

63810-6

63810-6

NO. 63810-6- I
In re the Personal Restraint Petition

**COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON**

WAYNE ALLEN NEWLUN

V.

STATE OF WASHINGTON

Appeal from the Superior Court of Snohomish County
The Honorable Richard J. Thorpe

NO. 06-00241-0

REPLY TO RESPONDENT'S REPLY BRIEF

Wayne A. Newlun
283750 I-A-16

Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA. 99326

FILED
COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON
2009 OCT 21 AM 11:22

A. ISSUE OF IDENTITY THEFT (Multiple counts)

I can prove that the device reportedly used at Lowe's was actually a driver's license. The Court need only examine the probable cause affidavit, which states that, "the defendant had presented Guy Randal's **ID with his (the defendant's) picture.....**". As the Court is fully aware that to rent a vehicle in the United States of America a person must possess and provide a valid driver's license to receive the keys to a vehicle. Furthermore and most importantly, I have enclosed for the Court a document which is in the discovery packet provided by the State.

And on this document is a copy of the **driver's license that was provided to the police by the attendant at LOWE'S. Also, I have provided the STATEMENT from the Lowe's attendant to the Bellevue Police Department which states, the suspect provided a Washington State Driver's License. Appendix A,B, Report # DD05-23829. Exhibit 6 (probable cause), 06-1-00241-0. Brief of respondent at 6:1-10.**

The respondent argues that , " **the item alleged to have been unlawfully possessed was an unspecified piece of Guy Randall's identification.**" The State is charging me with vague elements. How can I defend myself against such vague information. By the States own admission, I am not fully informed of the exact nature or elements of the charges.

Brief of respondent page 3.

The State is entertaining conjecture in their charging documents. Naming the driver's license as the device in 06-1-00648-2. Then naming only 'ID' in **06-1-00241-0.**

Or the State has conducted themselves in this manner so that I can be charged with multiple counts of identity theft.

The State argues that the error is harmless. This is not consistent with the current applicable case law. No double jeopardy is harmless. **SEE State V. Martin 60642-5-I. (2009) Brief of resp. at 6**

B. THE PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLIGENT

Probably the most important requirement of *Boykin* is that the defendant receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process". *Smith v. O'Grady*, 312 U.S. 329, 334, 85 L. Ed. 859, 61 S. Ct. 572 (1941), *quoted in Henderson v. Morgan*, 426 U.S. 637, 645, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976); *State v. Holsworth*, 93 Wn.2d 148, 156, 607 P.2d 845 (1980). In particular, this requires that the defendant be aware of the basic elements of the offense charged. *See Henderson v. Morgan, supra* at 646-47; *In re Keene*, [95 Wn.2d 203, 622 P.2d 360 (1980)] at 208-09; *State v. Holsworth, supra* at 153 n.3.

State v. Chervenell, 99 Wn.2d 309, 317-18, 662 P.2d 836 (1983). For there to be a truly voluntary guilty plea, the defendant must possess an understanding of the law in relation to the facts. *McCarthy v. United States*, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969).

The maximum penalty was changed, on Counts 6 and 7 of the plea on 06-1-00241-0, after I had signed the plea agreement. The judge stated on record that this was very important. This is not harmless error as the respondent has stated. The reason being, these un-ranked crimes were used in the findings of fact and conclusions of law, to support the exceptional sentence. **June 30, 2006 RP 8,9.**

The State used un-ranked crimes to give me an exceptional sentence and to persuade the judge into believing that they were ranked felonies after I signed the plea agreement.

The plea judge stopped to review this crucial aspect. And Mr. Huff for the State stood up and told the judge to proceed and that yes they were ranked crimes. **6-30-06 RP 8-9.**

It is important to note that Mr. Huff was not the appointed prosecutor for this case.

