STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

EDWARD GUOAN #246273,

Petitioner,

v

Case No. 09-27053-AH
HON. PHILIP E. RODGERS, JR.

THOMAS G. PHILLIPS (WARDEN),

Respondent.
_____/

Edward Guoan #246273
Petitioner In Pro Per

James E. Long (P53251)
Assistant Attorney General
Attorney for Respondent

DECISION AND ORDER DENYING PETITIONER'S
APPLICATION FOR WRIT OF HABEAS CORPUS

On September 29, 1995, a jury found the Petitioner Edward Guoan guilty of two counts of solicitation of open murder. The Petitioner was sentenced to two concurrent 40-year terms of confinement in the Michigan Department of Corrections. He is currently housed at the Pugsley Correctional Facility in Grand Traverse County, Michigan.

On February 26, 2009, the Petitioner filed an application for writ of habeas corpus, pursuant to MCR 3.303. On February 4, 2009, this Court issued an Order to Show Cause, giving the Respondent thirty-five (35) days from the date of the Order to show cause why the writ should not issue and giving the Petitioner forty-two (42) days from the date of the Order to reply. These time limits have now expired.

The Court dispenses with oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order. For the reasons stated herein, the Petitioner's application is denied.

A prisoner's right to file a complaint for habeas corpus is guaranteed by the Michigan Constitution. *Hinton v Parole Bd*, 148 Mich App 235, 244; 383 NW2d 626 (1986), citing Const 1963, art 1, § 12. The primary, if not the only, object of a writ of habeas corpus is to determine the legality of the restraint under which a person is held. 39 Am Jur 2d, Habeas Corpus, §1, p 179, citing *Carlson v Landon*, 342 US 524; 72 S Ct 525; 96 L Ed 547 (1952), reh den 343 US 988; 72 S Ct 1069; 96 L Ed 1375 (1952). A complaint for habeas corpus is designed to test the legality of detaining an individual and restraining him of his liberty. *In re Huber*, 334 Mich 100; 53 NW2d 609 (1952); *Trayer v Kent Co Sheriff*, 104 Mich App 32; 304 NW2d 11 (1981). If a legal basis for detention is lacking, a judge must order the release of the detainee from confinement. MCL 600.4352; MSA 27A.4352. But, the writ of habeas corpus deals only with radical defects which render a judgment or proceeding absolutely void. *In re Stone*, 295 Mich 207; 294 NW2d 156 (1940); *Walls v Director of Institutional Services*, 84 Mich App 355; 269 NW2d 599 (1978). "A radical defect in jurisdiction contemplates . . . an act or omission by state authorities that clearly contravenes an express legal requirement in existence at the time of the act or omission." *People v Price*, 23 Mich App 663, 671; 179 NW2d 177 (1970).

Pursuant to MCL § 600.4307 "[a]n action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever, except as specified in section 4310."

MCL § 600.4310 provides, in pertinent part, as follows:

> An action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of the following persons:
>
> * * *
>
> (3) Persons convicted, or in execution, upon legal process, civil or criminal; . . .

Thus, habeas corpus cannot serve as a substitute for an appeal and cannot be used to review the merits of a criminal conviction. *Cross v Dep't of Corrections*, 103 Mich App 409; 303 NW2d 218 (1981).

The Petitioner alleges that he is unlawfully detained because the trial court in which he was charged, convicted and sentenced did not have subject-matter jurisdiction. The Petitioner claims that the felony information was fatally defective, a radical jurisdictional defect, because

(1) it did not aver on its face the necessary elements of the offense, to wit: "with specific intent, premeditation and deliberation"; (2) it did not aver on its face the defendant's "conduct, the nature of his offense, his method of committing the offense, his mental state, the specific statutory citation of the offense, or state in a way required necessary for the trial court, and the average fair-minded man/woman can understand"; and (3) it did not aver on its face that the defendant did "through words or actions, offered, promised, or gave money, services, or anything of value or forgave or promised to forgive a debt or obligation owed to another person."

