

FILED  
Court of Appeals  
Division II  
State of Washington  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

JUAN ORTIZ,

Petitioner.

NO. 52195-4-II

Consolidated with No. 53300-6-II

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should the petition be dismissed as inadequately presented for review, where petitioner fails to support his allegations with competent evidence?
2. Must the petition be dismissed where petitioner fails to show actual and substantial prejudice stemming from an error of constitutional magnitude as he cannot show pre-plea ineffective assistance of counsel?
3. Must the petition be dismissed where petitioner fails to show actual and substantial prejudice stemming from an error of constitutional magnitude as he cannot show an invalid guilty plea?

B. STATUS OF PETITIONER:

Petitioner, Juan Ortiz, is restrained pursuant to a Judgment and Sentence entered on June 25, 2018, in Pierce County Cause Number 10-1-02057-0. CP 40-53. For a statement

of the case, *see* the State's response brief in the direct appeal (consolidated with this personal restraint petition).

In this personal restraint petition, petitioner alleges (1) ineffective assistance of counsel, (2) an involuntary plea, and (3) the trial court erred in failing to consider the mitigating factors of youth and mental disability before imposing sentence. Regarding the third issue, the State relies on its response in the direct appeal. The State's response to the first two issues is below.

C. ARGUMENT:

Personal restraint procedure came from the State's habeas corpus remedy, which is guaranteed by article 4, § 4 of the Washington State Constitution. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Collateral attack includes personal restraint petitions, motions to vacate judgment, and motions to withdraw guilty plea. RCW 10.73.090(2). Collateral attack by personal restraint petition is not, however, a substitute for direct appeal. *In re Hagler*, 97 Wn.2d at 824. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *In re Hagler*, 97 Wn.2d at 824 (citing *Engle v. Issac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. *In re Hagler*, 97 Wn.2d at 824.

In a collateral action, the petitioner must prove constitutional error resulted in actual prejudice. Mere assertions are inadequate to demonstrate actual prejudice. The rule constitutional error must be proven harmless beyond a reasonable doubt has no application. *In re Pers. Restraint of Mercer*, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); *In re Hagler*, 97 Wn.2d at 825. A petitioner must show a fundamental defect resulted in a

complete miscarriage of justice to obtain collateral relief for alleged nonconstitutional error. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than actual prejudice. *Id.* at 810. “After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence.” *Id.* at 814 (citing *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 89, 660 P.2d 263 (1983)). Inferences must be drawn in favor of the judgment’s validity. *In re Hagler*, 97 Wn.2d at 825-826.

Reviewing courts have three options in evaluating personal restraint petitions:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
2. If a petitioner makes a prima facie showing of actual prejudice or a miscarriage of justice, but the merits cannot be determined on the record, the court should remand for a hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudice arising from constitutional error or a miscarriage of justice, the petition should be granted.

*In re Hews*, 99 Wn.2d at 88.

1. THE PETITION SHOULD BE DISMISSED AS INADEQUATELY PRESENTED FOR REVIEW WHERE PETITIONER FAILS TO SUPPORT HIS CLAIMS WITH COMPETENT EVIDENCE.

A personal restraint petitioner is required to provide “the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations. . . .” RAP 16.7(a)(2)(i). This requirement means that a “petitioner must state with particularity facts which, if proven, would entitle him to relief.” *In re Pers.*

*Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations are insufficient to support a claim. *Id.*

Collateral attack claims must be supported by affidavits stating particular facts, certified documents, certified transcripts, and the like. RAP 16.7(a)(2); *Petition of Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988); *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 451, 28 P.3d 729 (2001). Arguments unsupported by applicable authority, citation to the record, or meaningful analysis should not be considered. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *State v. Camarillo*, 54 Wn. App. 821, 829, 776 P.2d 176 (1989) (no references to the record); *In re Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record and construct arguments)). *See also*, RAP 10.3(a)(6) (petitioner's brief should contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); RAP 16.7(a)(2); RAP 16.10(d).

