102131-3

Supreme Court No. (to be set)
Court of Appeals No. 56574-9-II (consolidated)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent
v.
Christopher Olsen, Petitioner

Thurston County Superior Court

Cause No. 03-1-01537-1

The Honorable Judge James Dixon

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

After the Supreme Court's *Blake*[1] decision, Christopher Olsen sought to withdraw guilty pleas to two charges of drug possession. Because each plea was part of an indivisible plea agreement, he also asked to withdraw his pleas to other charges that were part of each package deal.

The trial court refused to allow him to withdraw his guilty pleas to any of the charges, including the possession charges. Instead, the court vacated the possession charges and left the other convictions intact.

Mr. Olsen should have been allowed to withdraw his guilty pleas. His plea to possession was not knowing and voluntary. His other guilty pleas were part of indivisible plea agreements that included the possession charges.

The Court of Appeals' published decision has far-reaching consequences. It will affect a great many cases and

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

will disproportionately impact people of color who have suffered the most from the war on drugs. Given its broad effects, the lower court's decision creates issues of substantial public interest that should be reviewed by the Supreme Court.

The appellate court's decision also conflicts with several Supreme Court cases and with published opinions of the Court of Appeals. The Supreme Court should grant review, reverse the Court of Appeals, and remand with instructions to allow Mr. Olsen to withdraw his guilty pleas.

DECISION BELOW AND ISSUE PRESENTED

Petitioner Christopher Olsen, the appellant below, asks the Court to review the Court of Appeals' published opinion, entered on May 31, 2023.[2] This case presents one issue:

> When a conviction for simple possession is invalidated under *Blake,* must the defendant be permitted to withdraw guilty pleas to other charges that were part of an indivisible plea agreement?

[2] A copy of the opinion is attached.

STATEMENT OF THE CASE

Mr. Olsen's case involves two pairs of convictions. Clerk's Papers A[3] (CPA) 2, 11; CPB 2, 11; CPC 4, 11. One pair of convictions stemmed from guilty pleas entered in 2003. The second involved guilty pleas entered in 2005. Both sets of convictions involved a plea to unlawful possession of a controlled substance.

Plea agreement for 2003 offenses. On October 28, 2003, Christopher Olsen pled guilty to forgery and possession of a controlled substance. CPA 2, 11, 43, 51; CPB 2, 11. The two offenses were committed on different dates. CPA 1; CPB 1. Although each charge had its own cause number, both guilty pleas were entered at the same hearing. CPA 2, 11; CPB 2, 11.

Each of Mr. Olsen's plea statements referred to the other pending case. CPA 13; CPB 13. On the forgery charge, the plea

[3] The clerk's papers from the three separate cause numbers are not numbered sequentially. They will be referred to as CPA (for documents from Cause No. 03-1-1537-1), CPB (for documents from Cause No. 03-1-1697-1), and CPC (for documents from Cause No. 05-1-1887-2).

statement indicated that the prosecutor would "make the following recommendation to the judge: 3 months Thurston Co. Jail, concurrent with other cause 13-1-1697-1." CPA 13. Likewise, on the possession charge, the plea statement indicated that the prosecutor would "make the following recommendation to the judge: 3 months Thurston Co. Jail, Concurrent with 03-1-1537-1." CPB 13.

Each recommendation also included identical language regarding other terms: "Standard fees, costs, conditions, credit for time served." CPA 13; CPB 13.

The sentencing court followed the prosecutor's recommendation, and Mr. Olsen received a three-month concurrent term. CPA 6; CPB 5. Financial penalties and other conditions of sentence were identical.[4] CPA 4; CPB 4.

Plea agreement for 2005 offenses. In 2005, Mr. Olsen was charged with possession of a controlled substance and

[4] Apart from a requirement that he pay $500 to the drug enforcement fund for the possession case. CPA 45; CPB 4.

Unlawful Possession of a Firearm in the second degree (UPF 2). CPC 4. The charges shared an offense date and were charged in the same Information. CPC 1.

On January 17, 2006, Mr. Olsen pled guilty to both charges. CPC 4. He completed a single plea form that included both charges. CPC 4. The prosecutor made a single recommendation, spelling out the terms for a prison-based DOSA. CPC 6. The court accepted the recommendation and sentenced Mr. Olsen to a prison-based DOSA. CPC 16.

Motions to withdraw guilty pleas. In 2021, the Supreme Court invalidated RCW 69.50.4013, the statute criminalizing simple possession. *Blake, supra.* Following that decision, Mr. Olsen brought motions to withdraw his guilty pleas. CPA 18; CPB 21; CPC 23.

He argued that his 2003 pleas to possession and forgery were part of a single indivisible plea agreement. CPA 19, 72, 88; CPB 21, 73, 86. He asked the court to allow him to

withdraw his pleas to both charges. CPA 19, 72, 88; CPB 21, 73, 86.

Following a hearing, the court concluded that the 2003 guilty pleas were not part of an indivisible plea agreement. RP (12/7/21) 15-21. CPA 96-97; CPB 90-91. The judge decided that both pleas were knowing and voluntary, and vacated the invalid possession charge pursuant to *Blake,* without allowing Mr. Olsen to withdraw his plea to that charge. CPA 96-97; CPB 90-93. The court left intact the forgery conviction. CPA 96-97; CPB 90-91, 92-93.

Mr. Olsen also argued that his 2005 pleas to possession and UPF were part of a single indivisible plea agreement. CPC 22, 64, 79. He asked the court to allow him to withdraw his guilty pleas to both charges. CPC 22, 64, 79.

The court agreed that the 2005 convictions stemmed from an indivisible plea agreement. RP (12/7/21) 21; CPC 87. Despite this, the court refused to allow Mr. Olsen to withdraw his pleas. RP (12/7/21) 15-21; CPC 86-87. The court concluded

that Mr. Olsen's 2005 pleas were valid at the time they were entered. CPC 86-87. The court vacated the drug possession charge pursuant to *Blake* without allowing Mr. Olsen to withdraw his plea to that charge. CPC 86-95. The court left in place the UPF conviction. CPC 86-95.

Mr. Olsen appealed, and the Court of Appeals affirmed. According to the Court of Appeals, even though the possession convictions were vacated, Mr. Olsen could not withdraw his guilty pleas to possession. The court concluded that "[b]ecause Olsen is not entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges, the rule regarding withdrawal of indivisible pleas is not applicable." Opinion (OP) 1.

Mr. Olsen seeks review of the Court of Appeals' published opinion.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Each pair of Christopher Olsen's guilty pleas were part of an indivisible agreement. He should have been allowed to withdraw his plea to the forgery and firearm charges when the trial court invalidated his convictions for drug possession.

The Court of Appeals' published opinion undermines the promise of *Blake.* The court limited the ability of *Blake* defendants to withdraw from indivisible plea agreements.[5] The court's approach should be rejected, so that offenders who suffered the unconstitutional deprivations that preceded *Blake* can be treated in the same way as other defendants who seek to set aside indivisible plea agreements tainted by other types of invalid convictions.

[5] The decision will have an even broader reach if applied to cases not involving possession of a controlled substance.

I. MR. OLSEN MUST BE ALLOWED TO WITHDRAW HIS PLEAS TO ALL CHARGES BECAUSE EACH INDIVISIBLE PLEA AGREEMENT INCLUDED AN INVOLUNTARY GUILTY PLEA TO SIMPLE POSSESSION.

