

FILED  
Court of Appeals  
Division II  
State of Washington  
4/2/2018 9:22 AM  
Court of Appeals No. 50516-9-II

**IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

---

In Re the Personal Restraint of:

NICHOLAS NATHANIEL MARTIN,

Petitioner.

---

**PETITIONER'S REPLY BRIEF**

---

Pierce County Superior Court No. 14-1-03264-3

---

Corey Evan Parker  
1275 12th Ave NW, Suite 1B  
Issaquah, Washington 98027  
Ph: 425-221-2195  
Fax: 1-877-802-8580  
corey@coreyevanparkerlaw.com  
Attorney for Petitioner

## TABLE OF CONTENTS

I. ARGUMENTS IN REPLY .....	1
A. THE PETITION IS NOT TIME BARRED.....	1
B. MARTIN’S PETITION INCLUDES AN ADEQUATE RECORD OF INEFFECTIVE ASSISTANCE OF COUNSEL .....	5
II. CONCLUSION .....	7

**TABLE OF AUTHORITIES**

**Cases**

In re Reise, 146 Wn. App. 772, 192 P.3d 949, 956 (2008)..... 1

In re Rice, 118 Wn. 2d 876, 828 P.2d 1086 (1992) ..... 6

In re Stockwell, 179 Wn.2d 588, 316 P.3d 1007, 1011(2014) ..... 1

In re Toledo-Sotelo, 176 Wn.2d 759, 764, 297 P.3d 51 (2013)..... 1

Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835, 851  
(1994), ..... 1

Matter of Webster, 74 Wn. App. 832, 875 P.2d 1244 (1994)..... 6

State v. Burke, 132 Wn. App. 415, 132 P.3d 1095 (2006) ..... 5

State v. Jury, 19 Wn. App. 256, 265, 576 P.2d 1302, 1308 (1978) ..... 7

State v. McNeal, 98 Wn. App. 585, 991 P.2d 649 (1999) ..... 6

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996) ..... 1

State v. Valdez-Mendoza, 2011 MT 214, 361 Mont. 503, 260 P.3d 151  
(2011) ..... 3

Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984) ..... 3

**Statutes**

RCW 10.73.090(1)..... 1

RCW 7.36 ..... 7

## TABLE OF AUTHORITIES

### Rules

RAP 16.3.....	7
---------------	---

## I. ARGUMENTS IN REPLY

### A. THE PETITION IS NOT TIME BARRED

A personal restraint petition is time barred if it is filed more than one year after the judgment becomes final. RCW 10.73.090(1). An untimely personal restraint petition may be heard, however, if the judgment and sentence was not valid on its face, or if there is an exception to the RCW 10.73.100. In re Toledo-Sotelo, 176 Wn.2d 759, 764, 297 P.3d 51 (2013). The newly discovered evidence exception under RCW 10.73.100(1) to the one-year statute of limitations applies as “[a] petitioner who pleaded guilty and who subsequently seeks relief from personal restraint, on the basis of newly discovered evidence, must show that his plea was coerced or obtained in violation of due process.” In re Reise, 146 Wn. App. 772, 785, 192 P.3d 949, 956 (2008). Here, Martin’s plea was in violation of his due process rights and an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.” In re Stockwell, 179 Wn.2d 588, 594–95, 316 P.3d 1007, 1011(2014) (citing State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)).

“Newly discovered evidence is grounds for relief in a personal restraint petition if those facts “in the interest of justice require” vacation of the conviction or sentence. RAP 16.4(c)(3)”. Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 319–20, 868 P.2d 835, 851 (1994), decision

clarified sub nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994). Under that test for newly discovered evidence, the defendant must show that the evidence “(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Id.*

Here, Martin’s claims of ineffective assistance of counsel meet the test for newly discovered evidence. As stated in Martin’s personal restraint petition, Martin was erroneously advised by his counsel that if he went to trial his prior criminal record would come into evidence before the jury to prove his unlawful possession of a firearm charge. *See PRP* at 15. Martin acted consistently with his counsel’s advice and plead guilty erroneously believing that he had no chance of prevailing at trial for that reason. He discovered recently though when conferring with his current counsel that the evidence of a prior conviction does not require “naming the particular offense.” *Id.* This is material, as Martin would not have accepted the plea offer, had he known he could simply admit to the conviction and no details would be introduced. *Id.*

Further, Martin’s attorney advised him and his family that if he went to trial, he would not get a fair trial because he is black and the jury would be middle class and white; therefore, he should accept the plea deal.