Petitioners "must present evidence showing [] factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *In re Rice*, 118 Wn.2d at 886-87. "[A] mere statement of evidence [] petitioner believes will prove [] allegations is not sufficient." *Id.* Facts alleged in inherently unreliable or factually deficient declarations are not be considered as proof of a claim. *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 780-81, 192 P.3d 949 (2008) (citing *State v. Taylor*, 83 Wn.2d 594, 597-98, 521 P.2d 699 (1974)). A petition must be dismissed when the petitioner fails to provide sufficient evidence to support its claims. *Id.*; *In re Rice*, 118 Wn.2d at 885-86, 893. *See also*, *In re Pers. Restraint of Newlun*, 158 Wn. App. 28, 34, 240 P.3d 795 (2010) (an appellate court

is permitted to review a double jeopardy claim made on collateral attack only if the record is sufficient to establish the violations).

The fact that petitioner is pro se does not eliminate or diminish his obligation to comply with the above legal requirements. The law holds pro se litigants to the same standard as attorneys. *See Matter of Rhem*, 188 Wn.2d 321, 328, 394 P.3d 367 (2017) (“we hold [pro se petitioners] to the same standard as an attorney”); *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010) (“A trial court must hold pro se parties to the same standards to which it holds attorneys.”); *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (“[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws” (internal quotation omitted)).

Here, petitioner claims he received ineffective assistance of counsel, because his attorney (1) failed to provide petitioner with discovery when requested, (2) failed to answer petitioner’s questions, (3) promised petitioner the low end of the standard range before the plea and then violated that promise after petitioner entered his guilty plea, (4) refused to help petitioner file a motion to withdraw his guilty plea, and (5) failed to inform petitioner that by pleading guilty, petitioner “waived [his] right to use *Houston-Sconiers*.”<sup>1</sup> *See* PRP and petitioner’s Letter of Declaration

Ineffective assistance of counsel must be proved by more than a petitioner’s self-serving allegations. *See In re Connick*, 144 Wn.2d at 451; *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Petitioner provides nothing beyond his bald assertions that his attorney failed to provide discovery when requested, failed to answer petitioner’s questions, and failed to inform him regarding his purported waiver of *Houston-Sconiers*. This is insufficient to support his claim. *In re Rice*, 118 Wn.2d at 886. The same can be

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<sup>1</sup> *See State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

said for petitioner's assertions that his attorney broke his promise to seek the low end and refused to help petitioner file a motion to withdraw his guilty plea.<sup>2</sup> Although these claims are also mentioned in the "declaration" of petitioner's nephew Isai Alvarez, they consist of inadmissible hearsay, as Mr. Alvarez merely repeats what petitioner's attorney allegedly told petitioner.<sup>3</sup> See PRP Declaration of Isai Alvarez. Petitioner must present evidence showing his factual allegations are based on more than inherently unreliable and inadmissible hearsay. *In re Rice*, 118 Wn.2d at 886-87; *In re Reise*, 146 Wn. App. at 780-81. He fails to do so.

While petitioner also claims his attorney violated the Rules of Professional Conduct (RPCs) by speaking with petitioner's family members about his case, he fails to explain how such alleged communication creates a conflict of interest or constitutes professional misconduct.<sup>4</sup> Arguments unsupported by meaningful analysis should not be considered. See *Cowiche Canyon*, 118 Wn.2d at 809; *et al.* Moreover, nowhere does petitioner allege his attorney revealed confidential information, violated the attorney-client privilege, or even spoke with petitioner's family without his permission.

The petition here is inadequately presented for review. Petitioner fails to provide competent, admissible evidence to support his claims. There are no affidavits from witnesses with *actual* personal knowledge about the representation (such as the attorney he accuses of ineffectiveness). Petitioner cannot successfully fill the resulting evidentiary void by repeatedly quoting himself, for a petitioner may not support an ineffective assistance of counsel claim through his own self-serving affidavits. *Osborne*, 102 Wn.2d at 97; *In re*

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<sup>2</sup> As shown in the following section, these claims are also directly contradicted by the record.

<sup>3</sup> It is worth noting that the Declaration of Isai Alvarez is purportedly signed and dated 02/15/2019 and indicates that additional pages are attached, and yet the handwritten letter from Isai Alvarez is signed and dated a month later, on 03/13/2019. It is therefore unclear if the letter is appropriately part of the declaration (i.e., declared to be true under penalty of perjury).