When a conviction is invalidated, the defendant may withdraw any related guilty pleas that were part of an indivisible plea agreement. *State v. Turley*, 149 Wn.2d 395, 402, 69 P.3d 338 (2003); *In re Bradley*, 165 Wn.2d 934, 941, 205 P.3d 123 (2009). Where "there is error on one count of a multicount agreement, the entire plea agreement must be set aside upon request." *State v. King*, 162 Wn. App. 234, 241, 253 P.3d 120 (2011).

In this case, each of Mr. Olsen's unconstitutional drug possession convictions were part of an indivisible plea agreement. He must be allowed to withdraw his guilty pleas to the other charges that were part of those indivisible agreements. *Id.*

A. Each of Mr. Olsen's cases involved an indivisible plea agreement.

Plea agreements are akin to contracts. *Turley*, 149 Wn.2d at 400. To determine if a plea bargain is indivisible, courts look to "the intent of the parties." *Id.; State v. Chambers*, 176 Wn.2d 573, 580–81, 293 P.3d 1185 (2013).

It is the "objective manifestations of intent, not unexpressed subjective intent" that guide the analysis. *Chambers*, 176 Wn.2d at 580–81. Courts "examine the documents produced at [the plea hearing] for objective manifestations of intent." *Bradley*, 165 Wn.2d at 942. A package resolution of multiple charges may be indivisible even if the crimes occurred on separate days and were charged separately. *Id.,* at 942-943.

In *Bradley,* the Supreme Court found a plea agreement indivisible even though (1) the offenses occurred months apart, (2) the crimes were charged in separate charging documents, and (3) the defendant submitted separate plea forms. *Bradley*, 165 Wn.2d at 942. Despite these indicators, the *Bradley* court

found "an objective manifestation that the pleas were negotiated as part of a package deal." *Id.* at 943.

In another case involving separate charging documents, the Supreme Court found objective evidence of an indivisible plea agreement. *In re Shale*, 160 Wn.2d 489, 492, 158 P.3d 588 (2007). In *Shale,* the guilty pleas resolved multiple cases during a single proceeding. *Id.* The defendant signed separate plea statements; however, in each form, the prosecutor's recommendation referenced the other pending cases.[6] *Id.* The recommendation was for "concurrent time to all matters pleaded to on the same day and a standard range sentence." *Id.,* at 492-493.

Similarly, in *Chambers,* the crimes were committed on different days that were months apart. *Chambers*, 176 Wn.2d at 577-578. They were charged under three separate cause

[6] This distinguishes one factor the court found insignificant in *Bradley*: that each plea form in the *Bradley* case noted that the sentences would be served concurrently, as required by statute.

numbers. *Id.* The defendant pled guilty at two different hearings. *Id.* He was sentenced at two different hearings. *Id.* Despite this, the Supreme Court found objective evidence of an indivisible agreement. *Id.*, at 581-582.

In this case, each set of Mr. Olsen's convictions stemmed from an indivisible plea agreement. The objective manifestation of the parties' intent to form an indivisible agreement is reflected in the documents produced at each plea hearing. This "requires extending the remedy of rescission to both charges" that were part of each agreement. *Bradley*, 165 Wn.2d at 943.

Plea agreement for 2005 offenses. The 2005 crimes occurred at the same time, were charged in a single document, were pled to using a single plea statement, and resulted in a single judgment and sentence. CPC 1-22. The trial court found that the pleas to the 2005 offenses were part of an indivisible plea bargain. RP (12/7/21) 21; CPC 87. The Court of Appeals affirmed this conclusion. OP 12.

Plea agreement for 2003 offenses. The 2003 convictions also stemmed from an indivisible plea agreement. As in *Turley,* Mr. Olsen pled guilty "to multiple counts or charges at the same time, in the same proceeding[]." *Turley*, 149 Wn.2d at 402; CPA 2-17; CPB 2-17.

As in *Shale,* the State's sentencing recommendation on each of Mr. Olsen's plea statements referenced the other case. *Shale,* 160 Wn.2d at 492. The prosecutor's recommendation was, in summary, the same as that in *Shale*: "concurrent time to all matters pleaded to on the same day and a standard range sentence." *Id.,* at 492-493; CPA 13; CPB 13.

Under *Bradley,* this "objective manifestation" of an indivisible plea agreement is not undermined by the separate offense dates. *Bradley*, 165 Wn.2d at 942-943. Nor is it undermined by the fact that each case was charged under a separate cause number, or that the cases were resolved with separate documents. *Id.*; *Shale*, 160 Wn.2d at 492-493; *Chambers*, 176 Wn.2d at 581-582. The trial court and the Court

of Appeals failed to recognize this. CPA 96-97; CPB 90-91; OP 11-12.

Summary. The facts show "an objective manifestation that the pleas were negotiated as part of a package deal." *Bradley*, 165 Wn.2d at 943. Both sets of convictions stemmed from indivisible plea bargains. Because his possession convictions were invalid, Mr. Olsen must be permitted to withdraw his guilty pleas to the 2003 forgery and the 2005 firearm charge. *Turley*, 149 Wn.2d at 402; *Bradley*, 165 Wn.2d at 942-944.

B. Mr. Olsen may withdraw his guilty pleas because each indivisible plea agreement included a guilty plea that was unknowing and involuntary.

The statute criminalizing simple possession is unconstitutional. *Blake*, 197 Wn.2d at 195. If a statute is unconstitutional, "it is *and has always been* a legal nullity." *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952) (emphasis added); *State v. Paniagua*, 22 Wn. App. 2d 350, 354, 511 P.3d 113, *review denied*, 200 Wn.2d

1018, 520 P.3d 970 (2022). Such a statute "is as inoperative as if it had never been passed." *Boeing Co. v. State*, 74 Wn.2d 82, 88, 442 P.2d 970 (1968).

Due process requires that a guilty plea be knowing, voluntary, and intelligent. *Bradley*, 165 Wn.2d at 939. A guilty plea is valid "only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily." *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011). A guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969).

A guilty plea to an invalid charge does not "meet the knowledge requirement." *In re Thompson*, 141 Wn.2d 712, 721, 10 P.3d 380 (2000). Such a plea is "unknowing and involuntary and is a nullity." *In re Pers. Restraint Petition of Mayer*, 128 Wn. App. 694, 705, 117 P.3d 353 (2005); *State v. De Rosia*, 124 Wn. App. 138, 150, 100 P.3d 331 (2004).

In *De Rosia,* the defendant pled guilty to second-degree felony murder with assault as a predicate crime. *Rosia*, 124 Wn. App. at 141. Subsequently, the Supreme Court invalidated the crime of felony murder premised on assault. *Id.,* at 142-143 (citing *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), *as corrected* (Oct. 29, 2002), *as amended on denial of reconsideration* (Mar. 14, 2003)). The *De Rosia* court concluded that "because [the defendant] did not know that assault could not serve as the predicate felony for second degree felony murder, he could not knowingly and intelligently appraise the State's evidence against him." *Id.,* at 150. The court allowed him to withdraw his guilty plea. *Id.,* at 154.

In *Mayer,* the defendant also pled guilty to felony murder with assault as the predicate offense.[7] *Mayer*, 128 Wn.App. at 704. Following *Andress,* the Court of Appeals found that

[7] The defendant pled guilty to both intentional and felony murder for a single charge. Although the plea to felony murder was "unknowing and involuntary," the plea to intentional murder remained valid. *Mayer*, 128 Wn. App. at 705-706.

