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Court of Appeals  
Division III  
State of Washington

34183-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JESSE LUNA, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. Jesse James Luna, Jr., did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22 when:
  - a. His first attorney failed to challenge untimely trial settings; and
  - b. His third attorney failed to file a motion to withdraw guilty plea as he requested.
2. The trial court's failure to schedule a hearing on Mr. Luna's oral motion to withdraw his guilty plea deprived him of the opportunity to present testimony and argument as to why that plea should be withdrawn.
3. The trial court abused its discretion when it did not consider Mr. Luna's pro se request for a "same criminal conduct" analysis during the course of his allocution at the sentencing hearing.

## **II. ISSUES PRESENTED**

1. Whether defendant's first attorney was ineffective for failing to object to a trial date set more than 60 days past the defendant's arraignment, where defendant has failed to demonstrate that his attorney did not discuss the time for trial rule with him and he did not knowingly waive; and where, had the defendant objected to the time for trial, the court would have only set his trial for a sooner date?
2. Whether defendant's third attorney was ineffective for failing to reduce defendant's oral motion to withdraw his guilty plea to writing where the trial court knew the law, and was aware of all pertinent

facts, and where the court rule does not require such a motion to be made in writing?

3. Whether the trial court erred in declining to afford the defendant a “fact-finding” hearing for the motion to withdraw his guilty plea, where the trial court was aware of the disputed facts, agreed facts, unambiguously worded plea agreement and the extensive plea colloquy the court conducted with the defendant before entry of his plea?

4. Whether the trial court abused its discretion by not considering the defendant’s passing request for a same course of conduct analysis that was unsupported by any argument, contravened by the plea agreement, and wholly discretionary pursuant to the anti-merger statute?

### **III. STATEMENT OF THE CASE**

On May 29, 2013, Jesse Luna made his first appearance in Spokane County Superior Court on two counts of second degree robbery. CP 4-6. At the time of his first appearance, the defendant was represented by an attorney. CP 6. The court set an arraignment date for June 11, 2013. CP 182-186<sup>1</sup> (5/29/13 Scheduling Order).

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<sup>1</sup> On February 3, 2017, the State filed a Supplemental Designation of Clerk’s Papers in the Spokane County Superior Court. The State anticipates these documents will be numbered “CP 182-186.”

On the following day, May 30, 2013, Mr. Luna was charged by information with two counts of second degree robbery and two counts of intimidating a witness. CP 7-8. These charges stemmed from a robbery that occurred on May 23, 2013 at a Zip Trip convenience store in Spokane, at which time the defendant was alleged to have entered the business and demanded money. CP 9. Witnesses indicated that the robber kept his right hand in his coat pocket and threatened to shoot them if they did not comply with his demand. CP 9. The witnesses also stated that the robber told them that if they described him to the police, he would “come and get [them].” CP 10.

On June 5, 2013, the State amended the information to add one count of bail jumping occurring on or about April 26, 2013. CP 12-13. It was alleged that the defendant had failed to appear for a sentencing hearing on an unrelated charge after being informed of the hearing and signing a scheduling order acknowledging he was aware of the hearing date. CP 14.

On June 11, 2013, the defendant was apparently arraigned on the charges as the trial court set the defendant’s matter for trial on that date.<sup>2</sup> CP 15. The June 11, 2013 scheduling order directed that the defendant’s

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<sup>2</sup> Defendant has not requested that the verbatim report of proceedings from his arraignment be transmitted to this Court for review.

case would be set for pretrial conference on August 16, 2013, and trial on September 3, 2013. CP 15.

On June 12, 2013, the State gave notice that the charged offenses were “most serious offenses” and that he may be classified as a persistent offender and sentenced to life in prison if convicted of those charges. RP 16. The following day, Mr. Kevin Griffin filed a notice of appearance in Mr. Luna’s case. CP 180-181.

On August 19, 2013, the defendant, through counsel, requested a continuance of the pretrial and trial dates to September 13, 2013 and September 30, 2013, respectively, for negotiations. CP 17. The defendant signed this order. On September 13, 2013, the court again continued the matter for “continued discovery and/or negotiations,” setting pretrial and trial dates of October 18, 2013, and November 4, 2013, respectively. CP 18. The defendant signed this order. On October 18, 2013, the case was continued for “continued discovery and/or negotiations” to November 22, 2013 and December 9, 2013 for pretrial and trial settings. CP 21. The defendant signed this order.