The Respondent filed a brief in opposition to the writ. The Respondent maintains that the Petitioner is asking this Court to review his conviction and sentence and make an appellate ruling which is not a proper use of a writ of habeas corpus. *Cross, supra*. While the Court agrees that a writ of habeas corpus cannot be used to challenge a criminal conviction or sentence, the Court does not agree that the Petitioner's application is paramount to an appeal. The Petitioner has raised a legitimate question about the validity of the felony indictment and the subject matter jurisdiction of the trial court because, if a felony information charges no crime, the trial court lacks jurisdiction to try the accused. *People v Hardiman,* 132 Mich App 382, 384; 347 NW2d 460 (1984). If true, this would be a "radical defect" in the proceedings.

The due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. US Const, Am XIV; *Koontz v Glossa*, 731 F 2d 365, 369 (CA 6, 1984). This requires that the offense be described with some precision and certainty. *Id.* Although a defendant has a due process right to fair notice of the charges, prejudice is an essential prerequisite of a claim of inadequate notice. *People v Darden,* 230 Mich App 597, 600-602; 585 NW2d 27 (1998).

In the instant case, the felony information charged the Petitioner as follows:

> COUNT 1 "SOLICITATION OF OPEN MURDER - STATUTORY SHORT FORM did solicit another person, Gary Thuenick, to commit murder, to murder Janice Crainer; contrary to MCL 750.316; MSA 28,548. [750.316-C]; contrary to MCL 750.157b; MSA 28.354(2)."
> FELONY: Life of any term of years
>
> COUNT 2 SOLICITATION OF OPEN MURDER - STATUTORY SHORT FORM did solicit another person, Gary Thuenick, to commit murder, to murder

> Donald Jack May; contrary to MCL 750.316; MSA 28,548. [750.316-C]; contrary to MCL 750.157b; MSA 28.354(2)."
> FELONY: Life of any term of years

The Petitioner contends that the information was legally deficient on its face because it did not allege the required elements of the statutory crime of Solicitation to Commit Murder, MCL 750.157b(2) and, therefore, did not confer subject matter jurisdiction upon the trial court.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" US Const, Am VI; Const 1963, art 1, § 20. An information is sufficient as long as it provides the defendant with fair notice of the charges he must defend against, identifies the crime so that conviction or acquittal bars a subsequent charge, notifies him of the nature and character of the crime so he may prepare his defense, and permits the court to "pronounce judgment according to the right of the case." *People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994); MCL 767.45.

> Pursuant to MCL 767.45 (1), "an information must include in relevant part:
>
> (a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged . . ."

In *People v McKinney*, 65 Mich App 131; 237 NW2d 215 (1975), the defendant argued that binding him over on an "open charge" of murder did not give circuit court jurisdiction to try the defendant for first-degree murder. The Court said:

> The complaint and warrant both charged 'open murder' and cited the statutes for both first- and second-degree murder. Defendant was bound over on a charge of 'open murder'. In binding defendant over, the district judge stated that he felt the prosecution had established the crime of murder.
>
> Circuit court's jurisdiction is limited to the offense specified in the return of the examining magistrate. *People v Curtis*, 389 Mich 698; 209 NW2d 243 (1973). In the case at bar, the return specified 'open murder'. Defendant argues that a charge of open murder is a charge of second-degree murder, citing *Allen, supra* [390 Mich 383; 212 NW2d 21 (1973)]. We do not agree.
>
> MCLA § 767.71; MSA § 28.1011 provides:
>
> In all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased; and it shall be sufficient in manslaughter to charge that the defendant did kill the deceased.

