ordering a remand for resentencing.

Dated this ___ day of July, 2006.

Signed

Thomas WS Richey #929444
Appellant, pro-se.
1830 Eagle Crest Way
Clallam Bay, WA. 98326.

Ex. 1.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR 24 1987 P.
PIERCE COUNTY, WASHINGTON
TED RUTHERFORD, CLERK

FILED By: [Signature]

STATE OF WASHINGTON,

Plaintiff,

vs.

THOMAS WILLIAM SINCLAIR RICHEY,

Defendant.

NO. 86-1-00658-5

STATEMENT OF DEFENDANT ON PLEA
OF GUILTY (Felony)

1. My true name is Thomas William Sinclair Richey
2. My age is 19
3. I went through the 12 grade in school.
4. I have been informed and fully understand that 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. My lawyer's name is:
LARRY NICHOLS
5. I have been informed and fully understand that I am charged with the crime(s) of MURDER IN THE FIRST DEGREE, COUNT I and ATTEMPTED MURDER IN THE FIRST DEGREE, COUNT II

The elements of the crime(s) are: COUNT I: that on or about March 28, 1986, in Pierce County, Wa., Arlene Rae Koestner was killed; the defendant was committing or attempting to commit the crime of Robbery in the First Degree; the defendant caused the death of Arlene Koestner in the cause of and in furtherance of such crime. She was not a participant in said crime. COUNT II: that on or about March 28, 1986, in Pierce County, Wa., the defendant did shoot Scott Jacob Sanford attempting to cause the death of Scott Jacob Sanford while committing or attempting to commit the crime of Robbery in the First Degree or in the cause of or furtherance of such crime. Scott Jacob Sanford was not a participant in said crime.

The maximum sentence(s) is (are): LIFE, AT TO EACH COUNT
50,000.00, AS TO EACH COUNT
years and \$ fine(s).

In addition, I understand that I must have to pay restitution for crime(s) to which I enter a guilty plea and for any other uncharged crime(s) for which I have agreed to pay restitution. The standard sentence range for the crime(s) is/are at least COUNT I: 271 mos and no more than COUNT I: 361 mos
COUNT II: 180 mos COUNT II: 240 mos.

based upon my criminal history which I understand the Prosecutor presently knows to be: _____

SENTENCING DATE	CRIME	ADULT/JUVI	CRIME DATE	
Ct. II	Att. Murder 1°	adult	3/28/86	S/V

[] Criminal history attached as Appendix _____ and incorporated by reference.

I have been given a copy of the information.

[] And I further understand that as a First Time Offender, the court may decide not to impose the standard sentence range, and then the court may sentence me up to 90 days of total confinement and two years of community supervision. (If First Offender provision is not applicable, this statement shall be stricken and initialed by the defendant and the judge).

6. I have been informed and fully understand that:

(a) I have the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

(c) I have the right to remain silent before and during trial, and I need not testify against myself.

(c) I have the right to hear and question any witness who testifies against me.

(d) I have the right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge(s) is (are) proven beyond a reasonable doubt, or I enter a plea of guilty.

(f) I have the right to appeal a determination of guilt after a trial.

(g) If I plead guilty, I give up the rights in statements (a) through (f) of this paragraph 6.

7. I plead GUILTY to the crime(s) of MURDER IN THE FIRST DEGREE, COUNT I and ATTEMPTED MURDER IN THE FIRST DEGREE, COUNT II

, as charged in the 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. I have been informed and fully understand that the Prosecuting Attorney will make the following recommendations to the court: stipulated exceptional sentence upward of 65 years DOC,
costs \$70, fine \$365, CVPA \$70

Multiple horizontal lines for additional text or signature.

12. I have been informed and fully understand that the standard sentencing range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions of guilty pleas at juvenile court that are felonies and which were committed when I was fifteen years of age or older. Juvenile convictions count only if I was less than twenty-three years of age at the time I committed the present offense. I fully understand that if criminal history in addition to that listed in paragraph 5 is discovered, both the standard sentence range and the Prosecuting Attorney's recommendation may increase. Even so, I fully understand that my plea of guilty to this charge is binding upon me if accepted by the court, and I cannot change my mind if additional criminal history is discovered and the standard sentence range and the Prosecuting Attorney's recommendation increases: _____

NO PRIORS

13. I have been informed and fully understand that the court does not have to follow anyone's recommendation as to sentence. I have been fully informed and fully understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range, either I or the state can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence. I also understand that the court must sentence to a mandatory minimum term, if any, as provided in paragraph 14 and that the court may not vary or modify that mandatory minimum term for any reason.