Defendant requested a continuance of trial on November 21, 2013, to December 16, 2013; the scheduling order indicated that the defense might file a motion no later than December 11, 2013. CP 22. The defendant signed this order. Trial was again rescheduled to February 24, 2014, as the

defendant had not yet supplied a witness list. RP 23. The defendant signed this order.

On February 10, 2014, the State filed a second amended information, amending Count 1 to first degree robbery with a deadly weapon enhancement. CP 24. Count 2, second degree robbery, with a different alleged victim, was omitted in the second amended information; however, the second amended information retained the two counts of witness intimidation and the bail jumping charge. CP 24-25. On that same date, defendant gave notice that he intended to rely on an alibi defense. CP 26.

Also on February 10, 2014, the trial court addressed defendant's motion to suppress impermissibly suggestive identifications and exclude in-court identifications. CP 32-64. The court ultimately concluded that the photo-montage was impermissibly suggestive, but held that there was sufficient indicia of reliability that, despite the montage's suggestiveness, did not "rise to the level of creating a substantial likelihood of irreparable identification." CP 63.

On February 28, 2014,<sup>3</sup> the court discharged Mr. Griffin as counsel due to a conflict of interest, and immediately appointed new counsel to

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<sup>3</sup> Mr. Griffin was permitted to withdraw due to an ethical concern on the morning of trial. RP 4.

represent Mr. Luna. CP 27. The defendant's trial date was continued to May 19, 2014; however, the defendant did not sign the scheduling order because he "refused to appear" for court, notwithstanding the fact that he was in custody at the time. CP 27. Mr. Luna's new attorney was Eric Christianson. RP 27, 30.

A stay was entered on May 5, 2014, along with an order directing Eastern State Hospital to evaluate the defendant's competence to stand trial pursuant to RCW 10.77. CP 93. The evaluation was received by the court on August 22, 2014. In his report, Dr. Daniel Lord-Flynn concluded that the defendant was competent. CP 101. During the evaluation, the defendant indicated to Dr. Lord-Flynn that defense attorneys "lie to you and work together with the prosecutor." CP 100.

The matter was reset for trial on November 3, 2014. CP 103-104. The trial date was then continued to March 2, 2015, to accommodate defense counsel's schedule and to allow for additional trial preparation. CP 105. On January 9, 2015, Mr. Christianson filed a motion to dismiss on defendant's behalf, alleging misconduct by the State. CP 106-123. After hearing argument, the court denied the motion to dismiss. CP 182-186 (2/6/15 Courtroom Minutes).

On February 12, 2015, defense counsel again requested a continuance of the trial date, requesting additional time to interview the

defendant's witnesses. CP 128-129. The State opposed the motion, and the court denied the continuance. CP 182-186 (2/20/15 Courtroom Minutes).

A week prior to trial, on February 25, 2015, Mr. Christianson moved to withdraw as counsel. CP 133. Mr. Christianson felt as though he was caught between his duty to advocate for Mr. Luna and his duty to refuse to offer evidence that he reasonably believed was false. RP 7; CP 134-135. The court denied that motion. CP 133.

The morning of trial, while the court was addressing other issues, the prosecutor and defense attorney began handing notes "back and forth" to each other. RP 10. At both attorneys' request, the court recessed. RP 12 13. The parties then advised that there may be a resolution to Mr. Luna's matter, and requested additional time to prepare the paperwork and review it with Mr. Luna. RP 13.

After the recess, the State again amended the information, this time charging one count of second degree burglary, one count of first degree theft other than a firearm, and one count of intimidating a witness; the defendant presented the court with a statement on plea of guilty to those amended charges. RP 15; CP 130-131, 136-147. In an effort to determine how much time Mr. Luna had to contemplate his plea, the court asked defense counsel to comment on whether the negotiations had been on-going or whether the

agreement “is ... something that just happened today.” RP 16-17. The defense attorney indicated “there [had] been negotiations.” RP 17.