Mayer's guilty plea "to the nonexistent crime of second-degree felony murder predicated on assault was unknowing and involuntary."[8] *Id.,* at 705; *see also Thompson*, 141 Wn.2d at 715.

Here, Mr. Olsen pled guilty to conduct criminalized by a statute that was void *ab initio. Blake,* 197 Wn.2d at 195; *Evans,* 41 Wn.2d at 143. His pleas to simple possession were not knowing and voluntary: he did not have "an accurate understanding of the relation of the facts to the law." *Mayer*, 128 Wn.App. at 704. He did not know that his conduct—possessing a controlled substance—was not unlawful at the time he pled guilty.

Vacating "a conviction based on a guilty plea necessarily requires that the plea also be withdrawn." *State v. Tarrer*, 140 Wn. App. 166, 169, 165 P.3d 35 (2007). By vacating Mr.

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[8] *De Rosia* and *Mayer* undermine the Court of Appeals' conclusion that "a subsequent change in the law generally does not render a guilty plea not knowing, voluntary, or intelligent." OP 6.

Olsen's possession convictions, the trial court "necessarily require[d]" that his guilty pleas to possession be withdrawn. *Id.; see also De Rosia*, 124 Wn. App. at 154.

Because each involuntary plea was part of an indivisible plea agreement, Mr. Olsen is also entitled to withdraw his guilty pleas to the other charges that were part of those agreements. *Turley*, 149 Wn.2d at 402; *Bradley*, 165 Wn.2d at 941; *Shale*, 160 Wn.2d at 492-493.

C. Even if the Court of Appeals is correct that guilty pleas to possession cannot be withdrawn, vacating the possession charges dissolved each indivisible plea agreement.

The Court of Appeals erroneously concluded that there is a meaningful distinction between vacating a conviction and withdrawing a plea. OP 3-11. According to the court, *vacating* a conviction does not affect an indivisible agreement; instead, only when a plea is *withdrawn* can an indivisible agreement be set aside. OP 3-11.

But vacating a conviction based on a guilty plea necessarily requires that the plea be withdrawn. *Tarrer*, 140 Wn. App. at 169.

Furthermore, even if vacating his possession convictions did not require withdrawal of his guilty pleas, Mr. Olsen would still be entitled to set aside each indivisible plea agreement. There is no legal or logical basis to distinguish between vacating a conviction and withdrawing a guilty plea.

A vacated conviction that was part of an indivisible plea agreement justifies setting aside the entire agreement. *In re Bianchi*, 197 Wn. App. 1079 (2017) (*Bianchi* I) (unpublished). This is so even for vacated convictions where no mention is made of withdrawing a guilty plea. *Id.*

In *Bianchi,* the Court of Appeals vacated three convictions that were part of an indivisible plea agreement. *Id.*, at *1. Each conviction was vacated because it was for a charge

that did "not exist as a crime in Washington."[9] *Id.* The *Bianchi* court did not mention withdrawal of the guilty pleas to these three vacated charges. Despite this, the court directed that the defendant would "be entitled to withdraw his pleas of guilty as to the remaining 10 counts."[10] *Id.*

The applies to Mr. Olsen's case. His possession convictions were invalid under *Blake.* The trial court recognized this and vacated the convictions. CPB 92; CPC 88. The Court of Appeals ratified this decision. OP 1.

Because each possession conviction was vacated, Mr. Olsen is "entitled to withdraw his pleas of guilty as to the remaining [charges.]" *Id.* This is so even if the possession charges are vacated without withdrawal of the pleas. *Id.*

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[9] The crime was "attempted first degree felony murder." *Id.,* at *1.

[10] On remand, the trial court granted Bianchi's motion to withdraw his guilty pleas for the remaining charges. *State v. Bianchi*, 21 Wn. App. 2d 1047 at *2, *review denied,* 200 Wn.2d 1007, 516 P.3d 374 (2022) (*Bianchi* II) (unpublished).

The indivisible plea bargain must be set aside, and the case remanded so Mr. Olsen can withdraw his pleas to the 2003 forgery charge and the 2005 firearm charge. *Bradley*, 165 Wn.2d at 941-944.

D. Mr. Olsen has shown actual and substantial prejudice: he was convicted and sentenced for violating an unconstitutional statute.

On collateral attack, a Petitioner "must establish that the asserted error has resulted in actual and substantial prejudice." *In re Hinton*, 152 Wn.2d 853, 858, 100 P.3d 801 (2004). Here, Mr. Olsen has shown actual and substantial prejudice, entitling him to withdraw his guilty pleas to simple possession.

Mr. Olsen was actually and substantially prejudiced because he was convicted and sentenced under a statute that was void. It is difficult to conceive of a stronger showing of actual and substantial prejudice.

According to the Court of Appeals, he was not prejudiced (by pleading guilty based on conduct that was lawful), and thus cannot withdraw his pleas. OP 7-8.

The Court of Appeals used the wrong standard when assessing Mr. Olsen's showing of prejudice. Instead of recognizing the prejudice that inheres in his conviction under a void statute, the Court of Appeals imported a standard applicable to other circumstances. The court proposed that Mr. Olsen was required to "show that it would have been rational to reject the plea agreement and proceed to trial under the circumstances." OP 7 (citing *State v. Buckman*, 190 Wn.2d 51, 409 P.3d 193 (2018)).

This is not a basis to deny Mr. Olsen a remedy.

First, the test outlined by the Court of Appeals does not apply here. Where a person is convicted based on conduct that is not criminal, they are not required to show that they would have insisted on a trial. For example, in *Mayer,* the defendant was not required to show he would have insisted on a trial to obtain relief as to his invalid felony murder conviction. *Mayer*, 128 Wn.App. at 705.

The same is true of the defendants in *Hinton*, 152 Wn.2d at 859-860. There, the Supreme Court concluded that "Petitioners have established actual and substantial prejudice" because they pled guilty based on conduct subsequently determined not to qualify them for conviction of the charged offense. *Id.* The court did not require the defendants to show that they would have rejected guilty pleas had they known their convictions would be invalid. *Id.; see also In re Matter of Swagerty*, 186 Wn.2d 801, 810, 383 P.3d 454 (2016) (Court did not require Defendant to show he would have insisted on trial).

Second, even if the Court of Appeals' test is correct, Mr. Olsen has produced facts warranting relief. It is objectively rational to insist on trial rather than pleading guilty to a crime based on a void statute. This establishes actual and substantial prejudice.

The Court of Appeals also asserts that Mr. Olsen was required to "show that it is more likely than not that he would have refused to plead guilty and would have gone to trial" on

the *other* charges encompassed by the indivisible plea agreements—the forgery and the UPF charge. OP 12-13.

The Supreme Court has never required such a showing when a party seeks to set aside an indivisible plea agreement. *See, e.g., Bradley*, 165 Wn.2d at 944. As the *Bradley* court put it: "Because this plea and [the defendant's] plea to possession with intent to deliver were entered as part of a package deal, his withdrawal *necessarily includes both pleas*." *Id.* (emphasis added).

In fact, this rule may be invoked *against* a defendant who wishes to challenge only some charges that are part of an indivisible plea bargain. *Chambers,* 176 Wn.2d at 577-578; *see also Swagerty*, 186 Wn.2d at 810 (Defendant may either abandon his challenge to three of the four offenses in an indivisible plea agreement, or he may withdraw his pleas to *all four* charges); *State v. Pleasant*, 7 Wn. App. 2d 1064 at *4 (2019) (unpublished) ("The court in *Swagerty* recognized that this remedy potentially puts a defendant in a worse position.")

