

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
4/11/2022 4:07 PM  
BY ERIN L. LENNON  
CLERK

No. 100736-1  
COA NO. 54597-7-II

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

---

STATE OF WASHINGTON,  
Respondent,

v.

ISAIAH JACOB SCHUBERT,  
Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge  
The Honorable James J. Dixon, Judge

Cause No. 15-1-00831-9

---

ANSWER TO PETITION FOR REVIEW

---

Joseph J.A. Jackson  
Attorney for Respondent  
2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

## TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO REVIEW</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	9
1. <u>The Court of Appeals correctly found that Schubert could not expand the scope of his collateral attack on remand</u> .....	10
2. <u>The decision of the Court of Appeals does not conflict with the decisions in <i>Mendoza</i> and <i>Buckman</i></u> .....	15
3. <u>Schubert has not provided any basis under RAP 13.4 to accept review based of the issues raised in his statement of additional grounds</u> .....	16
D. <u>CONCLUSION</u> .....	17

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>In re Pers. Restraint of Coats,</u> 173 Wn.2d 123, 267 P.3d 324 (2011).....	3-4
<u>In re Pers. Restraint of Fawcett,</u> 147 Wn.2d 298, 53 P.3d 972 (2002).....	12
<u>In re Pers. Restraint of Isadore,</u> 151 Wn.2d 294, 88 P.3d 390 (2004).....	15
<u>In re Pers. Restraint of Riley,</u> 122 Wn.2d 772, 863 P.2d 554 (1993).....	13
<u>In re Pers. Restraint of Snively,</u> 180 Wn.2d 28, 320 P.3d 1107 (2014).....	15
<u>In re Pers. Restraint of Stockwell,</u> 179 Wn.2d 588, 316 P.3d 1007 (2014).....	12
<u>State v. Barberio,</u> 121 Wn.2d 48, 846 P.2d 519 (1993).....	11
<u>State v. Buckman,</u> 190 Wn.2d 51, 409 P.3d 193 (2018).....	4, 12-13, 15-16
<u>State v. Kilgore,</u> 167 Wn.2d 28, 216 P.3d 393 (2009).....	10
<u>State v. Mendoza,</u> 157 Wn.2d 582, 141 P.3d 49 (2006).....	12, 15-16

State v. Ross,  
129 Wn.2d 279, 916 P.2d 405 (1996)..... 12

State v. Weyrich,  
163 Wn.2d 554, 182 P.3d 965 (2008)..... 12

### **Decisions Of The Court Of Appeals**

In re Pers. Restraint of Schubert,  
7 Wn. App.2d 1007 (2020)..... 1-2

State v. Robb,  
2019 Wash.App.LEXIS 2348..... 11

State v. Schwab,  
134 Wn. App. 635, 141 P.3d 658 (2006)..... 10-11

### **Statutes and Rules**

CrR 4.2..... 15

GR 14.1..... 3, 11

RAP 2.5..... 10-11

RAP 13.4..... 1, 10, 14, 16-17

## A. ISSUES PERTAINING TO REVIEW

1. Whether review is appropriate under RAP 13.4 where the Court of Appeals correctly recognized the procedural posture of this case and applied the standard for collateral attacks in its review of the trial court's decision following remand from Schubert's prior personal restraint petition.

2. Whether review is appropriate under RAP 13.4 where the decision of the Court of Appeals follows and gives meaning to prior case law regarding the standard for withdraw of a guilty plea in a collateral attack.

3. Whether this Court should review the Court of Appeals' decision regarding Schubert's Statement of Additional Grounds where Schubert has not demonstrated a basis for review under RAP 13.4.

## B. STATEMENT OF THE CASE

Isaiah Jacob Schubert, pled guilty to burglary in the first degree while armed with a firearm/domestic violence,

violation of no contact order/domestic violence, residential burglary/domestic violence, assault in violation of a pretrial no contact order/domestic violence, unlawful imprisonment/domestic violence, unlawful possession of a firearm in the second degree, and criminal trespass in the first degree/domestic violence based on incidents that occurred in June and July of 2015. CP 14-24; 25-35.

When the trial court accepted his guilty plea, the trial court considered the factual basis provided in declarations of probable cause filed in both Thurston County Cause number 15-1-00831-9 and Thurston County Cause number 15-1-01020-8. RP (05/16/2017) 11-12. It was clear in the record that the plea agreement consolidated charges from both cases. RP (05/16/2017) 9.