During his colloquy with the court, Mr. Luna indicated that he read and understood the documents he signed; he had sufficient time to discuss his plea with his counsel; he understood the amended charges; he understood the rights he was giving up by entering a plea; he understood the standard range and maximum penalties for the crimes with which he was charged; he agreed with his criminal history as presented to the court; and he understood there to be a joint recommendation in return for his plea to the charges, which would be 30 years in prison, 10 years on each count to run consecutively, as an agreed exceptional sentence. RP 17-21; CP 136 140, 146-147. The court accepted his *Alford* and *In Re Barr* pleas of guilty, finding they were voluntarily, intelligently and knowingly made. RP 28. The defendant’s sentencing was continued to April 23, 2015. RP 29.

However, before sentencing, defense counsel again moved to withdraw from representing Mr. Luna as Mr. Luna alleged that he was ineffective as counsel. RP 85; CP 151-152. The court granted the motion and a third attorney, Timothy Trageser, was appointed to represent Mr. Luna. RP 5, 33.

Shortly after Mr. Trageser was appointed, at the original sentencing date,<sup>4</sup> the court became aware that Mr. Luna was “considering a motion to withdraw” his plea. At that time, the court continued the sentencing because Mr. Trageser had just been appointed to represent Mr. Luna. Sentencing was continued to May 7, 2015. CP 182-186 (4/23/15 Courtroom Minutes).

The State responded to the defendant’s oral request to withdraw his guilty plea. RP 33; CP 155-159. Defense counsel did not file a formal written motion for defendant to withdraw his plea, but by the May 7, 2015 hearing had spoken with former counsel, Eric Christianson and his client, and took the position that “a fact finding hearing” would be necessary. RP 34. Mr. Trageser informed the court that he had read the plea statement, and was aware of its contents, but that Mr. Luna told him that Mr. Christianson made oral representations to him at the time of the plea that contradicted the written plea statement – namely that Mr. Christianson would be free to argue that the sentences run concurrently on the charges.<sup>5</sup> RP 34. Mr. Trageser indicated that he would need more time to properly prepare for the motion, including drafting the appropriate affidavits, in order

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<sup>4</sup> Defendant has not requested a verbatim transcript of this hearing be transmitted to this court for review.

<sup>5</sup> “My client has specifically said that counsel stated to him, ‘Don’t worry. It’s ok. We are – we can ask the court to run these concurrently.’” RP 35.

for the court to determine whether a fact finding hearing would be warranted. RP 36.

The State indicated that if Mr. Luna wanted to withdraw his plea and proceed trial on the original charges, it would agree to do so, as it believed Mr. Luna was “creating conflicts” with counsel and engaging in “gamesmanship.” RP 38-39.

The court indicated it “fairly vividly” recalled the sequence of events from the date the defendant pled guilty. RP 39. The court indicated that Mr. Luna wrote a note, handed it to his attorney, who then whispered to the prosecutor, and it was after that that the court took a recess and was then informed the parties had reached a plea agreement. RP 39. The court then restated each of the questions it asked Mr. Luna to determine the voluntariness of Mr. Luna’s plea.<sup>6</sup> RP 40. Although the court recognized that the terms “concurrently” and “consecutively” could be confusing, it found that Mr. Luna’s plea agreement was unambiguously written, as it

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<sup>6</sup> In terms of what the agreement was, I think this is clear and unequivocal. I questioned Mr. Luna if that was his understanding. He gave me an unequivocal answer that it was. I also asked him whether he had had sufficient time to discuss this with his attorney. He said he did. And, that’s a standard question I ask in every plea agreement. And so I just think that’s fairly overwhelming evidence that this was an unequivocal understanding that it wasn’t going to run concurrently.

RP 41.

stated: “[t]here is an agreed recommendation of 30 years in prison, 10 years on each count to run consecutively.” RP 44; CP 140. The court stated, “I don’t see where a fact-finding hearing is going to change things.” RP 45.

In issuing its ruling, the trial court reviewed CrR 4.2 and relevant case law, and held that Mr. Luna failed to meet his burden of demonstrating manifest injustice which is required for a defendant to be allowed to withdraw his guilty plea before sentencing. The court also recognized that the defendant could file a post-sentence motion for relief from the judgment under CrR 7.8. RP 51-52.

The court proceeded with sentencing, finding that “this case has drug on for two years, plus the sentencing has been continued three times.” RP 53. The State requested the court follow the agreed recommendations, pointing out that the defendant’s offender score was “off the charts ... about 19 or 20” felonies, and that this was not the first time<sup>7</sup> that Mr. Luna had faced a third strike offense. 5RP 59. The prosecutor indicated that negotiations had been ongoing and “there had been extensive conversations prior to the date of trial what the state would accept based upon these facts and after talking to the victims.” RP 60.