<sup>4</sup> The Rules of Professional Conduct (RPCs) do not embody the constitutional standard for effective assistance of counsel. See *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 349, 325 P.3d 142 (2014); *State v. White*, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995).

*Reise*, 146 Wn. App. at 789. Here, the petition can fairly be characterized as consisting of “bald assertions and conclusory allegations.” *In re Rice*, 118 Wn.2d at 886. This is insufficient. Petitioner fails to meet his burden of proof, and as a result, this Court should dismiss the petition in its entirety.

2. PETITIONER’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE WITHOUT MERIT AND SHOULD BE DISMISSED.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also, Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is

whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694.

When evaluating an ineffective assistance argument, the utmost deference must be given to counsel’s tactical and strategic decisions. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007). A fair assessment of trial attorney performance requires “every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 690. The defendant bears the burden of establishing the absence of any “conceivable” legitimate strategy or tactic explaining counsel’s performance to rebut the strong presumption that counsel’s performance was effective. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

A petitioner must demonstrate both prongs of the *Strickland* test,<sup>5</sup> but a reviewing court is not required to address both prongs of the test if the petitioner makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d 225-26.

Here, petitioner can only prevail in his claim if he proves by a preponderance of the evidence counsel's presumptively effective representation was deficient and the deficiency resulted in actual prejudice by inducing the petitioner to enter a plea he would have otherwise rejected. *In re Crace*, 174 Wn.2d at 840.

- a. Petitioner fails to overcome the strong presumption counsel effectively advised him about the plea and otherwise provided effective assistance.

To prove deficiency, petitioner must prove counsel failed to substantially assist him in deciding whether to plead guilty. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 706, 327 P.3d 660 (2014) (citing *State v. McCollum*, 88 Wn. App. 977, 982-83, 947 P.2d 1235 (1997)); *Osborne*, 102 Wn.2d at 99; *In re Pers. Restraint of Peters*, 50 Wn. App. 702, 703, 750 P.2d 643 (1988)). Substantial assistance consists of aiding a criminal defendant in evaluating the evidence against him and discussing the direct consequences of the plea, so the defendant can make an informed decision on whether or not to plead guilty. *In re Pers. Restraint of McCready*, 100 Wn. App. 259, 263, 996 P.2d 658 (2000); *State v. Malik*, 37 Wn. App. 414, 416, 680 P.2d 770 (1984). Again, deficient performance must be proved by more than a petitioner's self-serving allegations. *See Connick*, at 451; *Osborne*, 102 Wn.2d at 97.

Petitioner claims his attorney advised him that he was "positive" petitioner would receive the low end based on his youth and mental disabilities if petitioner pleaded guilty,

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<sup>5</sup> A personal restraint petitioner who makes a successful ineffective assistance of counsel claim has necessarily met his burden to show actual and substantial prejudice. *See In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

and then after petitioner pleaded guilty his attorney “inform[ed] [petitioner] that he could not get...the low end anymore.” *See* PRP Letter of Declaration. These claims are directly contradicted by the record. Petitioner was specifically advised in his statement on plea of guilty that the judge did not have to follow anyone’s recommendation as to sentence. CP 11. Petitioner’s attorney affirmed the same during the plea hearing. 2/14/18 RP 6 (“Mr. Ortiz understands that the judge does not have to follow anyone’s recommendation as to the sentence.”). And, the judge orally confirmed that petitioner understood the court was “not obliged to follow anybody’s recommendation.” 2/14/18 RP 14. This obviously meant a low end sentence was not guaranteed. Following petitioner’s guilty plea, his attorney asked the court to impose the low end of the standard range. *See* CP 10, 24-31; 6/25/18 RP 13 (“The Defense is requesting the Court sentence Mr. Ortiz to the low end of the standard range.”), 17 (“We ask the Court that a low end of the standard range sentence is the appropriate sentence here.”). Petitioner’s attorney followed through on his promise to request the low end, which, again, was never a guaranteed sentence. Petitioner’s claim of deficient performance accordingly fails.