Schubert did not file a direct appeal. However, he later filed a personal restraint petition. In re Pers. Restraint

of Schubert, 7 Wn. App.2d 1007 (2020),<sup>1</sup> CP 37-41.<sup>2</sup> In his personal restraint petition, Schubert alleged that his offender score was incorrect and that he received ineffective assistance of counsel. CP 38. The Court of Appeals accepted the State’s concession that Schubert’s offender score on his burglary in the first-degree conviction improperly included a point for the first-degree criminal trespass charge. CP 39. The Court indicated “Schubert is entitled to be resentenced with an offender score of 8 for the first-degree burglary conviction.” CP 39. The Court rejected Schubert’s claim that the error rendered his plea involuntary, entitling him to withdraw it, citing to In re Pers. Restraint of Coats, 173 Wn.2d 123, 141, 267 P.3d 324

---

<sup>1</sup> Unpublished, not offered as precedent under GR 14.1, but the State notes it is part of the law of the case in this matter.

<sup>2</sup> The Court of Appeals decision in the personal restraint petition and the certificate of finality are included in the clerk’s papers, and this brief will refer to the opinion as it appears there, as was done in the Brief of Respondent in the Court of Appeals.

(2011). CP 40. Schubert sought review in this Court, which was denied by a ruling of the Deputy Commissioner. Ruling Denying Review, No. 96934-5 (Appendix B to Petition for Review).<sup>3</sup>

In denying review, the Deputy Commissioner stated,

I agree that the miscalculation, which appeared in Mr. Schubert's plea statement as well as in the judgment and sentence, rendered the plea involuntary. See State v. Buckman, 190 Wn.2d 51, 59-60, 409 P.3d 193 (2018) (misinformation as to sentencing consequences renders plea involuntary). But in this collateral challenge Mr. Schubert must also show that he was actually and substantially prejudiced by the misinformation, meaning, specifically, that in the absence of the error he more likely than not would have declined to plead guilty and would have insisted on going to trial. *Id.*

Ruling Denying Review at 2. The Deputy Commissioner later noted, "Mr. Schubert does not even assert he was actually prejudiced, much less show that he was. Instead,

---

<sup>3</sup> A motion to supplement the record with the decision of the Deputy Commissioner of this Court was granted by the Court of Appeals on January 15, 2021.



he relies on principles of entitlement to withdraw that do not apply to collateral challenges,” and then provided a summary of case law in the area regarding collateral challenges. *Id.* at 2-3. Finding that Schubert had demonstrated no prejudice, the Deputy Commissioner stated, “The Court of Appeals sustainably denied the relief of withdrawal of the guilty plea and instead granted the relief appropriate in this circumstance: resentencing under the correct offender score.” *Id.* at 3.

After review was denied, the Court of Appeals entered a certificate of finality and the matter was remanded to the Superior Court. CP 37. Prior to the resentencing hearing, Schubert filed a motion to withdraw his guilty plea. CP 67-71. In that motion, Schubert made essentially the same argument that was rejected by the Deputy Commissioner.

When the trial court considered the issue, the prosecutor argued that “it would be inappropriate for [the

trial court] to rule on those today, as they've already been addressed by the Court of Appeals and the Supreme Court." RP (02/03/2020) 6. The trial court agreed stating, "I agree with the State's assessment of this, having read the Court of Appeals decision. I view this as having been previously raised, and I am denying it for the reasons requested by the State." RP (2/3/2020) 9.

While noting that the remand addressed only Count 1, the prosecutor at resentencing indicated that there "were some errors" in "some of the other offenses" and stated, "I don't know whether or not the Court should resentence Mr. Schubert on those other counts, given that the mandate doesn't address can [sic] them." RP (2/3/2020) 9. It was not made clear during the hearing the exact issue with the offender score on other charges; however, the trial court asked defense counsel, "do you agree with that assessment, that the air has infected, since we're talking about illness, the other counts, as well?" and defense

counsel responded “Yes, Judge. That is our position.” RP (2/3/2020) 10.<sup>4</sup>

The trial court noted that resentencing on the other counts was a technical question based on the law of the case, and indicated,

technically, I don't think I am supposed to do that with the mandate as written. And so do you - - does anyone disagree that I'm actually, with this mandate under the law of the case and my limited jurisdiction right now, not supposed to address anything other than Count 1?