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<sup>7</sup> Mr. Luna indicated it was his sixth time facing a third-strike offense. RP 61.

Mr. Luna told the court that he understood how sentencing worked, but maintained, despite what the plea agreement's express terms, Mr. Christianson told him that he could argue concurrent sentences, and that the "judge can do anything he wants" in sentencing the defendant. RP 61-62. Additionally, he stated, "I knew I was taking an exceptional sentence of 10 years on each charge, but I thought they were going to be ran [sic] concurrent." RP 64. The court asked Mr. Luna multiple questions after his allocution, including whether Mr. Luna recalled the court reading him the agreed recommendations, whether he recalled telling the court no promises had been made to induce his plea, and whether he remembered the court asking whether he read and understood the plea statement in its entirety. RP 67-69. Mr. Luna answered all questions in the affirmative, but qualified each response by telling the court that there was no way he would have agreed to a 30-year sentence. RP 67-70.

Ultimately, the court sentenced Mr. Luna to the agreed-upon 30-year sentence. RP 75; CP 161-176. The court declined to exercise its discretion and deviate from the agreed recommendation. RP 75. It found that the sentence, while substantial, was reasonable, in light of the life sentence Mr. Luna faced had he been convicted of the original offenses after

trial.<sup>8</sup> RP 72-74. Findings of fact and conclusions of law supporting the agreed-exceptional sentence were entered on May 12, 2015. CP 177-178.

The defendant filed a notice of appeal on January 28, 2016, with the superior court, which was transferred to the court of appeals as a personal restraint petition. This court has determined that Mr. Luna's appeal was timely filed. *See* Commissioner's Ruling, August 10, 2016.

#### **IV. ARGUMENT**

##### **A. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is

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<sup>8</sup> I can't speak to the other six third-strike cases that Mr. Luna's had. You know, if they were overcharged and reduced, then hopefully the system worked well and appropriately and that happened, but all the more reason there's no question in my mind that Mr. Luna knew the risk, the peril he was facing when we were getting ready to start trial on March the 2<sup>nd</sup>.

RP 73.

reliable.” *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel’s performance is highly deferential and requires that every effort be made to eliminate the “distorting effects of hindsight” and to evaluate the conduct from “counsel’s perspective at the time”; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

In order to rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

The first element of ineffectiveness is met by showing counsel’s conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

1. Defendant's first attorney was not ineffective in not requesting and requiring that trial be held within the first 60 days after arraignment.

CrR 3.3 provides court-rule enforcement for the right to a speedy trial, but is not itself a guarantee of constitutional rights. *See State v. Brewer*, 73 Wn.2d 58, 62, 436 P.2d 473 (1968). Defendant's first allegation of ineffective assistance of counsel involves an alleged violation of this time for trial rule. Defendant alleges that his attorney's failure to object to the untimely setting of the defendant's trial date resulted in a "rule-based non-knowing involuntary waiver" of the time for trial rule. Appellant's Br. at 11.

CrR 3.3(b) provides that a defendant who is detained in jail shall be brought to trial within the longer of 60 days or as provided in CrR3.3(b)(5). Defendant was arraigned on June 11, 2013. His trial date was set for September 3, 2013. The defendant's argument that he made an involuntary waiver of his court-rule time for trial right is based *solely* on the absence of an attorney's signature on the scheduling order setting his trial date beyond 60 days from the arraignment, and the fact that his first attorney filed a notice of appearance two days after his arraignment. Appellant's Br. at 10. Defendant contends that when Mr. Griffin began representing him, counsel was "required to familiarize himself with the record and file an objection on his behalf in accord with the rule." Appellant's Br. at 10.

Defendant's argument is flawed. First, the absence of a defense attorney's signature on the scheduling order does not establish that the defendant was unrepresented at arraignment. Counsel could have been present, but neglected to sign the scheduling order, and did not file the notice of appearance until two days later. The defendant has failed to provide the transcript of the arraignment proceedings to this court to demonstrate that he was unrepresented at the time. It is the defendant's burden to perfect the record for review. RAP 9.2; *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999) ("The party seeking review bears the burden of perfecting the record so that we have before us all evidence relevant to the claimed error. Therefore, this argument ... lacks merit").