> The defendant in this case was charged with murder in both the warrant and information under the provisions of MCLA § 767.44; MSA § 28.984, the statutory short form. Both the warrant and information cited MCLA § 750.316; MSA § 28.548, first-degree murder; MCLA § 750.317; MSA § 28.549, second-degree murder; and MCLA § 750.318; MSA § 28.550, manslaughter.
>
> Michigan courts have long recognized the propriety of the open charge of murder. *Brownell v People*, 38 Mich 732 (1878); *Cargen v People*, 39 Mich 549 (1878); *People v Davis*, 343 Mich 348; 72 NW2d 269 (1965). The courts have also held that a person may properly be charged with and convicted of first-degree murder under a theory of premeditation and deliberation, where such a charge has been made in the statutory short form language. *People v Collins*, 216 Mich 541; 185 NW 850 (1921); *People v Brown*, 23 Mich App 528; 179 NW2d 58 (1970). The same rule applies when the defendant is convicted of first-degree murder on a felony-murder theory, as is demonstrated in *People v Page*, 198 Mich 524; 165 NW 755 (1917).
>
> Furthermore, the district judge is not required, on preliminary examination, to determine the degree of murder. *People v Strutenski*, 39 Mich App 72; 197 NW2d 296 (1972). Therefore we find defendant's contentions to be without merit.

For these same reasons, this Court finds the Petitioner's argument to be without merit.

The felony information in this case charged the Petitioner with soliciting two open murders and cited the statute for first-degree murder, MCL 750.316[1] and the statute for solicitation, MCL 750.157b. MCL 750.318 provides in pertinent part, "[T]he jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree." This statute is commonly referred to as the "open murder statute." MCL 750.318; see *People v Watkins*, 468 Mich 233; 661 NW2d 553 (2003). Therefore, "open murder" is an offense that exists in this state. In addition, the information clearly states that the substance of the accusations was soliciting Gary Thuenick to murder Janice Crainer and Donald Jack May. Therefore, the information was not deficient, the trial court had subject matter jurisdiction, and the Petitioner was not deprived of his right to be informed of the offenses charged. See also,

[1] The Petitioner questions the reference in the information to 750.316-C which appears in brackets after the cite to MCL 750.316. This notation appears to be of internal significance only as it does not refer to subsection 1, subpart c which is the murder of a police officer subpart. In any event, it is insignificant and has no impact on the validity of the information. See the unpublished opinions in *People v Mitchell*, 2003 WL 21995248 (Mich App) and *Zamboroski v Luoma*, 2006 WL 846755 (ED Mich). In these cases, the defendant raised the same concern and it was dismissed as insignificant.

People v Spalla, 83 Mich App 661; 269 NW2d 259 (1978) rev on other grounds, 408 Mich 876; 290 NW2d 729 (1980).

The Petitioner cites the unpublished opinion of *State v Knasiak*, Mich App No. 203826 (1999) in support of his contention that the information did not allege a crime and thus was inadequate to confer subject matter jurisdiction upon the trial court. In the *Knasiak* case, the Court said that there is no such offense as solicitation to commit second-degree murder because one cannot solicit, like one cannot conspire to commit, an *unplanned* substantive crime.

The *Knasiak* case has no relevance here. The Petitioner was not charged with soliciting second-degree murder. He was charged with soliciting open murder which is any degree of murder, including first degree, premeditated murder. He claims he should not have been charged with soliciting first degree, premeditated murder because no one was actually harmed. The Petitioner's argument ignores the fact that the *solicitation* of the murders is the crime. Solicitation to commit murder is complete when "(1) the solicitor purposely seeks to have someone killed and (2) tries to engage someone to do the killing." *People v Crawford,* 232 Mich App 608, 616; 591 NW2d 669 (1998). Pursuant to MCL 750.157b(1), " 'solicit' means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." Further, while the solicitor must intend that a killing take place, actual incitement is not necessary. *Crawford, supra* at 616.

For the reasons stated herein, the Petitioner's is being legally restrained and his application for a writ of habeas corpus is denied.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

_____

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: s/ 03/13/09