Where one conviction is invalidated, the question becomes whether the agreement is indivisible—not the defendant's motivation for pleading guilty. If the plea agreement is indivisible, invalidation of one conviction "requires extending the remedy of rescission to [all] charges" that are part of the agreement. *Bradley*, 165 Wn.2d at 943.

Mr. Olsen has shown actual and substantial prejudice entitling him to withdraw his guilty plea to simple possession. *Hinton*, 152 Wn.2d at 859-860. This invalidates the entire plea agreement in each case. *Bradley*, 165 Wn.2d at 943. He must be allowed to withdraw his guilty pleas to all the charges encompassed by each agreement. *Id.*

II. THE COURT OF APPEALS' PUBLISHED OPINION CONFLICTS WITH SEVERAL SUPREME COURT CASES AND WITH PUBLISHED DECISIONS OF THE COURT OF APPEALS.

The Supreme Court will accept review if the lower court's decision conflicts with a Supreme Court decision or a published Court of Appeals decision. RAP 13.4(b)(1) and (2).

Here, the Court of Appeals' published opinion conflicts with Supreme Court precedent and with published decisions of the Court of Appeals.

The appellate court erroneously concluded that Mr. Olsen's 2003 plea agreement was divisible. It incorrectly decided he could only withdraw his pleas in each case if simple possession qualifies as a "nonexistent crime." OP 4-6. It failed to recognize that RCW 69.50.4013 was void at the time of its enactment, and incorrectly concluded that simple possession was "a valid crime that was later invalidated." OP 5.

It improperly found Mr. Olsen's pleas to possession knowing and voluntary, even though neither he nor anyone else knew that his conduct was lawful at the time of the plea. It wrongly concluded that pleading guilty to lawful conduct did not establish actual and substantial prejudice. It failed to recognize that invalidation of one conviction dissolves the other convictions that comprise an indivisible plea agreement.

The Court of Appeals' published opinion conflicts with several Supreme Court cases and published decisions of the Court of Appeals. This court should grant review under RAP 13.4(b)(1) and (2).

A. The Court of Appeals ignored Supreme Court precedent when concluding that Mr. Olsen's 2003 plea agreement was not indivisible.

The Court of Appeals erroneously concluded that "the 2003 charge was not part of an indivisible plea agreement" because "the offenses were committed at separate times, charged in separate informations, and resolved in separate documents." OP 11-12.

These factors do not undermine other objective manifestations that an agreement is indivisible. *Bradley*, 165 Wn.2d at 941-944; *Shale*, 160 Wn.2d at 492-493; *Chambers*, 176 Wn.2d at 581-582. Here, the parties objectively manifested their intent to treat the agreement as indivisible.

The Supreme Court should grant review under RAP 13.4(b)(1). The Court of Appeals' published opinion conflicts with *Bradley, Shale,* and *Chambers*.

B. The Court of Appeals erroneously focused on whether possession is a "nonexistent crime" rather than whether Mr. Olsen's plea was knowing, intelligent, and voluntary.

A guilty plea that is unknowing or involuntary is invalid. *See, e.g., Bradley,* 165 Wn.2d at 941 (plea involuntary because defendant not informed about direct consequences); *see also State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008) (same).

The Court of Appeals ignored this, focusing instead on whether possession of a controlled substance is a "nonexistent" crime. OP 4-6. According to the Court of Appeals, Mr. Olsen can only withdraw his plea to possession if it is a "nonexistent" crime. OP 5-6.

The characterization of the offense does not control the validity of a guilty plea. It's true that some cases use the phrase "nonexistent crime" when invalidating convictions. *See, e.g.,*

Mayer, 128 Wn.App. at 705; *Hinton*, 152 Wn.2d at 859-860. However, others do not. *See, e.g., De Rosia*, 124 Wn. App. at 149-150.

If a plea is not made knowingly, intelligently, and voluntarily, it is invalid and may be withdrawn. *Robinson*, 172 Wn.2d at 790. An unknowing or involuntary plea can always be set aside, regardless of whether the crime pled to is "nonexistent." *See, e.g., Bradley,* 165 Wn.2d at 941; *Weyrich*, 163 Wn.2d at 557.

The Court of Appeals erroneously suggested that "a conviction under a statute that is later determined to be unconstitutional is not the same as a conviction for a nonexistent crime." OP 5. The court does not provide any authority affirmatively supporting this claim. OP 5.

Even if the definition of "nonexistent" is limited in the manner suggested by the Court of Appeals, this limitation does not affect Mr. Olsen's argument. Any distinction between nonexistent crimes and the offense to which Mr. Olsen pled

guilty is irrelevant. Mr. Olsen is entitled to withdraw his plea because it was unknowing and involuntary, whether or not possession is a "nonexistent crime."

Furthermore, there is no principled basis to distinguish between a "nonexistent crime" and a crime based on a statute that is and has always been a legal nullity. *Id.* The Court of Appeals should have recognized simple possession as a "nonexistent crime," even though that phrase does not control the analysis here.

Having concluded that possession did not qualify as a "nonexistent crime," the Court of Appeals went on to describe the offense as "a valid crime that was later invalidated." OP 5.

The offense has never been a "valid crime." It has been unconstitutional since the day it was enacted. *Blake*, 197 Wn.2d at 195; *Evans*, 41 Wn.2d at 143; *Paniagua*, 22 Wn. App. 2d at 354; *Boeing*, 74 Wn.2d at 88. This suggests that it was a "nonexistent" crime; however, as noted above, the word used to describe the offense does not affect the outcome of this case.

The Supreme Court should grant review under RAP 13.4(b)(1) and (2). The Court of Appeals' decision conflicts with *Bradley, Evans, Paniagua, Boeing, Thompson,* and *Mayer.*

C. In deciding that Mr. Olsen's pleas to possession were voluntary, the Court of Appeals failed to recognize his lack of understanding of the law and its relationship to the facts.

A voluntary plea requires the defendant to understand the law and its relationship to the facts. *McCarthy*, 394 U.S. at 466. If the defendant does not have "an accurate understanding of the relation of the facts to the law," the plea is unknowing and involuntary. *Mayer*, 128 Wn. App. at 704.

Mr. Olsen did not have this understanding, because RCW 69.50.4013 "is and has always been a legal nullity." *Paniagua*, 22 Wn. App. 2d at 354. Thus, neither he nor anyone else in the courtroom understood the law at the time he pled guilty.

Unbeknownst to the parties and the court, the statute criminalizing possession was "a legal nullity" on the day Mr. Olsen pled guilty. *Evans*, 41 Wn.2d at 143. No one understood

the relationship between the law and the facts of his case; everyone assumed that Mr. Olsen's conduct was covered by a valid criminal statute. *Id.* It was not.

His pleas were involuntary. *Mayer*, 128 Wn.App. at 704.

The Court of Appeals claimed that Mr. Olsen's guilty plea to simple possession was voluntary because "nothing in the record… shows Olsen was misinformed as to the elements," or that he was "not able to determine whether his conduct violated the elements" of the possession charge. OP 7.

This reflects a misunderstanding of the requirement that a plea be knowing and voluntary. Mr. Olsen's plea was neither knowing nor voluntary because he didn't understand that possession of a controlled substance was lawful at the time of his plea. It was not a crime, and there were no "elements of the charge."[11]

[11] OP 7.