Petitioner claims his attorney refused to help him file a motion to withdraw his guilty plea. This claim is also contradicted by the record. At sentencing, petitioner’s attorney informed the court that petitioner wanted to withdraw his guilty plea. 6/25/18 RP 4. Petitioner did not inform his attorney regarding the basis for the withdrawal. *Id.* Petitioner’s attorney, however, asked the court to continue sentencing to allow him to consult with petitioner. 6/25/18 RP 4-5. The court denied the request. 6/25/18 RP 8. By all accounts, petitioner’s attorney was ready and willing to assist petitioner as needed. *See also*, CP 54-55; 6/25/18 RP 6-8. Petitioner’s claim of deficient performance again fails.

Finally, petitioner claims his attorney failed to inform him about *State v. Houston-Sconiers* and his ability to request an exceptional mitigated sentence. Again, petitioner's claim consists of a bald assertion without evidentiary support. *Rice*, 118 Wn.2d at 886. This is insufficient. His claim of ineffective assistance of counsel must be proved by more than his self-serving allegation. *In re Connick*, 144 Wn.2d at 451; *Osborne*, 102 Wn.2d at 97. Moreover, petitioner's statement on plea of guilty made clear that as part of the plea agreement, petitioner was limited to requesting the low end of the standard range. CP 10. *See also*, 2/14/18 RP 4-6 (petitioner's attorney informs the court that the State and defense have different sentencing recommendations, and "[n]o one in this case will be asking for an above or below the standard range sentence."); CP 28 (defense acknowledges "that the parties have considered the Defendant's 'youth' in negotiating this case and the Defense has specifically agreed to not use the Houston-Sconiers factors as a basis for recommending an exceptional sentence below the standard range."). Petitioner fails to demonstrate his attorney did not appropriately advise him and thus fails to show deficient performance.

Petitioner also claims his attorney's alleged violations of RPCs 1.4(a)(4), 1.8(a)(1), and 8.4 constitute ineffective assistance of counsel. However, "the RPCs do not 'embody the constitutional standard for effective assistance of counsel.'" *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 349, 325 P.3d 142 (2014) (quoting *State v. White*, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995)). "Rather, they serve as mere guides for determining what is reasonable." *Id.* (citing *Strickland*, 466 U.S. at 688-89). Again, petitioner fails to provide competent evidence that his attorney failed to provide him with discovery or other requests for information (RPC 1.4(a)(4)), fails to provide any evidence (competent or

otherwise) that his attorney had a conflict of interest by entering into a business transaction with petitioner (RPC 1.8(a)(1)), and fails to explain or demonstrate how, specifically, his attorney committed misconduct (RPC 8.4) by speaking with petitioner's family.

Counsel's effectiveness remains uncontroverted by competent evidence. Because petitioner fails to demonstrate deficient performance, his claim of ineffective assistance of counsel fails. *See Thomas*, 109 Wn.2d at 225-26.

b. Petitioner has not proved he was prejudiced by the alleged deficiency.

"There is a strong public interest in the enforcement of plea agreements when they are voluntarily and intelligently made." *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). The prejudice prong is analyzed in terms of whether counsel's performance affected the outcome of the plea process. *State v. Garcia*, 57 Wn. App. 927, 932-33, 791 P.2d 244 (1990) (citing *Hill v. Lockart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). The petitioner must satisfy this Court there is a reasonable probability that, but for counsel's deficient performance, the petitioner would not have pled guilty and would have insisted on trial. *Id.* Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself before entry of the plea. *Id.* These predictions should be made objectively, without regard for "idiosyncrasies of the particular decision maker." *Hill*, 474 U.S. at 59-60 (quoting *Strickland*, 466 U.S. at 695). A trial court can rely on the written plea agreement to make this determination where, as here, the petitioner presumptively averred he read it and its statements are truthful. *See Codiga*, 162 Wn.2d at 923; *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 204-09, 622 P.2d 360 (1980); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001).

Bare assertions petitioner would not have pleaded guilty but for counsel's alleged deficiency is not sufficient to establish prejudice. *In re Rice*, 118 Wn.2d at 886; *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 782, 863 P.2d 554 (1993).