4-4-6-4
K 20000

14. I have been further advised that the crime(s) of _____

with which I am charged carries with it a term of total confinement of not less than _____ years.

I have been advised that the law requires that a term of total confinement be imposed and does not permit any modification of this mandatory minimum term. (If not applicable, any or all of this paragraph shall be stricken and initialed by the defendant and the judge).

15. I have been advised that the sentences imposed in Counts I and Count II

will run consecutively concurrently unless the court finds substantial and compelling reasons to run the sentences concurrently/consecutively.

16. I understand that if I am on probation, parole, or community supervision, a plea of guilty to the present charge(s) will be sufficient grounds for a Judge to revoke my probation or community supervision or for the Parole Board to revoke my parole.

17. I understand that 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.

18. The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime(s) in the information. This is my statement: ON MARCH 28TH 1986 I WENT INTO MILITARY TV/STEREO STORE, WITH THE INTENT TO BUY A TV. AS I HAD TRIED TO DO IN A PREVIOUS STORE THAT DAY. PRIOR TO GOING INTO THE STORE I HAD TAKEN LSD. DURING THE NEGOTIATIONS TO BUY THE TV SOMETHING CLICKED IN MY HEAD, AND I TOOK ARLENE KOESTNER TO THE BACK ROOM AND WHEN I GOT THERE SCOTT SANDFORD WAS ALREADY PRESENT. I ASKED HIM WHERE THE MONEY WAS AND THEN HE TURNED AROUND STARTLING ME I THEN SHOT HIM ONCE IN THE HEAD THEN SHOT ARLENE IN THE HEAD BOTH SHOTS WERE INSTANTANEOUS. ON MY WAY OUT OF THE STORE I TOOK STEREO EQUIPMENT AND A CONTRACT WITH MY SIGNATURE ON IT. THIS HAPPENED IN PIERCE COUNTY.

19, I have read or have had read to me and fully understand all of the numbered sections above (1 through 19) and have received a copy of this "Statement of Defendant on Plea of Guilty" form. I have no further questions to ask of the court.

Thomas Richey
THOMAS RICHEY Defendant

Carl T. Huliman
Deputy Prosecuting Attorney
CARL T. HULIMAN

Larry Nichols
Defendant's Attorney
LARRY NICHOLS

The foregoing statement was read by or to the defendant and signed by the defendant in the presences of his or her attorney, and the undersigned Judge, in open court. The court finds the defendant's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the defendant of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the defendant is guilty as charged.

Further, the court finds that acceptance of this plea is consistent with prosecuting standards and the interests of justice.

Dated this 23 day of April, 1987

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR 24 1987 P.M.
PIERCE COUNTY WASHINGTON
TED RUTCO. CLERK

[Signature]
Judge

I KNOW I HAVE A RIGHT TO A PRE-SENTENCE REPORT. BUT I WISH TO WAIVE MY RIGHT AND BE SENTENCED TODAY.

23 APRIL 1987

Thomas Richey

Vertical text on the left margin, possibly a date or reference number.

S.H. APR 24 1987

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR 24 1987 P.M.
PIERCE COUNTY, WASHINGTON
TED RUTK, CLERK

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

8	STATE OF WASHINGTON,)	
9)	
	Plaintiff,)	NO. 86-1-00658-5
10	vs.)	STIPULATION TO SENTENCE
)	IN EXCESS OF PRESUMPTIVE
11	THOMAS WILLIAM SINCLAIR RICHEY,)	RANGE AND TO REAL FACTS
12)	
	Defendant.)	
13)	

It is hereby stipulated by and between the parties as follows:

That this court should sentence the defendant to a term of confinement of 65 years, a sentence which is in excess of the presumptive standard range, based on aggravating circumstances pursuant to RCW 9.94A.390 as follows:

(1) The defendant's conduct during the commission of the current offenses manifested deliberate cruelty to the victims in that both victims were shot directly in the head at close range; and

(2) The operation of the concurrent sentencing requirements of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of the Sentencing Reform Act of 1981.