Mr. Olsen incorrectly believed that his conduct was unlawful. It was not, because the statute was "void, and [was] as no law." *State v. Markovich*, 19 Wn. App. 2d 157, 172, 492 P.3d 206 (2021), *review denied,* 198 Wn.2d 1036, 501 P.3d 141 (2022) (internal quotation marks and citations omitted). He *believed* he understood the elements of the offense, but he could not, since he didn't know the law was void.

Mr. Olsen's pleas were necessarily "unknowing and involuntary." *Mayer*, 128 Wn.App. at 705. Although he was aware of the facts, he did not have "an accurate understanding of the relation of [those] facts to the law." *Id.* at 704. In each case he acknowledged that he possessed a controlled substance, but he did not know that the law criminalizing his behavior was unconstitutional. *Blake*, 197 Wn.2d at 195.

The Supreme Court should grant review under RAP 13.4(b)(1) and (2). The Court of Appeals' published opinion conflicts with *Mayer, Paniagua, Markovich,* and *Evans*.

D. The Court of Appeals applied the wrong standard when deciding that Mr. Olsen had not shown actual and substantial prejudice.

Instead of recognizing the prejudice that flows from a conviction for lawful conduct, the Court of Appeals required Mr. Olsen to show that he would not have pled guilty had he known the conduct was non-criminal. OP 8. But no such showing is required. *See Hinton*, 152 Wn.2d 853, 859-860. Conviction for conduct that is not a crime is per se prejudicial, and there should be no bar to withdrawing a guilty plea.[12] *Id.*

The Court of Appeals erroneously suggests that Mr. Olsen must make an additional showing of actual and substantial prejudice to dissolve an indivisible plea agreement where one conviction is invalidated. OP 12-13. But defendants are not required to show that they would have insisted on a trial for the remaining counts. Instead, where one conviction is set

[12] Alternatively, Mr. Olsen has established actual and substantial prejudice because "it would have been rational to reject the plea agreement" for conduct that was lawful. OP 7.

aside, the entire agreement is dissolved. *Bradley*, 165 Wn.2d at 943-944; *Swagerty,* 186 Wn.2d at 810; *Chambers,* 176 Wn.2d at 577-578.

The Supreme Court should grant review under RAP 13.4(b)(1). The Court of Appeals' decision conflicts with *Hinton, Bradley, Chambers,* and *Swagerty.*

III. THE SUPREME COURT SHOULD ACCEPT REVIEW TO ADDRESS ISSUES THAT ARE OF SUBSTANTIAL PUBLIC INTEREST.

The Supreme Court's *Blake* decision has had sweeping effects, impacting "up to 250,000 individuals." Washington State Judicial Branch, *2023-25 Biennial Budget State v. Blake Public Defense Response.*[13] The Court of Appeals' published decision here will affect a significant number of those offenders, especially those who pled guilty to possession as part of an indivisible plea agreement.

[13] Available at 72 AE Blake Response Combined.pdf (wa.gov) (accessed 6/16/23).

Furthermore, "[a] disproportionate number of individuals convicted of simple drug possession are people of color." *Biennial Budget,* pp. 2, 5; *see also* Robin Hardwick, *Racial, Gender, and County Disparities for Simple Drug Possession Convictions in Washington State,* Washington Defender Association (2021).[14]

Data show that the application of RCW 69.50.4013 was "grossly uneven" in the way it was used to prosecute Black and brown people. Rich Smith, *New Data Analysis Shows the Astonishing Breadth of the Racial Disparity in Washington's Drug Possession Convictions,* The Stranger (2021).[15] The "racial disparities in drug prosecutions and convictions" are reflective of the broader problem: "that criminal laws are enforced against marginalized communities at disproportionate

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[14] Available at https://defensenet.org/racial-gender-and-county-disparities-for-simple-drug-possession-convictions-in-washington-state/ (accessed 6/16/23).

[15] https://www.thestranger.com/slog/2021/03/17/55910514/new-data-analysis-exposes-wide-racial-disparities-in-drug-possession-convictions-across-washington (accessed 6/16/23)

rates." *Blake*, 197 Wn.2d at 208 (Stephens, J., concurring in part, dissenting in part).

These disparities mean that the Court of Appeals' new restrictions on setting aside guilty pleas will likewise have a greater impact on people of color. The Supreme Court must grant review to "reaffirm [its] deepest level of commitment to achieving justice by ending racism." Open Letter from Wash. State Supreme Court to Members of Judiciary and Legal Community, p. 2 (June 4, 2020).[16]

Mr. Olsen is a person of color with Native American and African American heritage. His interactions with the criminal justice apparatus have necessarily been impacted by systemic racism.

For example, the county in which he pled guilty and later tried to withdraw his pleas shows significant racial disparities in

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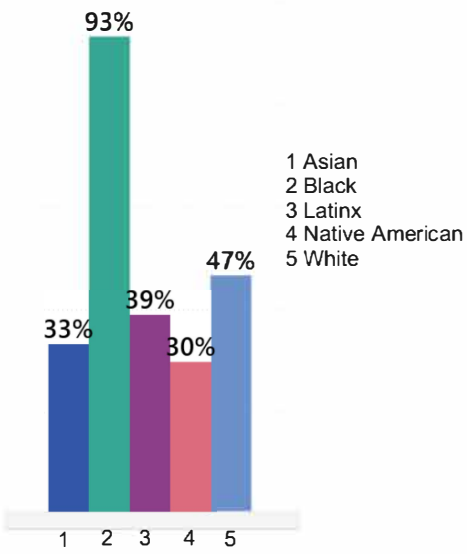
[16] Available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf (accessed 6/20/23).

sentencing, as illustrated in the chart below.[17] Although these figures are not directly applicable to Mr. Olsen's appeal, they provide some idea of the problems faced by people of color in the justice system.



Thurston County
Sentencing Disparities by Race
1999-2020[18]

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[17] The chart outlines a breakdown by race of sentence lengths in Thurston County, shown as a percentage of the standard range; thus 0% is a sentence at the low end and 100% is a sentence at the high end.

[18] Source: American Equity and Justice Group Dashboard (based on data from Washington Caseload Forecast Council), available at https://americanequity.org/dashboard.html (accessed 6/20/23).

In addition, the Court of Appeals' published opinion has implications for all cases involving withdrawal of guilty pleas, not just those affected by *Blake*. This is especially true for invalid pleas that were entered as part of an indivisible plea agreement.

The Court of Appeals created a distinction between pleas to "nonexistent crimes" and other invalid guilty pleas. OP 5. It refused to recognize that parties can negotiate indivisible plea agreements that involve crimes committed on different days and resolved in separate plea statements. OP 11-12.

The court proclaimed that a statute that is void *ab initio* can nonetheless create "a valid crime." OP 5. It concluded that a person can enter a knowing, intelligent, and voluntary plea to an offense defined by a void statute. OP 5-6. It also suggested that a guilty plea cannot be found involuntary based on subsequent changes in the law. OP 6-7.

The Court of Appeals decision raises "issue[s] of substantial public interest that should be determined by the

Supreme Court." RAP 13.4(b)(4). The court should grant review, reverse the Court of Appeals, and remand with instructions to allow Mr. Olsen to withdraw his guilty pleas to all charges, including the 2003 forgery charge and the 2005 firearms charge.