B. Continued:

The respondent argues that I was aware of the penalties regarding counts 6 and 7. When I signed the plea agreement I was not told that 6 and 7 were ranked crimes. The record reflects that the prosecution and my counsel Max Harrison believed they were unranked. The judge decided to change the unranked crimes to ranked to fulfill the findings and conclusions of law. The record does not support these findings and conclusions of law. Therefore, the exceptional sentence should be reversed due to this miscarriage alone. Counts 6 and 7 are counted as ranked crimes on the findings and conclusions of law. These crimes along with the crime(s) of identity theft were used to give me an exceptional sentence and a CONSECUTIVE sentence for the other GUY RANDALL identity theft charge. The illegal double jeopardy charge for Guy Randall was used to enhance my sentence. This is where the allegation of HARMLESS error FAILS. I was of the understanding that I could not back out of the plea. I contacted Max Harrison multiple times on the phone and requested that my plea be pulled, prior to my sentencing. Due to my attorney's silence I assumed I could not pull my plea.

SEE AUGUST 8, 2006 RP at 4:7,8,13,14.
{R.C.W. 9.94A.411

.....If the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, **on the record**, inform the defendant and the prosecutor that they are not bound by the agreement and that the defendant may withdraw the defendant's plea of guilty, if one has been made, and enter a plea of not guilty.}

The sentencing judge did not say to me, on the record, that *I may withdraw my plea.*

And proceed with a not guilty plea, after he explained to me that he did not have to follow the recommendations.

The respondent has remained mute on the issue of the unranked charges being changed, after I signed the plea agreement, to ranked crimes.

B. continued

Had I known that counts 6 and 7 on 06-1-00241-0 would be changed and I had I known that they would become aggravating factors with the flick of a pen and Mr. Huff's voice, I would not have pled guilty. The consequence for counts 6 and 7 went from 0-12 months when I signed the deal to 5 years 10,000 dollar fine. This was changed under pressure in the heat of the moment as I set in a courtroom. I felt locked in, to whatever was going to occur. **June 30, 2006 RP 8-9.** I have provided the court with a document showing where the judge changed the penalty regarding counts 6 and 7.

August 8, 2006 RP at 4:8-14.

C. THE STATE UNDERCUT THE PLEA AGREEMENT

The respondent argues that the **clarification hearing** was just to clarify my sentence.

This couldn't be farther from the truth. I was not informed of this hearing until I arrived in the courtroom three days after my original sentence was already handed down.

The State requested this hearing. Again with NO NOTIFICATION. Courtney Popp

For the State did recommend the range sentence. However, in {(State v. Williams,103 Wn.App 231,11 p.3d 878 (2000) reversed)}, the State committed the identical error in my case also.

OUTCOME: Judgment reversed and case remanded. Because prosecutor's comments could not be explained as simply supporting the recommended sentence, the prosecutor effectively undercut plea agreement in a transparent attempt to sustain an exceptional sentence. Therefore, the State breached plea agreement.

Courts determine whether the State has breached a plea agreement by viewing the entire sentencing record and applying an objective standard. The test is whether the prosecutor's words or ***conduct contradict*** the State's sentencing recommendation under the plea agreement, irrespective of the prosecutor's motivations or justifications for the failure in performance.

C. Undercut Plea Agreement cont.

{The State began its oral argument at sentencing by asking the trial court to impose { 11 P.3d. 882 Williams} sentence at the high end of the standard range. But during argument the State made the following statements.}

The State proceeded (Ms. Popp) to state, “ There are several victims charged and uncharged. There are many, many others.” RP at 4:22-23.

Ms. Popp went a step further and brought in a alleged victim from KING

County. A Ms. Teresa Buckmier. **RP at 5 (August 8, 2006.)**

I have never been charged with any crime regarding this person. Nor do I have any idea who she is or why Ms. Popp is referring to her.

Ms. Popp also goes on to state that I have a ‘ *outrageous history.*’ **RP at 5.**

At the ‘clarification hearing’ the State informed the court that the sentence would not hold up in the higher court. The prosecution requested this hearing, and, after the sentencing judge had already made his decision.

The prosecution also provided the court with the R. C. W. for the exceptional sentence.

I did object to this entire ‘clarification hearing.’ All of this, without ever notifying me of the intent to seek in word or conduct, an exceptional sentence. The prosecutor’s motivations or justifications cannot be an excuse for this breach of the plea agreement.