It is further stipulated and agreed to by the defendant and his attorney that the court may consider real facts that support a more serious crime than that pled to in Count I in imposing this sentence

STIPULATION - 1

APPENDIX D (PART I)

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402
Telephone: 591-7400

Handwritten notes in the left margin.

1 which goes outside the presumptive sentence range pursuant to RCW
2 9.94A.370.

3 It is further agreed that the real facts the court may consider
4 are that on March 28, 1986, the defendant entered the Military TV and
5 Stereo store on Pacific Highway Southwest in Pierce County,
6 Washington, to purchase a television set. He had concealed on his
7 person a loaded .22 caliber Beretta handgun. He had earlier that day
8 secretly removed this gun from Ft. Lewis and used it for target
9 practice. In the store, the defendant negotiated with Arlene Koestner
10 for the purchase of a color television with a listed price of \$599.00.
11 Upon learning that the terms of his time payment contract would result
12 in a total price in excess of \$700.00, the defendant became upset. He
13 pulled out his gun, pointed it at Mrs. Koestner, and ordered her to a
14 back room. As she complied the defendant noticed another employee,
15 Scott Jacob Sanford, and ordered him at gunpoint to accompany Mrs.
16 Koestner.

17 As they approached the back room, the defendant demanded to be
18 told where the money was. However, before any reply was made and upon
19 entering that room, the defendant shot each victim once in the head.
20 Mrs. Koestner, who was shot in the back of the head, died very shortly
21 thereafter. Mr. Sanford was facing the defendant and moved slightly
22 to protect himself. He has survived the gunshot wound to the brain.

23 The defendant then gathered up all the paperwork that would have
24 traced him to the crime and took it with him. He also stole a stereo
25 cassette player and a pair of speakers. He later burned the
26
27
28

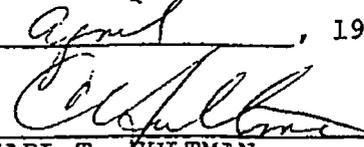
STIPULATION - 2

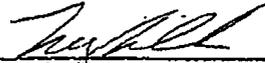
923,004

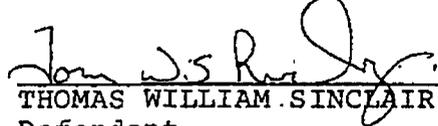
Ex. 2.

1 paperwork. The stolen property was found secreted in a ceiling space
2 over his bunk at Ft. Lewis during a later search.

3 DATED this 23^d day of April, 1987.

4 
5 _____
6 CARL T. HULTMAN
7 Deputy Prosecuting Attorney

8 
9 _____
10 LARRY NICHOLS
11 Attorney for Defendant

12 
13 _____
14 THOMAS WILLIAM SINCLAIR RICHEY
15 Defendant

11 crt

16 FILED
17 COUNTY CLERK'S OFFICE
18 APR 24 1987 P.M.
19 PLEASANT COUNTY, WASHINGTON
20 TED RUTT, CO. CLERK

Richey 939444

28 STIPULATION - 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF PIERCE

VOL 220 PAGE 364

THE STATE OF WASHINGTON

Plaintiff,

vs.

THOMAS WILLIAM SINCLAIR RICHEY
Defendant.

NO. 86-1-00658-5

JUDGMENT AND SENTENCE

SID NO. WA13216058
DOB: 1-25-68 M W

FILED
PIERCE COUNTY CLERK'S OFFICE
APR 24 1987 P.M.
PIERCE, WASHINGTON

4/23/87

This court having conducted a sentencing hearing pursuant to RCW 9A.44.170 on

upon defendant's conviction(s) of the crime(s) set forth below, and the court having heard from the parties and considered the presentence reports and the records and files herein, and otherwise being fully advised, now makes the following findings:

1. PARTIES PRESENT: Present at the sentencing hearing were the defendant, the defendant's attorney, _____

LARRY NICHOLS, Deputy Prosecuting Attorney CARL T. HULLMAN

2. CURRENT OFFENSE(S): The defendant has been convicted of the following current offense(s) upon a plea of guilty/ ~~conviction~~ on the 23rd day of April, 19 87.