As with the deficiency prong, petitioner fails to prove actual prejudice. He adduced nothing beyond legally inadequate assertions he would have proceeded to trial had counsel (1) not pressured him into pleading guilty, (2) not promised a low end sentence, and (3) informed petitioner that his plea waived the right to request an exceptional sentence below the standard range. Those assertions are directly impeached by his plea, and they are indirectly impeached through his failure to adduce competent supporting evidence. Petitioner fails to make the required showing of constitutional error and actual prejudice for his claim of ineffective assistance of counsel to prevail on the merits; therefore, his petition should be dismissed.

3. PETITIONER FAILS TO SHOW ACTUAL AND SUBSTANTIAL PREJUDICE STEMMING FROM AN ERROR OF CONSTITUTIONAL MAGNITUDE AS HE CANNOT SHOW AN INVOLUNTARY GUILTY PLEA.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Robinson*, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011); *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). The criminal rules reflect this principle by requiring that the trial court not accept a guilty plea without first determining that the plea was made "voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). This rule provides further safeguards to protect a defendant against an involuntary plea. *Robinson*, 172 Wn.2d at 792; *State v. Knotek*, 136 Wn. App. 412, 424, 149 P.3d 676 (2006).

A strong public interest supports enforcement of voluntary and intelligently made pleas. *State v. Chambers*, 176 Wn.2d 573, 586-87, 293 P.3d 1185 (2013). Guilty pleas are voluntary when entered by uncoerced defendants that understand the constitutional protections waived, the charged offense's elements (and how their conduct satisfied those elements), and the direct consequences of pleading guilty. *State v. Holsworth*, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980); *Hews v. Evans*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). When a defendant completes a written plea statement and admits to reading, understanding, and signing the statement, a strong presumption arises that the plea was voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *see also State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996 ("a defendant's signature on a plea statement is strong evidence of a plea's voluntariness"). An information that notifies the defendant of the nature of the crimes to which he is pleading creates a presumption that the plea was knowing, intelligent and voluntary. *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). Additionally, when a judge orally inquires of the defendant and becomes satisfied of voluntariness on the record, the presumption of voluntariness is "well nigh irrefutable." *State v. Perez*, 33 Wn. App. 258, 261-62, 654 P.2d 708 (1982).

Petitioner appears to claim his plea was involuntary, because his attorney pressured him into pleading guilty and promised him a sentence at the low end of the standard range. *See* PRP and Letter of Declaration. Petitioner's claim fails, because his mere allegation of involuntariness is rebutted by the record which shows he voluntarily pled guilty.

Once a plea is entered, the defendant bears the burden to show an involuntary plea. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). The defendant must present some evidence of involuntariness beyond his self-serving allegations. *Id.* at 97. In *Osborne*, one of the defendants moved to withdraw his guilty plea, alleging his plea was involuntary because his wife threatened to commit suicide if he went to trial. *Osborne*, 102 Wn.2d at 96-97. The Supreme Court determined that because defendant had “specifically stated, several times during the plea proceedings, that his guilty plea was voluntary and free of coercion,” these statements on the record constituted “‘highly persuasive’ evidence of voluntariness” that required more than a “mere allegation by the defendant” to be overcome. *Id.* at 97. In this case, nothing other than petitioner’s allegation indicates the plea was involuntary.<sup>6</sup>

Petitioner submitted a written plea statement, which he acknowledged in open court to have reviewed and understood in full. CP 7-17; 2/14/18 RP 11. The written plea statement provided that petitioner was freely and voluntarily pleading guilty to the charges without any threats of harm or any promises apart from those set forth in the statement. CP 16. Petitioner signed the plea statement. CP 16. This is prima facie evidence that his guilty plea was voluntary. *Perez*, 33 Wn. App. at 261.