Clearly the State did not adhere to the plea agreement by requisitioning the ‘ Clarification Hearing.’

August 11, 2006 RP 3-6.

All of these actions, taken together, show that the State had no need to influence the court any further. The State was going to get their wish as far as the high end, as the defense also agreed to the recommendation and that we were not asking for anything less.

August 8, 2006 RP at 10:10-14.

Plea agreements are contracts, and the law imposes upon the State an implied promise to act in good faith. *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the State must adhere to its terms by recommending the agreed-upon sentence to the court. *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (citing *State v. Talley*, 134 Wn.2d 176, 183, 949{11 P.3d 881} P.2d 358 (1998)), *review denied*, 138 Wn.2d 1002, 984 P.2d 1033 (1999).

The State can undercut a plea agreement either explicitly or implicitly through conduct indicating an intent to circumvent the agreement. *Sledge*, 133 Wn.2d at 840; *Van Buren*, 101 Wn. App. at 213.

(State V. Jerde 93 Wn.app 774 970 p2d 781 (1999)).

The state enters into a contract with a defendant when it offers a plea bargain and the defendant accepts. Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the state must adhere its terms by recommending the agreed upon sentence. Although the recommendation need not be made enthusiastically, the prosecutor is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with the duty of candor toward the tribunal and, consistent with Wash. Rev. Code 9.94A.460, not hold back relevant information regarding the plea agreement. At the same time, the state is obligated not to undercut the plea bargain explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement. The test is whether the prosecutor contradicts, by word or conduct, the state's recommendation for a standard range sentence.

Criminal Law -- Plea of Guilty -- Plea Bargaining -- Breach by State -- Remedy -- In General

When the State breaches a plea agreement, the appropriate remedy is to grant the defendant a choice between withdrawing the guilty plea or having the agreement specifically enforced. Absent compelling reasons to the contrary, the defendant's choice of remedy controls.)

{ Thus, the prosecutor's comments cannot be explained as simply supporting the recommended sentence; the prosecutor "effectively undercut the plea agreement in a transparent attempt to sustain an exceptional sentence." Jerde, 93 Wn.app782. }

CONCLUSION:

**For the foregoing reasons and facts I would respectfully request that the Court
GRANT my Personal Restraint Petition.**

Submitted this 16th day of October 2009.

Respectfully,



Wayne A. Newlun #283750

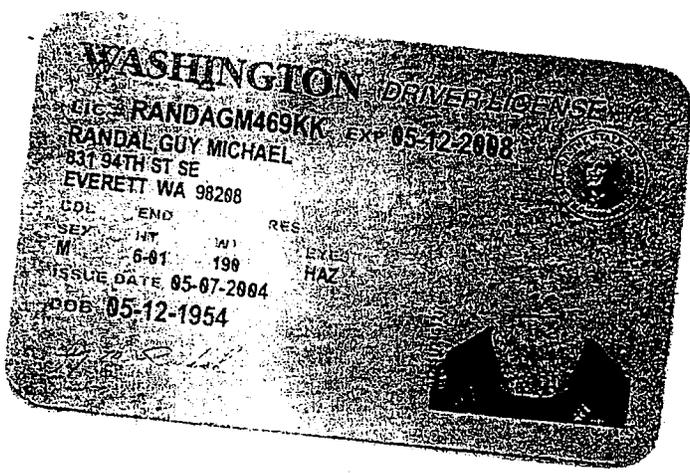
Coyote Ridge Corrections Center

P.O. Box 769

Connell, WA. 99326

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APPENDIX A



Washington		BYSBELL	
		INSURANCE IDENTIFICATION CARD	
(STATE)			
COMPANY NUMBER	COMPANY		
	Nationwide Mutual Insurance Co.		
POLICY NUMBER	EFFECTIVE DATE	EXPIRATION DATE	
ACP7501722880	12/17/2004	12/17/2005	
YEAR	MAKE/MODEL	VEHICLE IDENTIFICATION NUMBER	
XXXX	Garage Keepers	\$90,000 Limit	
AGENCY/COMPANY ISSUING CARD			
Bell-Anderson Ins-Bellevue C/L			
P. O. Box 40509			
11201 S. E. 8TH ST., SUITE 100			
Bellevue, WA 98015-4509			
INSURED			
<input type="checkbox"/> By's Bellevue Auto Repair <input type="checkbox"/> Wayne Lenik DBA: <input type="checkbox"/> 1557 127th PINE <input type="checkbox"/> Bellevue, WA 98005			
# 24700	SEE IMPORTANT NOTICE ON REVERSE SIDE		