Count I Crime: MURDER IN THE FIRST DEGREE
RCW: 9A.32.030 (1) (c) Crime Code: _____
Date of Crime: 3-28-86
Incident Number: 86-087-532
Special Finding: _____

Count II Crime: ATTEMPTED MURDER IN THE FIRST DEGREE
RCW: 9A.32.030 (1) (c) + .020 Crime Code: _____
Date of Crime: 3-28-86
Incident Number: 86-087-532
Special Finding: _____

Count Crime: _____
RCW: _____ Crime Code: _____
Date of Crime: _____
Incident Number: _____
Special Finding: _____

[] Additional current offenses attached as Appendix A.

This court has jurisdiction of the defendant and the subject matter. It is ADJUDGED that the defendant is guilty of the current offenses set forth above.

The following group(s) of current offenses encompassed the same criminal conduct and should be counted as one crime in determining the offender score (RCW 9.94A.400 (1)): N.A.

The following counts in the _____ information are hereby dismissed: _____

3. CRIMINAL HISTORY: This Court finds that the defendant has the following criminal history used in calculating the offender score pursuant to RCW 9.94A.360:

Sentencing Date	Crime	Adult/Juvenile	Crime Date	Crime Type
1. Ct. II	Att. Murder 1°	ADULT	3-28-86	SV
2.				
3.				
4.				

[] The defendant's criminal history is attached in Appendix B and incorporated by reference into this Judgment and Sentence.

4. SENTENCE DATA:

	OFFENDER SCORE	SERIOUSNESS LEVEL	RANGE	MAXIMUM TERM
Count I	3	XIII	271-362 mos	LIFE
Count II	0	XIII x .75	180-240 mos	LIFE
Count				

[] Presumptive data score sheet(s) is attached as Appendix C and is incorporated by reference into this judgment.

5. SENTENCE ALTERNATIVE FINDINGS:

[] A. FIRST TIME OFFENSE: The defendant qualifies as a first-time offender pursuant to RCW 9.94A.120 (5). The first-time offender waiver is/is not used in this sentence.

B. EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify a sentence above ~~the~~ the standard range for count(s) I & II. Findings of Fact and Conclusions of Law pursuant to RCW 9.94A.120 (3) and Stipulations as to real and material facts, if any, are attached as Appendix D.

[] C. SPECIAL SEXUAL OFFENDER SENTENCING ALTERNATIVE: The defendant has been convicted of a felony sexual offense as specified in RCW 9.94A.120 (7) (a) and is eligible for use of the special sexual offender sentencing alternative. The defendant and the community will/will not benefit from use of the alternative.

[] D. SEXUAL OFFENDER TREATMENT PROGRAM: The defendant has been convicted of a felony sexual offense, does not qualify for the special sexual offender sentencing alternative, and is to be sentenced to a term of confinement of more than one year but less than six years. The defendant shall/shall not be ordered committed for evaluation for treatment pursuant to RCW 9.94A.120 (7) (b).

RICHES 9:29:49

[] E. RESTITUTION: Based on information concerning restitution attached in Appendix E, the defendant is responsible for payment of restitution:

[] For offenses adjudicated herein pursuant to RCW 9.94A.140 (1).

[] For offenses which were not prosecuted and for which the defendant agreed to make restitution in a plea agreement, which is attached to Appendix E.

[] To be set by later order of court.

6. [] MONETARY PAYMENTS JUDGMENT AND SENTENCE: The defendant is ADJUDGED to be responsible for making monetary payments as stated below, within ten years, under the supervision of the Department of Corrections. The defendant is ORDERED to make the following monetary payments:

[X] A. COSTS: Court costs in the amount of \$ 70

[X] B. VICTIM ASSESSMENT: Penalty assessment pursuant to RCW 7.68.035: \$ 70.00

[] C. RESTITUTION: Restitution payments to: (subject to modification based on failure of co-defendants to pay):

\$ _____

\$ _____

\$ _____

[] Restitution information attached in Appendix E -- total amount ordered: \$ _____

[] D. RECOUPMENT: Recoupment for defense attorney's fees of \$ _____

[X] E. FINE: A monetary fine in the amount of \$ 365.00

[] F. DRUG ENFORCEMENT FUND: Reimbursement in the amount of \$ _____

[] G. OTHER: Other costs in the amount of \$ _____

for _____ T \$ 575.00

The above payments shall be made to the Pierce County Superior Court Clerk, 110 County-City Building, Tacoma, Washington 98402, and the Clerk of the Court shall credit monetary payments to the above obligations in the above listed order according to the rules of the clerk and according to the following terms:

[] Terms to be set by defendant's Community Correction Officer.