RP (2/3/2020) 10-11. The prosecutor acknowledged that the remand covered only count one but indicated a desire to handle all of the issues rather than potentially having the matter remanded again. RP (2/3/2020) 11. Defense counsel also asked that the parties go forward with a full resentencing. RP (2/3/2020) 11.

---

<sup>4</sup> Both defense counsel and the prosecutor indicated that they were sick during the hearing, hence the reference to illness.

The trial court ruled, “what we’re going to do today is just address Count 1.” RP (2/3/2020) 12. Defense counsel noted “my client is really anxious for the Court to reconsider the offender score. But I’ve explained to him that’s not before the Court today.” RP (2/3/2020) 17-18. Per the remand and certificate of finality, the trial court resentenced Schubert with an offender score of 8 on the burglary in the first-degree count to a term of 102 months followed by a 60-month firearm enhancement. RP (2/3/2020) 18-19.

Schubert then appealed the resentencing and the denial of his motion to withdraw guilty plea. The Court of Appeals ruled, “While Schubert prevailed in his PRP on inaccuracy of his offender score, he cannot now expand the scope of the remanded PRP to include a previously rejected argument regarding his withdrawal of his plea.” Unpublished Opinion, No. 54597-7-II, at 4. The Court of Appeals further indicated, “Even if he could argue the prejudice issue for the first time at this procedural juncture,

Schubert fails to show actual and substantial prejudice, that is, that more likely than not he would have chosen not to plead guilty.” *Id.* at 5. The Court of Appeals found that the trial court abused its discretion by not correcting the sentence on counts 2-7 following remand and remanded the case once again for resentencing on those counts. *Id.* at 6-7. Schubert now seeks review of the decision of the Court of Appeals.

### C. ARGUMENT

A petition for review will be accepted by this

Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

1. The Court of Appeals correctly found that Schubert could not expand the scope of his collateral attack on remand.

The “trial court’s discretion to resentence on remand is limited by the scope of the appellate court mandate.” State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

The law of the case is a doctrine derived from the common law and RAP 2.5(c)(2) and is intended to promote finality and efficiency. State v. Schwab, 134 Wn. App. 635, 644, 141 P.3d 658 (2006). Generally, it stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation. *Id.* RAP 2.5(c)(2) limits the doctrine by allowing the appellate court to review the propriety of an earlier decision in the same case, where justice would be served.

The trial court does not retain broad discretion when the Court of Appeals remands to the trial court with

direction that leaves no room for independent judgment. State v. Robb, 2019 Wash.App.LEXIS 2348, 4,<sup>5</sup> citing State v. Schwab, 134 Wn. App. at 645. Here, the Court of Appeals remanded the case “for resentencing with a correct offender score of 8 for the first-degree burglary.” CP 41. The trial court properly declined to consider Schubert’s motion to withdraw his guilty plea because that was previously considered and ruled upon by the Court of Appeals and the Deputy Commissioner of this Court. See State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993) (RAP 2.5(c)(1) does not revive every issue not previously raised).

When a plea is based on misinformation regarding the consequences of the plea in a direct appeal, our courts have said “due process requires an affirmative showing a defendant entered a guilty plea intelligently and

---

<sup>5</sup> Unpublished opinion offered only for whatever persuasive value this Court deems appropriate. GR 14.1.

voluntarily.” State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006); State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). However, a petitioner’s burden on collateral review is different. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 596-597, 316 P.3d 1007 (2014).

In order for a petitioner on collateral attack to demonstrate that they are entitled to withdraw a guilty plea based on misinformation, the petitioner must demonstrate “actual and substantial prejudice arising from an incorrect statement of sentencing consequences.” *Id.* at 598-599, citing In re Pers. Restraint of Fawcett, 147 Wn.2d 298, 299-300, 53 P.3d 972 (2002). Put another way, “the petitioner must show that the outcome of the guilty plea proceedings would more likely than not have been different had the error not occurred. State v. Buckman, 190 Wn.2d 51, 60, 409 P.3d 193 (2017).



This Court clarified that the term prejudice, in the context of a guilty plea, means “a defendant challenging a guilty plea must show that there is a reasonable probability that, but for [the alleged error], he would not have pleaded guilty but would have insisted on going to trial.” In re Pers. Restraint of Riley, 122 Wn.2d 772, 780-781, 863 P.2d 554 (1993); State v. Buckman, 190 Wn.2d at 62. A bare allegation that a petitioner would not have pleaded guilty if he had known all of the consequences of the plea is not sufficient to establish prejudice. *Id.* at 782.