CONCLUSION

The Court of Appeals has issued a published opinion that will affect many Washington offenders, especially those who pled guilty to simple possession as part of a package deal. The Supreme Court should grant review to address issues of substantial public interest. The court should also grant review because the Court of Appeals' decision conflicts with several Supreme Court cases and with published opinions of the Court of Appeals.

Christopher Olsen must be allowed to withdraw his guilty pleas. Each of his convictions stems from an indivisible plea agreement that included invalid pleas to simple possession. The Supreme Court should grant review, reverse the Court of

Appeals, and remand with instructions to allow Mr. Olsen to withdraw his guilty pleas.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 6224 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted June 23, 2023.

BACKLUND AND MISTRY

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Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Christopher Olsen DOC# 831898
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 68520

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on June 23, 2023.

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

May 31, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent v. CHRISTOPHER LEE OLSEN, Appellant.	No. 56574-9-II (Consol. with No. 56577-3-II and No. 56584-6-II) PUBLISHED OPINION

LEE, J. — Christopher L. Olsen moved to withdraw his guilty pleas in three separate cases after our Supreme Court held in *State v. Blake*[1] that the unlawful possession of a controlled substance statute was unconstitutional. The superior court vacated Olsen's unlawful possession of a controlled substance convictions but denied his motions to withdraw his guilty pleas.

Olsen appeals, arguing that he is entitled to withdraw his guilty pleas to not only the unlawful possession of a controlled substance charges, but also his guilty pleas to the forgery and second degree unlawful possession of a firearm charges because the pleas were part of an indivisible plea agreement. Because Olsen is not entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges, the rule regarding withdrawal of indivisible pleas is not applicable. Therefore, we affirm the superior court.

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

FACTS

On August 15, 2003, the State charged Olsen with forgery committed on August 13, 2003. Then, on September 10, the State charged Olsen with unlawful possession of a controlled substance committed on September 7. Olsen pleaded guilty to both charges on the same day. Separate judgment and sentences, based on two separate cause numbers, were entered on each conviction.

On October 4, 2005, the State charged Olsen with unlawful possession of a controlled substance and second degree unlawful possession of a firearm. On January 17, 2006, Olsen pleaded guilty to both charges.

On October 6, 2021, Olsen filed motions under CrR 7.8, seeking to withdraw his guilty pleas in all three cases based on our Supreme Court's decision in *Blake*. Olsen argued that his motions were not time barred because his judgment and sentences were facially invalid due to the fact that his convictions for unlawful possession of a controlled substance were unconstitutional after the *Blake* decision. Olsen contended that he was entitled to withdraw his guilty pleas to the unlawful possession of a controlled substances charges because those convictions were void. Olsen then argued that his guilty pleas to the 2003 forgery and the 2005 second degree unlawful possession of a firearm charges were part of indivisible plea agreements with the unlawful possession of a controlled substance charges, and therefore, he is entitled to withdraw his pleas to all charges.

At the show cause hearing, Olsen clarified that he was asking to vacate his unlawful possession of a controlled substance convictions because they were void. Olsen argued that vacating the convictions required withdrawing his guilty pleas. And because the guilty pleas to unlawful possession of a controlled substance were indivisible from the guilty pleas to the other

charges, he was entitled to withdraw his guilty pleas to all charges that were part of the indivisible plea agreements.

The State conceded that Olsen was entitled to have his convictions for unlawful possession of a controlled substance vacated. But the State argued that vacating those convictions did not require allowing Olsen to withdraw his guilty pleas because the pleas were valid at the time that they were entered. Similarly, Olsen was not entitled to withdraw his guilty pleas to the forgery and second degree unlawful possession of a firearm charges.

The superior court ruled that Olsen's motions were not time barred because *Blake* was a significant, material, retroactive change in the law under RCW 10.73.100(6). The superior court also ruled that it was not required to allow Olsen to withdraw his voluntarily entered guilty pleas in order to vacate the unlawful possession of a controlled substance convictions. Thus, the superior court vacated Olsen's unlawful possession of a controlled substance convictions, but denied Olsen's motions to withdraw his guilty pleas.

Olsen appeals the superior court's orders denying his motions to withdraw his guilty pleas.

ANALYSIS

Olsen argues that because *Blake* rendered unlawful possession of a controlled substance a nonexistent crime, he was entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges. Olsen also argues that because his other convictions were part of indivisible plea agreements, he must be entitled to withdraw his guilty pleas in its entirety.

When a defendant is entitled to withdraw a guilty plea to one charge in an indivisible plea agreement, the defendant may move to withdraw the entire plea agreement. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). But here, Olsen was not entitled to withdraw his guilty pleas

to the unlawful possession of a controlled substance charges; therefore, he also is not entitled to withdraw his pleas to the forgery and second degree unlawful possession of a firearm charges.

A. OLSEN NOT ENTITLED TO WITHDRAW PLEAS TO UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

We review a trial court's order on a motion to withdraw a guilty plea for an abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). "A trial court abuses its discretion if its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A decision is based on untenable reasons if the court relies on an incorrect standard or the facts do not satisfy the correct standard. *Id.* A decision is based on untenable grounds if the superior court's factual findings are unsupported by the record. *Id.*

1. Knowing and Voluntary Plea

Olsen contends that he was entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges because (1) the holding in *Blake* that the unlawful possession of a controlled substance statute was unconstitutional means that unlawful possession of a controlled substance was a nonexistent crime at the time he entered his guilty pleas and (2) his guilty pleas to the unlawful possession of a controlled substance charges were invalid because a defendant cannot knowingly and voluntarily plead guilty to a nonexistent crime. Therefore, according to Olsen, the superior court erred in denying his motions to withdraw his guilty pleas to the unlawful possession of a controlled substance charges. We disagree.

"Due process requires that a guilty plea be knowing, voluntary, and intelligent." *In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 703, 117 P.3d 353 (2005). A guilty plea to a nonexistent crime is not knowing, voluntary, or intelligent. *Id.* at 705.

However, a conviction under a statute that is later determined to be unconstitutional is not the same as a conviction for a nonexistent crime. Rather, a nonexistent crime is conduct which, as charged, does not violate any criminal statute that existed at the time of the conviction. For example, in *In re Personal Restraint of Andress*, our Supreme Court held that second degree felony murder predicated on an assault was a nonexistent crime because the specific language of the second degree felony murder statute demonstrated that the Legislature did not intend for assault to be a predicate felony for felony murder. 147 Wn.2d 602, 611, 56 P.3d 981 (2002) ("The 'in furtherance of' language is strong indication that the Legislature does not intend that assault should serve as a predicate felony for second degree felony murder."). Similarly, in *In re Personal Restraint of Richey*, our Supreme Court held that the crime of attempted first degree felony murder does not exist in Washington because attempt is a specific intent crime and a person cannot intend to commit a crime that does not have an element of intent. 162 Wn.2d 865, 869, 175 P.3d 585 (2008) ("In electing to charge first degree felony murder, the State relieves itself of the burden to prove an intent to kill or, indeed, any mental element as to the killing itself. It follows that a charge of attempted felony murder is illogical in that it burdens the State with the necessity of proving that the defendant intended to commit a crime that does not have an element of intent."). When a defendant is convicted of a nonexistent crime, their conduct, as charged, simply does not actually violate any criminal statute that existed at the time of the plea.