*See PRP Appendix, Exhibit “E,” Declaration of Conchata Gaston-Martin, ¶ 5, January 14, 2017; See PRP Appendix, Exhibit “F,” Declaration of Nicholas Martin ¶ 5; See PRP Appendix, Exhibit “G,” Declaration of Annette Green, ¶ 4, January 18, 2017; See PRP Appendix, Exhibit “H,” Declaration of Camille Bea, ¶ 4, February 21, 2017.*

The Eighth Circuit Court of Appeals has long recognized that where counsel gave a defendant and his family the impression that the defendant would have to prove his innocence, in violation of the Constitution, because the defendant was black and his jury would be white, preventing him from obtaining a fair trial, counsel is ineffective. Thomas v. Lockhart, 738 F.2d 304, 309 (8th Cir. 1984). In Thomas, defense counsel made remarks which led Thomas to believe that racial prejudice would determine the jury verdict. Id. Where counsel’s statements left the family with the understanding that “to go to trial would be an exercise in futility” based upon his race, these statements go beyond persuasion and constitute coercion, rendering the plea involuntary. Id.

Similarly, in State v. Valdez-Mendoza, the Montana Supreme Court held that when counsel makes a misrepresentation to a client that induces a defendant to plead guilty, that plea is involuntary, and grounds exist to withdraw his guilty plea. State v. Valdez-Mendoza, 2011 MT 214,

16, 361 Mont. 503, 260 P.3d 151 (2011). In Valdez-Mendoza, counsel told the defendant that she did not believe he could get a fair trial because of his race. The Montana Supreme Court held that “[t]here is a clear distinction between advising a client that they cannot or are unlikely to prevail at trial and telling a client that they cannot receive a fair trial based on race or ethnicity. The former properly falls within defense counsel’s duty to their client. The latter, on the other hand, constitutes a misrepresentation, essentially informing a defendant that they are not entitled to either an impartial jury or the presumption of innocence as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution...” Id.

Here, Martin’s trial counsel improperly advised him that his race would prevent him from having a fair trial. These claims of ineffective assistance of counsel meet the test for newly discovered evidence. Martin acted consistently with his counsel’s advice that he would not receive a fair trial and plead guilty. He plead guilty relying on the erroneous advice that he had no chance of prevailing at trial for that reason. He discovered recently though when conferring with his current counsel that defense counsel’s assertions were inaccurate and impermissible under the law. This is material, as Martin would not have accepted the plea offer, had he known his race would not preclude him from obtaining a fair trial. The

revelations that defense counsel so egregiously misadvised Martin are newly discovered evidence, excepting Martin's petition from the one-year statute of limitations. This petition is timely and Martin is entitled to relief.

**B. MARTIN'S PETITION INCLUDES AN ADEQUATE RECORD OF INEFFECTIVE ASSISTANCE OF COUNSEL**

The State's arguments in response center on the allegation that Martin only presents his own conclusory and self-serving statements to support his claims of ineffective assistance of counsel. (SR at 21.)

However, in a footnote, the State acknowledges that Martin attached affidavits from not only himself, but several witnesses. (SR at 21, fn. 5.)

There is clearly additional evidence beyond Martin's own affidavit, which supports the claims he made in his petition. The State summarily dismisses the three additional affidavits as not supporting Martin's assertions he was misadvised by counsel and coerced. *Id.* The State seems to suggest that the only way to demonstrate ineffective assistance of counsel in this instance is to obtain an affidavit from his defense counsel, admitting to her own ineffectiveness. (SR at 21). This is not correct.