Additionally, the trial court entered into a colloquy with petitioner to determine whether his plea was voluntary. 2/14/18 RP 8-15. During the colloquy, petitioner informed the trial court that: (1) he went over the statement on plea of guilty with his attorney; (2) his attorney answered all of his questions; (3) he understood the important

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<sup>6</sup> During the plea hearing, petitioner’s attorney informed the court, “I have not threatened Mr. Ortiz. I’m not aware of anyone else who has threatened him.” 2/14/18 RP 7. Petitioner’s nephew, Isai Alvarez, does not claim in his letter that he actually pressured or convinced petitioner to plead guilty.

rights he was giving up by pleading guilty, including the right to trial by jury; (4) he understood the sentencing consequences of his plea; (5) he understood the court did not have to follow anyone's recommendation as to sentence; and (6) no one threatened him or made any promises in order to get him to plead guilty. In light of this colloquy, the presumption that petitioner's plea was voluntary is nearly "irrefutable." *Perez*, 33 Wn. App. at 262.

Petitioner claims his attorney pressured him into pleading guilty by advising that petitioner would not prevail if he proceeded to trial. *See* petitioner's Letter of Declaration. "Subjective fear is not coercion externally applied, and does not render a defendant's plea involuntary. If fear of a trial and the resulting stress were sufficient mental coercion to constitute grounds to avoid trial or withdraw a plea, no doubt many defendants could claim their pleas were coerced." *State v. Osborne*, 35 Wn. App. 751, 754-55, 669 P.2d 905 (1983) (citing *North Carolina v. Alford*, 400 U.S. 25, 30-31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)). *See also*, *State v. Music*, 40 Wn. App. 423, 429-30, 698 P.2d 1087 (1985) (a guilty plea induced by the risk of more severe punishment does not necessarily invalidate an otherwise voluntary plea).

Petitioner's claim of coercion contradicts his express assurances to the trial court that he was making the decision to plead guilty without undue force or persuasion. After denying improper influence in open court, a defendant who later tries to retract his admission of voluntariness will bear a heavy burden to convince a court that his admission was coerced. *State v. Frederick*, 100 Wn.2d 550, 557-58, 674 P.2d 136 (1983), *overruled on other grounds by Thompson v. State Dep't of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999). Again, a mere allegation by the defendant of coercion will not overcome his

“highly persuasive” assertions at the guilty plea hearing of voluntariness. *Osborne*, 102 Wn.2d at 97 (quoting *Frederick*, 100 Wn.2d at 557).

After receiving an apparently honest assessment and legal opinion from his attorney, petitioner was faced with a choice between (1) asserting his trial rights and risking a lengthy prison sentence, and (2) pleading guilty to reduced charges with lesser sentencing consequences. “[T]he imposition of these difficult choices [is] an inevitable – and permissible – attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” *State v. Music*, 40 Wn. App. 423, 429, 698 P.2d 1087 (1985) (internal citations and quotation marks omitted).

Petitioner fails to show an invalid plea. This Court should dismiss the petition, because petitioner fails to show actual and substantial prejudice stemming from an error of constitutional magnitude.

The issue in the present case is the lack of evidence supporting anything that would give rise to a credible factual discrepancy which would warrant a reference hearing or relief. Petitioner not only fails to show any actual or substantial prejudice, he fails to provide competent corroborating support for his claims that are based on nothing more than bare assertions and self-serving allegations that would call into question the validity of his guilty plea or the effectiveness of his counsel. As such, the petition must be dismissed.

D. CONCLUSION:

The State respectfully requests that this Court dismiss the petition for the reasons set forth above.

DATED: September 20, 2019.

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WSB #44108

Certificate of Service:

*efile*  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/20/19 *Johnson*  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**September 20, 2019 - 11:45 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52195-4  
**Appellate Court Case Title:** State of Washington, Respondent v. Juan Ortiz, Appellant  
**Superior Court Case Number:** 10-1-02057-0

**The following documents have been uploaded:**

- 521954\_Other\_Filings\_20190920114352D2375456\_1386.pdf  
This File Contains:  
Other Filings - Other  
*The Original File Name was Ortiz Add Authority.pdf*
- 521954\_Personal\_Restraint\_Petition\_20190920114352D2375456\_0238.pdf  
This File Contains:  
Personal Restraint Petition - Reply to Response to PRP/PSP  
*The Original File Name was Ortiz PRP Response.pdf*

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

- kevin@olympicappeals.com
- sierra@olympicappeals.com

**Comments:**

Other Filings: Statement of Additional Authority

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Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

**Filing on Behalf of:** Britta Ann Halverson - Email: britta.halverson@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

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