In contrast, Olsen's conduct in 2003 and 2005 did violate a then existing criminal statute—unlawful possession of a controlled substance. Unlawful possession of a controlled substance was not a nonexistent crime; instead, it was a valid crime that was later invalidated.

Moreover, the reasoning underlying why pleading guilty to a nonexistent crime is not knowing, voluntary, and intelligent does not support Olsen's contention that his pleas to the

unlawful possession of a controlled substance charges were involuntary. A guilty plea to a nonexistent crime is invalid because the defendant is unaware of the elements of the offense and that their conduct fails to satisfy the elements of an offense. *See Mayer*, 128 Wn. App. at 703-95 (explaining that a guilty plea to a nonexistent crime is not knowing and intelligent because a defendant is misinformed about the elements of an offense and is unable to evaluate the evidence or the strength of the State's case); *cf. In re Pers. Restraint of Thompson,* 141 Wn.2d 712, 721, 10 P.3d 380 (2000) (plea invalid when defendant did not know that the charge to which he pleaded was enacted after his criminal conduct). Here, Olsen does not argue that at the time he pleaded guilty to unlawful possession of a controlled substance, he was misinformed as to the elements of the charge or that he was unable to determine whether his conduct violated the elements of that charge.

Also, a subsequent change in the law generally does not render a guilty plea not knowing, voluntary, or intelligent.[2] In *Lamb*, our Supreme Court held that a guilty plea could not be withdrawn because of a subsequent change in the law making a juvenile conviction for second degree burglary an offense that resulted in the loss of right to possess firearms. 175 Wn.2d at 129 ("Whether a plea is voluntary is determined by ascertaining whether the defendant was sufficiently informed of the direct consequences of the plea that existed *at the time* of the plea.") (emphasis in

[2] At the time Olsen pleaded guilty to unlawful possession of a controlled substance in 2003 and 2006, the statute making unlawful possession of a controlled substance a criminal offense was deemed constitutional. *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981) (holding it was within the legislature's authority to omit an intentional or knowing element to simple possession), *cert. denied*, 456 U.S. 1006 (1982); *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004) (holding a knowledge element is unnecessary when the legislature intentionally omits a mens rea element), *cert. denied*, 544 U.S. 922 (2005); *State v. Schmeling*, 191 Wn. App. 795, 801-02, 365 P.3d 202 (2015) (holding possession as a strict liability crime does not violate due process). It was not until years later, in 2021, that our Supreme Court declared the unlawful possession of a control substance statute unconstitutional. *Blake*, 197 Wn.2d at 186, 195.

original); *see also In re Pers. Restraint of Newlun*, 158 Wn. App. 28, 35, 240 P.3d 795 (2010) ("But, *Broce* makes it clear that 'a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.'" (internal quotation marks omitted) (quoting *United States v. Broce*, 488 U.S. 563, 572, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989))).

Here, Olsen does not argue that he was not aware of the elements of unlawful possession of a controlled substance or that his conduct failed to satisfy the elements of that offense when he pleaded guilty in 2003 and 2006. And there is nothing in the record that shows Olsen was misinformed as to the elements of unlawful possession of a controlled substance nor is there anything in the record that shows Olsen was not able to determine whether his conduct violated the elements of the unlawful possession of a controlled substance charge. Therefore, Olsen's guilty pleas to the unlawful possession of a controlled substance charges were knowing, voluntary, and intelligent.

2. Actual and Substantial Prejudice

Even if we agreed with Olsen that his guilty pleas to the unlawful possession of a controlled substance charges were not knowing, voluntary, and intelligent, the superior court did not err in denying Olsen's motion to withdraw his guilty pleas because he cannot show actual and substantial prejudice.

"A motion to withdraw a plea after judgment has been entered is a collateral attack." *State v. Buckman*, 190 Wn.2d 51, 60, 409 P.3d 193 (2018). To obtain relief in a collateral attack, a petitioner must show both error and that they were actually and substantially prejudiced. *Id.* Therefore, Olsen also needs to show actual and substantial prejudice to be entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges.

"Prejudice at the guilty plea stage means that the defendant would more likely than not have refused to plead guilty and would have insisted on going to trial." *Id.* at 65. To show actual and substantial prejudice, the petitioner must show that it would have been rational to reject the plea agreement and proceed to trial under the circumstances. *Id.* at 66.

"In evaluating claimed prejudice, we engage in an objective, rational person inquiry, rather than a subjective analysis." *Id.* at 66. "'[A] bare allegation that a petitioner would not have pleaded guilty if he had known all the consequences of the plea is not sufficient to establish prejudice.'" *Id.* at 67 (alterations in original) (quoting *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 782, 863 P.2d 554 (1993)).

Here, Olsen makes no argument and presents no evidence to support a claim that he was actually and substantially prejudiced. At the time that Olsen pleaded guilty, there is no reason supported by the record that a rational person would have rejected the guilty pleas and gone to trial on the unlawful possession of a controlled substance charges. Olsen does not even offer the bare assertion that he would have refused to plead guilty and proceeded to trial. Accordingly, Olsen cannot establish actual and substantial prejudice.

In sum, Olsen fails to show that his guilty pleas to unlawful possession of a controlled substance were not knowing, voluntary, and intelligent. Olsen also cannot establish actual and substantial prejudice resulting from his guilty pleas to the unlawful possession of a controlled substance charges. Therefore, Olsen has failed to show that he was entitled to relief in his CrR 7.8 motion, and the superior court did not abuse its discretion in denying his motion to withdraw his guilty pleas to the unlawful possession of a controlled substance charges.

B. WITHDRAWAL OF GUILTY PLEAS TO OTHER CHARGES – INDIVISIBILITY OF PLEAS

Olsen also argues that because his pleas to the 2003 forgery and 2005 second degree unlawful possession of a firearm charges were indivisible from the pleas to the unlawful possession of a controlled substance charges, he is entitled to withdraw those pleas as well. We disagree.

Olsen relies on *Turley*. In *Turley*, the defendant pleaded guilty to one count of first degree escape and one count of conspiracy to manufacture methamphetamine. 149 Wn.2d at 396. Three years after the defendant entered his plea, the State moved to amend the judgment and sentence to include a mandatory term of community custody that was not included in the original plea agreement or judgment and sentence. *Id.* at 396-97. After the superior court entered an amended judgment and sentence, the defendant moved to withdraw his plea agreement. *Id.* at 397. The superior court found that the guilty plea to the conspiracy to manufacture methamphetamine was involuntary because the defendant was not informed of the direct consequences of his plea. *Id.* The superior court also found that there was no error in the plea to escape because there was no mandatory community custody term on that charge. *Id.* at 397-98. The superior court granted the defendant's motion to withdraw his plea to the conspiracy to manufacture methamphetamine charge but not to the first degree escape charge. *Id.* at 398.

On appeal, our Supreme Court agreed that Turley had demonstrated that there was a manifest injustice under CrR 4.2(f)[3] and allowed Turley to withdraw the guilty plea to conspiracy to manufacture methamphetamine. *Id.* at 398-99. The court then held that "[w]hen the defendant can show manifest injustice as to one count or charge in an indivisible agreement, the defendant

[3] CrR 4.2(f) provides, "The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice."

may move to withdraw the plea agreement or have specific performance of the agreement." *Id.* at 400.