Provided that no forfeiture proceedings are pending at the date of this order, bail or bond is exonerated.

RECEIVED 8/2/06

(SENTENCE OVER ONE YEAR)

7. DETERMINATE JUDGMENT AND SENTENCE: The court having determined that no legal cause exists to show why a further judgment should not be pronounced, it is therefore ORDERED, ADJUDGED and DECREED the defendant serve the determinate sentence and abide by the conditions set forth below.

The defendant is sentenced to a term of total confinement in the custody of the Department of Corrections for 65 years or 780 months months on Count I, 65 years or 780 months months on Count II, _____ months on Count III, with credit for time 1 year & 25 days days/months served prior to this date.

the terms in counts I & II are concurrent.
 the terms in counts _____ are consecutive, for a total term of _____ months.

The following appendices are attached to this Judgment and Sentence and are incorporated by this reference:

- Appendix A, Current Offenses
- Appendix B, Current History
- Appendix C, Sentence Scoring Worksheet(s)
- Appendix D, Exceptional Sentence
- Appendix E, Restitution

DONE IN OPEN COURT this 23 day of April 1997

[Signature]
JUDGE

FILED
IN COUNTY CLERK'S OFFICE
APR 24 1997 P.M.
CLERK COUNTY WASHINGTON
Approved as to form, CLERK

Presented by:
[Signature]
Deputy Prosecuting Attorney

[Signature]
Attorney for Defendant

APR 24 1997

FINGERPRINTS

VOL 220 PAGE 368



Fingerprint(s) of: THOMAS WILLIAM SINCLAIR RICHEY

Attested by: _____

CLERK

Ferry Brewer Jr

By: _____ Date: 4-23-87

DEPUTY CLERK

CERTIFICATE

I, _____,
Clerk of this court, certify that the above is a true
copy of the Judgment and Sentence in this action
on record in my office.

Dated: _____

Clerk

By: _____
Deputy Clerk

OFFENDER IDENTIFICATION

State I.D. Number WA13216058

Date of Birth 1-25-68

Sex Male

Race White

5-11-87

Ex. 3

COUNT II

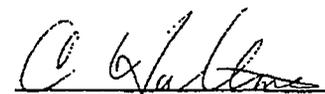
1
2 And I, JOHN W. LADENBURG, Prosecuting Attorney aforesaid, do
3 accuse THOMAS WILLIAM SINCLAIR RICHEY of the crime of ATTEMPTED MURDER
4 IN THE FIRST DEGREE, a crime of the same or similar character, and/or
5 so closely connected in respect to time, place and occasion that it
6 would be difficult to separate proof of one charge from proof of the
7 others, committed as follows:

8 That THOMAS WILLIAM SINCLAIR RICHEY, in Pierce County,
9 Washington, on or about the 28th day of March, 1986, did unlawfully
10 and feloniously with premeditated intent to cause the death of another
11 person, did shoot Scott Jacob Sanford, thereby attempting to cause the
12 death of Scott Jacob Sanford, a human being, and/or while committing
13 or attempting to commit the crime of Robbery in the First Degree, and
14 in the course of or furtherance of said crime or in immediate flight
15 therefrom, did shoot Scott Jacob Sanford, a human being, not a
16 participant in such crime, thereby attempting to cause the death of
17 Scott Jacob Sanford, contrary to RCW 9A.28.020 and 9A.32.030(1)(a)(c),
18 and against the peace and dignity of the State of Washington.

19 DATED this 10th day of April, 1987.
20

21 JOHN W. LADENBURG

22 _____
23 PROSECUTING ATTORNEY IN AND FOR
24 SAID COUNTY AND STATE.