In this case, the plea agreement demonstrated that Schubert faced a potential total sentence of 212 months, which would have included 36 month enhancement on an Assault in the Second Degree charge that the State ultimately did not pursue as part of the plea bargain. CP 102-111. Instead of going to trial, Schubert elected to accept the State’s offer, which was for a total agreed sentence of 176 months. *Id.* The only recommendation

that was listed in the plea offer was the burglary in the first degree, which was the driving factor of the plea. *Id.* There was no reasonable probability that Schubert would not have entered the plea agreement had he known that the offender score was 8 instead of 9. That error actually makes the plea agreement more beneficial than the one which he chose to accept. This Court properly concluded that the correct remedy was to remand for resentencing, not withdrawal of Schubert's guilty plea

Schubert's petition for review assumes an incorrect procedural posture. Schubert did not file a direct appeal. This appeal is of the issues that were remanded by the Court of Appeals following a collateral attack. The correct standard for any motion to withdraw guilty plea is that of a collateral attack. The Court of Appeals applied the correct standard. As such, there is no basis upon which Schubert has demonstrated that review is appropriate under RAP 13.4.

2. The decision of the Court of Appeals does not conflict with the decisions in *Mendoza* and *Buckman*.

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006), had a different procedural posture than this case. The defendant in State v. Mendoza objected to his attorney's representation and sought to withdraw his guilty plea during a hearing where his attorney requested an evidentiary hearing on contested facts in a presentence investigation report. *Id.* at 586. Mendoza appealed the denial of his motion to withdraw guilty plea under CrR 4.2. *Id.* at 587. State v. Mendoza was never in the procedural posture of a collateral attack. The standard in the direct appeal of State v. Mendoza is different than the standard in a collateral attack. In re Pers. Restraint of Snively, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004). The Court of Appeals correctly noted that the posture of Schubert's

case was remand from a collateral attack and correctly applied the standard for a collateral attack.

State v. Buckman, 190 Wn.2d 51, 60, 409 P.3d 193 (2017), reiterated that the standard in a collateral attack for withdrawing a guilty plea is different than the standard for withdrawal of a guilty plea in a direct appeal. Following Schubert's rationale and holding that the direct appeal standard applies following remand from a collateral attack would render the distinction meaningless. Schubert cannot show that the decision of the Court of Appeals conflicts with the holdings of State v. Mendoza and State v. Buckman.

3. Schubert has not provided any basis under RAP 13.4 to accept review based of the issues raised in his statement of additional grounds.

While Schubert asks this Court to accept review of the issues raised in his Statement of Additional Grounds at the Court of Appeals, he provides no analysis as to why review of those issues should be granted. As such, he has

not demonstrated that review of those issues is appropriate under RAP 13.4.

D. CONCLUSION

Schubert has not demonstrated that review is appropriate under RAP 13.4. The State respectfully requests that this Court deny review.

I certify that this document contains 2,640 words, as counted by word processing software, not included those portions exempted from the word count, in compliance with RAP 18.17.

Respectfully submitted this 11th day of April, 2022.

  
\_\_\_\_\_  
Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

## DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: April 11, 2022

Signature: 

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**April 11, 2022 - 4:07 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 100,736-1  
**Appellate Court Case Title:** State of Washington v. Isaiah Jacob Schubert  
**Superior Court Case Number:** 15-1-00831-9

**The following documents have been uploaded:**

- 1007361\_Answer\_Reply\_20220411160501SC623220\_4717.pdf  
This File Contains:  
Answer/Reply - Reply to Answer to Petition for Review  
*The Original File Name was Schubert Isaiah Answer to Pet for Review 100736-1.pdf*

**A copy of the uploaded files will be sent to:**

- jan@washapp.org
- teri.bryant@lewiscountywa.gov
- wapofficemail@washapp.org

**Comments:**

---

Sender Name: Stephanie Johnson - Email: stephanie.johnson@co.thurston.wa.us

**Filing on Behalf of:** Joseph James Anthony Jackson - Email: joseph.jackson@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:  
2000 Lakedrige Dr SW  
Olympia, WA, 98502  
Phone: (360) 786-5540

**Note: The Filing Id is 20220411160501SC623220**