The very nature of ineffective assistance of counsel claims, and why they often must be brought in personal restraint petitions, as opposed to direct appeal, hinge on the fact that not all deficiencies of counsel would be apparent from the record. State v. Burke, 132 Wn. App. 415, 132

P.3d 1095 (2006) (Where a defendant wishes to raise issues concerning ineffective assistance of counsel that require evidence or facts not in the trial record, the appropriate means of doing so is through a personal restraint petition); State v. McNeal, 98 Wn. App. 585, 991 P.2d 649 (1999), aff'd, 145 Wn. 2d 352, 37 P.3d 280 (2002) (Allegations of trial counsel's ineffectiveness in failing to move to suppress evidence could not be considered on direct appeal because record did not fully show officers' reasons for warrantless search; the issue could be properly raised in personal restraint proceeding where an additional fact-finding hearing could be ordered.)

While bald assertions and conclusory allegations will not support a petitioner's entitlement to a hearing, a petitioner must state with particularity facts which, if proven, would entitle him to relief. In re Rice, 118 Wn. 2d 876, 828 P.2d 1086 (1992); Matter of Webster, 74 Wn. App. 832, 875 P.2d 1244 (1994) (Bare assertions and conclusory allegations are not sufficient to command judicial consideration and discussion in personal restraint proceeding.) If a petitioner's evidence is based on knowledge which is not his own, he must present the affidavits of those who have the information or other corroborative evidence to be entitled to reference hearing. In re Rice, supra 118 Wn. 2d 876.

“There are two ways to break the vicious circle of an empty record created by ineffective counsel. First, evidence dehors the record can be submitted by affidavit on a motion for new trial. [citations]. Second, evidence dehors the record can be submitted in a personal restraint petition and hearing. State v. Jury, 19 Wn. App. 256, 265, 576 P.2d 1302, 1308 (1978); citing RAP 16.3 et seq., RCW 7.36; State v. White, 81 Wn.2d 223, 226, 500 P.2d 1242, 1243 (1972). Here, Martin has submitted evidence that he was misadvised and coerced into taking the plea via affidavit, which support the claims made in his petition. Minimally, this Court should remand for an evidentiary hearing where Martin may present witness testimony regarding the issue of ineffective assistance of counsel.

## II. CONCLUSION

For the foregoing reasons, this Court should grant the petition and, at a minimum afford Mr. Martin an evidentiary hearing.

DATED this 2nd day of April, 2018.

Respectfully submitted,



Corey Evan Parker  
1275 12th Ave NW, Suite 1B  
Issaquah, WA 98027  
Ph: 425-221-2195  
Fax: 1-877-802-8580  
corey@coreyevanparkerlaw.com  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on April 2, 2018, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

Attorney for Respondent:

Britta Halverson  
[bhalver@co.pierce.wa.us](mailto:bhalver@co.pierce.wa.us)  
[PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us)

- By First Class Mail
- By Fed Express
- By Facsimile
- By Hand Delivery
- By Messenger
- By Email

/s/ Corey Evan Parker  
Corey Evan Parker

**LAW OFFICE OF COREY EVAN PARKER**

**April 02, 2018 - 9:22 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50516-9  
**Appellate Court Case Title:** Personal Restraint Petition of: Nicholas Martin  
**Superior Court Case Number:** 14-1-03264-3

**The following documents have been uploaded:**

- 505169\_Personal\_Restraint\_Petition\_20180402092134D2388181\_2105.pdf  
This File Contains:  
Personal Restraint Petition - Reply to Response to PRP/PSP  
*The Original File Name was PRP Reply - Nicholas Martin.pdf*

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

- PCpatcecf@co.pierce.wa.us
- bhalver@co.pierce.wa.us

**Comments:**

---

Sender Name: Corey Parker - Email: corey@coreyevanparkerlaw.com

Address:

1230 ROSECRANS AVE STE 300  
MANHATTAN BEACH, CA, 90266-2494  
Phone: 425-221-2195

**Note: The Filing Id is 20180402092134D2388181**