104

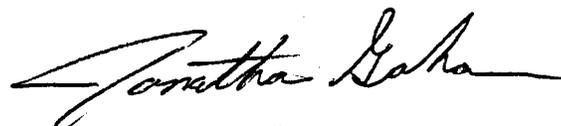
284

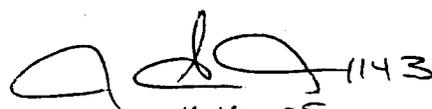
APPENDIX B

ON 11/15/2005 I JONATHAN GRAHAM DLPM FOR LOWE'S HOME IMPROVEMENT WAS INFORMED BY THE LOWE'S OF BELLEVUE WA STAFF THAT OUR RENTAL TRUCK WAS RENTED ON 11/13/2005 TO A CUSTOMER NAMED GUY RANDAL. THE TRUCK HAS NOT BEEN RETURNED AS OF 11/16/05 SO THE STORE STAFF CALLED THE CUSTOMER. AT THAT TIME THE CUSTOMER STATED THEY DID NOT RENT THE TRUCK AND THAT THEY HAD A ^{RE} RECENT THEFT OF ID'S AND CREDIT CARDS.

AFTER GAINING THAT INFORMATION I WAS CONTACTED BY THE RANDAL'S AND GIVEN DETECTIVE IRVING'S NAME AND NUMBER FOR THEIR CASE.

I THEN FILED A VEHICLE THEFT REPORT WITH BELLEVUE PD CASE # 05B12982, I THEN PROVIDED A VIDEO RECORDING OF THE TRUCK RENTAL, AND SIGNATURE CAPTURE OF THE CREDIT CARD. I ALSO PROVIDED A COPY OF THE RENTAL AGREEMENT, AND A COPY OF AN INSURANCE CARD & WA STATE DRIVERS LICENSE PROVIDED BY THE THEFT SUSPECT.

 11/15/05
206-423-5039 CELL

 1143

11-16-05
EVERETT, WA
EVERETT PD.

APPENDIX C

6/24/06(chw)

UNLAWFUL POSSESSION OF PERSONAL IDENTIFICATION DEVICE

1-26-06 (gp)

UNRANKED OFFENSE

NEWLUN, Wayne Allen
aka HILTS, Wade Scott

(If sexual motivation finding/verdict, use form on page III-19)

I. OFFENDER SCORING

ADULT HISTORY:

not scored

JUVENILE HISTORY:

not scored

OTHER CURRENT OFFENSES:

not scored

STATUS:

not scored

II. SENTENCE RANGE

A. OFFENDER SCORE:

NONE

STANDARD RANGE
(unranked)

not more than 12 months (9.94A.505)

B. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-6 or III-7 to calculate the enhanced sentence.

III. SENTENCING OPTIONS

- A. If not a sex offense, not a drug offense and not a violent offense (RCW 9.94A.030), and if "First-time Offender" eligible: 0-90 days confinement and up to one year of community custody. If treatment is ordered, the period of community custody may include up to the period of treatment, but shall not exceed two years.
- B. Sentence can include community service work and a term of community custody not to exceed one year (RCW 9.94A.545).
- C. If not a sex offense (RCW 9.94A.030), not a drug offense (RCW 9.94A.030), and not a violent offense (RCW 9.94A.030), then partial confinement may be served in home detention (RCW 9.94A.030).
- D. If sentence is one year or less: one day of jail can be converted to one day of partial confinement or eight hours of community service (up to 240 hours) (RCW 9.94A.680).
- E. If eligible, Work Ethic Camp may be recommended (RCW 9.94A.690).
- F. If Drug Offender Sentencing Alternative (DOSA) eligible: see DOSA form for alternative sentence on page III-8 (RCW 9.94A.660).