Following *Turley*, a defendant is entitled to withdraw all pleas in an indivisible plea agreement when they have demonstrated that they are entitled to withdraw at least one guilty plea in the indivisible plea agreement. As explained above, Olsen has failed to show that he is entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges. Other than relying on the argument that he is entitled to withdraw his guilty pleas to the unlawful possession of a controlled substance charges, Olsen makes no argument that there is an error entitling him to withdraw his guilty pleas to the 2003 forgery or 2005 second degree unlawful possession of a firearm charges separate from them being part of an indivisible plea with the unlawful possession of a controlled substance pleas.

Also, to the extent Olsen is arguing that the *Turley* holding applies simply because his convictions for unlawful possession of a controlled substance must be vacated (as opposed to he should be allowed to withdraw his guilty pleas to unlawful possession of a controlled substance), the analysis in *Turley* does not support such an extension of the holding in *Turley*. The holding in *Turley* was based explicitly on the withdrawal of guilty pleas under CrR 4.2. And the court reasoned that a manifest injustice in one plea justified withdrawal of the other pleas that were part of an indivisible plea agreement—in other words, a defendant is entitled to withdraw guilty pleas to all charges in the plea agreement if the defendant shows that they are entitled to withdraw their guilty plea to at least one charge in an indivisible plea agreement. There is nothing in *Turley* that supports extending its holding to situations where a defendant has failed to show that they are entitled to withdraw at least one of their guilty pleas. Accordingly, *Turley*'s indivisible plea rule

does not apply here because Olsen has not shown that he is entitled to withdraw any of his guilty pleas.

Even if the rule in *Turley* were to be extended to a situation in which some convictions are vacated (as opposed to allowing the defendant to withdraw the guilty plea), Olsen is not entitled to withdraw his guilty pleas to the 2003 forgery and 2005 second degree unlawful possession of a firearm charges. As explained below, the plea to the 2003 forgery charge was not part of an indivisible plea agreement; therefore, Olsen is not entitled to withdraw his guilty plea to the 2003 forgery charge. With regard to the 2005 second degree unlawful possession of a firearm guilty plea, while that guilty plea was part of an indivisible plea with the unlawful possession of a controlled substance guilty plea, Olsen fails to show actual and substantial prejudice; therefore, Olsen is not entitled to withdraw his guilty plea to the 2005 second degree unlawful possession of a firearm charge.

1. 2003 and 2005 Pleas

Olsen argues that his 2003 and 2005 plea agreements were indivisible plea agreements. We disagree with regard to the 2003 guilty plea on the forgery charge, but agree with regard to the 2005 guilty plea on the second degree unlawful possession of a firearm charge.

"A plea agreement is essentially a contract made between a defendant and the State." *Id.* When a defendant is entitled to withdraw one count or charge in an indivisible plea agreement, the defendant may withdraw the entire plea agreement. *Id.* "[A] trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding." *Id.*

Here, the 2003 forgery charge was not part of an indivisible plea agreement. Although the guilty pleas to the forgery and unlawful possession of a controlled substance charges were entered

at the same time and in the same proceeding, the offenses were committed at separate times, charged in separate informations, and resolved in separate documents. Therefore, the 2003 forgery charge was not part of an indivisible plea agreement with the 2003 unlawful possession of a controlled substance charge. Accordingly, even if we extend *Turley* to circumstances where one conviction is vacated, Olsen is not entitled to withdraw his guilty plea to the 2003 forgery charge because it was not part of an indivisible plea agreement.

In contrast, the 2005 unlawful possession of a controlled substance charge and the 2005 second degree unlawful possession of a firearm charge were committed on the same day, charged in the same information, pleaded guilty to on the same day and in the same document, and resolved in the same judgment and sentence from the same proceeding. Therefore, Olsen's guilty plea to the 2005 charges were part of an indivisible plea agreement. However, although the 2005 guilty plea to second degree unlawful possession of a firearm was part of an indivisible plea agreement, Olsen must still show actual and substantial prejudice to be entitled to relief.

2. Actual and Substantial Prejudice

As explained above, to obtain relief in a collateral attack, a petitioner must show both error and that they were actually and substantially prejudiced. *Buckman*, 190 Wn.2d at 60.[4] Thus, to

[4] In *In re Personal Restraint of Bradley*, our Supreme Court applied the indivisible plea rule from *Turley* and held the petitioner was entitled to withdraw both pleas in an indivisible plea agreement because of an error in one of the pleas without requiring a showing of actual and substantial prejudice. 165 Wn.2d 934, 941-43, 205 P.3d 123 (2009).

Although *Bradley* appears to support Olsen's argument, our Supreme Court later disavowed *Bradley* in *Buckman*. In *Buckman*, the court explained:

> [W]e briefly veered from [the] clear standard in *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 296, 88 P.3d 390 (2004), and in *In re Personal Restraint of Bradley*, 165 Wn.2d 934, 205 P.3d 123 (2009), both of which failed to require the petitioner to show actual and substantial prejudice of any kind. We subsequently

be entitled to relief, Olsen must show that it is more likely than not that he would have refused to plead guilty and would have gone to trial. *See id.* at 65. A bare allegation that he would not have pleaded guilty to the 2005 second degree unlawful possession of a firearm charge is insufficient; Olsen must show that it would have been rational to reject the plea agreement. *See id.* at 65-66.

Here, Olsen makes no argument attempting to show actual and substantial prejudice. Olsen does not even offer a bare assertion that he would not have pleaded guilty or entered the 2005 plea agreement. Based on the record before us, we can conceive of no argument that shows Olsen was prejudiced in any way from pleading guilty as charged to the 2005 second degree unlawful possession of a firearm charge. Therefore, Olsen has failed to meet his burden to show actual and substantial prejudice, and he is not entitled to withdraw his 2005 guilty plea to the second degree unlawful possession of a firearm charge.

CONCLUSION

Olsen fails to show that his guilty pleas to unlawful possession of a controlled substance charges were not entered into knowingly, voluntarily, and intelligently. Therefore, although he is entitled to having his guilty pleas to unlawful possession of a controlled substance vacated pursuant to *Blake*, Olsen is not entitled to withdraw his guilty pleas to those charges.

> corrected this detour. We have explained that "*Isadore* did not require the petitioner to show actual and substantial prejudice because the unique circumstances of the case compelled the court to apply the direct appeal standard rather than the personal restraint petition standard." [*In re Pers. Restraint of*] *Yates*, 180 Wn.2d [33,] 40, 321 P.3d 1195 (citing [*In re Pers. Restraint of*] *Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 [(2014)]). We further explained that *Bradley*, by citing *Isadore*, mistakenly applied that same direct appeal standard.

190 Wn.2d at 63 n.9. Thus, *Buckman* was clear that to obtain relief from a collateral attack, the petitioner must demonstrate actual and substantial prejudice. *Id.* at 65.

Because Olsen is not entitled to withdraw his pleas to the unlawful possession of a controlled substance charges, *Turley* does not apply. And even if we extend the holding in *Turley* to circumstances where a conviction is vacated, there remains no basis to allow Olsen to vacate his 2003 forgery and 2005 second degree unlawful possession of a firearm guilty pleas. The 2003 guilty plea to forgery was not part of an indivisible plea, and although the 2005 guilty plea to second degree unlawful possession of a firearm was part of an indivisible plea, Olsen fails to show actual and substantial prejudice. Therefore, we affirm the superior court's orders denying Olsen's motions to withdraw his guilty pleas.

Lee, J.

We concur:

Maxa, P.J.

Che, J.

BACKLUND & MISTRY

June 23, 2023 - 9:28 AM

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