25 By: 
26 CARL T. HULTMAN
27 Deputy Prosecuting Attorney
28

AMENDED
INFORMATION - 2

RICHEY 2-24-87

Ex. 4

1 Murder in the First Degree, Counts I and II, of the Amended
2 Information. That the standard range sentence is 271 months to 361
3 months imprisonment for Count I and 180 months to 240 months
4 imprisonment for Count II. That these sentences would be required to
5 be run concurrently pursuant to the provisions of RCW 9.94A.400.

6 II.

7 That the factors set forth in the Stipulation to Sentence in
8 Excess of Standard Presumptive Range and to Real Facts entered into by
9 the parties herein are applicable and are aggravating factors in the
10 instant case because:

11 (a) Shooting people directly in the head at close range
12 manifests a deliberate cruelty to victims because the brain is such a
13 vital and vulnerable organ of the body;

14 (b) The concurrent sentencing requirements of RCW 9.94A.400
15 would result in a punishment far too lenient in light of the
16 Sentencing Reform Act's purposes of ensuring punishments that are
17 commensurate with the crimes committed and that are just under the
18 particular circumstances; and

19 (c) The true facts stipulated to by the defendant that the
20 victims were taken at gunpoint from a public area to a back room
21 before being shot could have permitted a jury to find the defendant
22 had a premeditated intent to kill Arlene Rae Koestner. That the
23 sentence in that event for that crime would have been life
24 imprisonment without parole or other release. That while the agreed
25 sentence of 65 years is higher than the high end of the presumptive
26 sentence range for the crimes pled to, it is substantially less than a
27
28

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 2

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402
Telephone: 591-7400

1 life without parole, sentence because it allows for possible release of
2 the defendant.

3 CONCLUSIONS OF LAW

4 I.

5 That there are substantial and compelling aggravating reasons
6 justifying an exceptional sentence in excess of the presumptive
7 standard range.

8 II.

9 That the sentence of 65 years agreed to by all parties concerned
10 is commensurate with crimes committed by this defendant and is a just
11 punishment under the circumstances of this case, particularly in light
12 of the real facts agreed to by the defendant.

13 III.

14 That the defendant should be incarcerated in the Department of
15 Corrections for a determinate sentence of 65 years.

16 DONE IN OPEN COURT this 23 day of April, 1987.



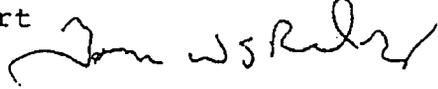
J U D G E

19 Presented by:

20 
21 CARL T. HULTMAN
22 Deputy Prosecuting Attorney

23 Approved as to Form:

24 
25 LARRY NICHOLS
26 Attorney for Defendant

27 crt 

28 FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 3

FILED
COUNTY CLERK'S OFFICE
APR 24 1987 P.M.
SPOKANE COUNTY, WASHINGTON
JUDICIAL CLERK

Ex. 5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
Respondent,)	NO. 86-1-00658-5
)	
v.)	AFFIDAVIT OF:
)	THOMAS WILLIAM SINCLAIR RICHEY
THOMAS WS RICHEY,)	
Petitioner)	
_____)	

I, Thomas WS Richey, over the age of twenty-one and competent to testify herein, hereby declare that:

(1) In 1987, the Pierce County Superior Court convicted me upon a plea of guilty to First Degree Murder, RCW 9A.32.30(1)(c) and Attempted First Degree Murder, RCW 9A.32.30(1)(c) and 9A.28.020.

(2) I voluntarily surrendered to civilian authorities at the Fort Lewis Army base. I then confessed to my crimes. I was always truthful and willing to meet my moral obligations by accepting the penalty for my actions. However, from the start, I refused to be convicted of behavior I did not engage in. I did not remorselessly plan nor premeditate shooting either Arlene Koestner nor Kenneth Sanford. I refused to admit to this calloused conduct in my statement and I refused to accept a plea agreement that included the elements of premeditated intent. I did not harbor the calculating and heinous state of mind required for premeditated intent.

(3) One of the terms of my plea agreement, at paragraph-13 of Statement of Defendant on Plea of Guilty, informed me that I retained the right to appeal my sentence. No restrictions were attached, and I believed that I could appeal at any time.

(4) I was 18 years old when arrested and ignorant of the laws.

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

Dated this ___ day of July, 2006.

Signed

Thomas WS Richey #929444
Respondent, pro-se.
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326.