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.	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancement)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range including enhancement)	COMMUNITY CUSTODY RANGE (Only applicable for crimes committed on or after July 1, 2000. For crime committed prior to July 1, 2000, see paragraph 6(n))	MAXIMUM TERM AND FINE
1	63-84 months		63-84 months		10 years/\$20,000
2	22-28 months		22-28 months		5 years/\$10,000
3	22-28 months		22-28 months		5 years/\$10,000
4	22-28 months		22-28 months		5 years/\$10,000
5	22-28 months		22-28 months		5 years/\$10,000
6	Not more than 12 months		Not more than 12 months		Unlimited 5 years / \$10,000
7	Not more than 12 months		Not more than 12 months		Unlimited 5 years / \$10,000

* (F) Firearm, (D) other deadly weapon, (V) VUCSA in protected zone, (VH) Veh. Hom, See RCW 46.61.520 (JP) Juvenile Present.

(b) The standard sentence range(s) shown above is/are based on the prosecuting attorney's understanding of my criminal history. Criminal history includes prior adult and juvenile convictions, whether in this state, in federal court, or elsewhere. Even so, my plea of guilty to the crime(s) is binding on me. I cannot change my mind if additional history is discovered even though the maximum sentence, the standard sentence range, and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without possibility of parole is required by law.

(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) I understand that the prosecutor's understanding of my criminal history is tentative in nature, and that it will be the Judge who ultimately determines my correct score. If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, or if it is determined that the prosecutor's scoring is incorrect, both the standard sentence and the prosecuting attorney's recommendations may increase.

(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 costs of incarceration. The judge may place me on community supervision, community placement, or community custody, impose restrictions on my activities, and order me to perform community restitution.

(f) The prosecuting attorney will make the recommendation to the judge as stated on the attached plea agreement form.

(g) Persons other than the prosecutor may make sentence recommendations which could differ from the prosecutor's recommendation. The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless

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PAM L. DANIELS
COUNTY CLERK
SNOHOMISH CO. WASH.



CL11683492

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

No. 06-1-00241-0

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR AN EXCEPTIONAL SENTENCE

v.

APPENDIX 2.4 JUDGMENT AND SENTENCE

NEWLUN, WAYNE ALLEN

Defendant.

SID: WA12176549
If no SID, use DOB: 12/08/1963

An exceptional sentence [X] above [] within [] below the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. The defendant has twenty prior felony convictions, and an offender score of 26.
2. The defendant has pled guilty to one count of First Degree Identity Theft, four counts of Forgery, and two counts of Unlawful Possession of Personal Identification Device.

II. CONCLUSIONS OF LAW

1. Because of the defendant's high offender score, the standard range sentence for all seven counts is the same as the standard range sentence for First Degree Identity theft alone.
2. Since the defendant has committed multiple current offenses, and the defendant's high offender score would result in some of the current offenses going unpunished, an exceptional sentence is justified under RCW 9.94A.535(2)(c).

Dated: August 11, 2006

C. Poppe #35470
Deputy Prosecuting Attorney
COURTNEY A. POPP

[Signature]
JUDGE RICHARD J. THORPE
APPROVE AS TO FORM ONLY
Attorney for Defendant #72043
MAX P. HARRISON

AS
33

(NO JTS filed as of 8-14-06 AS)

DIVISION ONE
P.R.P. # 63810-6-1

CERTIFICATE OF SERVICE

I, WAYNE ALLEN NEWLON, being first duly sworn on oath,
deposes and says:

That I am a citizen of the United States over the age of eighteen years and
competent to be a witness herein.

That on the 16th day of OCTOBER, 2009, I delivered true and correct
copies of the following documents in the above-entitled cause, to which this certificate is
attached, by US Mail:

Reply to Respondent's / Reply Brief
C/C - SNOHOMISH COUNTY

2009 OCT 21 AM 11:22

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE



Signed WAYNE ALLEN NEWLON