Assuming, *arguendo*, that defendant *was* unrepresented at arraignment, he has also failed to demonstrate that counsel did not subsequently discuss the untimely trial setting with him and the procedure set forth in CrR 3.3 for objecting to the hearing date.<sup>9</sup> This conversation, is, of course, outside the record, but the lack of such a conversation would be necessary to establish that Mr. Luna did not understand his right to object to the trial setting pursuant to CrR 3.3(d)(4).

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<sup>9</sup> Defendant's 20 felony convictions would establish that Mr. Luna had some familiarity with the criminal justice system.

Defendant is correct about one thing. Defense counsel *is* required to familiarize him or herself with a defendant's case after being appointed as legal counsel. Appellant's Br. at 10. However, nothing in the record establishes or even indicates that Mr. Griffin failed to do so.

Furthermore, the Defendant is unable to demonstrate any prejudice by Mr. Griffin's failure to object. Had counsel filed an objection to the defendant's trial setting within 10 days of the defendant's arraignment, pursuant to CrR 3.3(d)(4), the court would have simply rescheduled the trial date to within the time limits provided by the rule, as contemplated in CrR 3.3(d)(4). Conversely, had Mr. Griffin pushed the matter to trial within 60 days of arraignment (as Mr. Luna suggests he should have done) the defendant would now be complaining on appeal that he did not receive effective assistance of counsel because he was required to go to trial on a three-strikes case with an unprepared attorney.

To the contrary, the record demonstrates that Mr. Griffin was attempting to thoroughly work Mr. Luna's very serious case, by attempting to negotiate with the State, by interviewing Mr. Luna's witnesses, by preparing an alibi defense, and by filing a motion seeking to suppress the photo-montage as overly-suggestive. The likelihood of all of this having been accomplished within the 60 days prior to the first trial setting is slim.

Defendant has failed to carry his burden to demonstrate that counsel's representation was deficient and that the deficiency prejudiced him.

2. Defendant's third attorney was not ineffective for failing to write a written motion to withdraw defendant's guilty plea after defendant had orally made the motion, and the attorney did not have all relevant facts he needed to proceed.

As with the previous claim, the defendant has not requested the verbatim transcript of the April 23, 2015 hearing in which Mr. Trageser, defendant's third attorney, requested a continuance of the sentencing hearing because he had only been appointed two days earlier. It was likely at this hearing that the defendant made his oral motion to withdraw his guilty plea. CP 182-186 (4/23/15 Courtroom Minutes); RP 33-34. It was after this hearing that the State filed its motion in response to defendant's oral motion to withdraw his guilty plea, CP 124-127, which tends to demonstrate the importance of the April 23, 2015 hearing.

It is based on the events of this untranscribed hearing that defendant now avers that counsel was required to file a motion to withdraw the guilty plea pursuant to CrR 4.2<sup>10</sup> on defendant's behalf.

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<sup>10</sup> However, the State notices that in the defendant's opening brief's conclusion, defendant indicates that his third attorney's failure to file a written motion contrary to the provisions of CrR 7.8(c)(1) (Relief from Judgment) amounted to ineffective assistance. The State assumes this was a scrivener's error as defendant's argument alleges counsel's failure to "follow through on the oral motion" was deficient. Appellant's Br. at 11. As far as the State is able to discern, no oral motion was ever made for relief from the judgment pursuant to

CrR 4.2 does not require a motion to withdraw a guilty plea be made in writing. It 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*. If the defendant pleads guilty pursuant to a plea agreement, and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A. 401-.411, the court shall inform the defendant that the guilty plea may be withdrawn and a not guilty plea entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

(Emphasis added).

In this case, the defense attorney prepared for the May 7, 2015 hearing by reviewing the file and plea statement, and by speaking with Mr. Luna and Mr. Christianson. RP 33-34. It was based on that effort that Mr. Trageser told the court that he believed that a fact finding hearing would be necessary to resolve an inconsistency between what Mr. Luna told him and what former counsel, Mr. Christianson, told him. Mr. Trageser stated:

And I'm not the finder of fact, but I can tell you that if I thought and believed I was proffering false statement and things that I believed not to be true as clear as day, I would move to withdraw, claiming that I have a conflict of interest. But in speaking with my client, he is adamant, adamant, that

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CrR 7.8(c)(1). The defendant was free to make such a motion within a year after the judgment was entered. CrR 7.8(b).

it was his understanding that counsel was free to argue concurrent.

RP 35.

In his appeal, defendant has not proffered any authority to demonstrate his allegation that Mr. Trageser's "failure to follow through on the oral motion" "deprived [him] of any opportunity to adequately address and present the issue of a manifest injustice to the trial court." Appellant's Br. at 11.

Additionally, he has failed to demonstrate how a *written* motion would have better addressed the issue than the oral argument made by Mr. Trageser on May 7, 2015. Mr. Trageser described to the court in detail Mr. Luna's recollection of how the plea negotiations unfolded:

He described the situation at counsel table when the decision was made and the parties going back and forth. And I'm not alleging any intentional misconduct by anybody. I am just indicating that my client believed that they were going to come back for sentencing and that his counsel was free to argue concurrent.

And I'll just summarize this. My client has specifically said that counsel stated to him, "Don't worry. It's okay. We are - - we can ask the Court to run these concurrently." And so that's where I stand now.

Now, I only spoke to Mr. Christianson, I don't know, last week, probably five days ago, and so I haven't had a chance to file an appropriate motion with the appropriate affidavits and whether or not they should be sealed, but I'd like some additional time for that. I haven't been on the case that long.

It's a really serious matter, Judge, as you know, and my client is subjected to a 30-year sentence.

RP 35-36.

Mr. Trageser additionally indicated:

And Counsel may have said -- and I'm sorry to interrupt you, but this is the problem pointing out in the plea agreement the Court is free to do whatever it wants, and the way Mr. Luna describes it is exactly that provision of the paragraph. He's saying that that's the kicker. That's what -- that's the problem that he has because it was in there, and he's saying that his lawyer interpreted that statement that the Court can do whatever it wants and went one step further and said, "We can make any presentation we want to convince the Court to run these concurrent." So that's what my client is telling me.

The Court: All right. Not what Mr. Christianson has told you, but what your client has told you.

Mr. Trageser: No, no, correct.

RP 47-48.

The trial court was fully aware of the facts that would be elicited at any "fact finding hearing." Essentially, the defendant would claim he misunderstood and that his attorney gave him bad advice and Mr. Christianson would have stated that he fully informed Mr. Luna of the consequences of the plea agreement and that Mr. Luna understood them in full. No written motion would have provided any additional relevant evidence or legal authority for the court's consideration.

Additionally, defendant cannot show that he was prejudiced by counsel's failure to reduce to writing the motion the defendant had already made orally, to which the State responded. Defendant has not demonstrated that the law cited by the State in opposition to his motion to withdraw his guilty plea was incomplete or misleading, or that there was some other legal authority that defense counsel should have cited to the court in order for it to make an informed discretionary decision. Simply put, as to this claim, defendant states that no motion was written, ergo, ineffective assistance of counsel has been demonstrated. Appellant's Br. at 11. However, more is required in order to overcome the presumption of reasonableness. And, as discussed below, the result would not have been different if counsel *had* prepared a written motion - the court did not abuse its discretion in determining that no manifest injustice occurred when the defendant entered his plea of guilty to reduced charges that ensured he would not face a life sentence, as further discussed below.

**B. THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE THE DEFENDANT A "FACT FINDING HEARING" TO DETERMINE THE VERACITY OF HIS ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL AGAINST HIS SECOND ATTORNEY.**

In order for a guilty plea to be constitutionally valid, it must be knowingly, voluntarily and intelligently made, with the accused being apprised of the nature of the charges against him. *State v. Robinson*,

172 Wn.2d 783, 794, 263 P.3d 1233 (2011); *In Re Pers. Restraint of Barr*, 102 Wn.2d 265, 269, 684 P.2d 712 (1984) (citing *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)).

CrR 4.2(f) provides the standard by which a court shall permit a criminal defendant to withdraw a guilty plea. It provides, in part:

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.*

(Emphasis added.)

A trial court's decision to grant or deny a motion to withdraw a guilty plea for an abuse of discretion. *State v. Forest*, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Under CrR 4.2(f), a "manifest injustice" is "an injustice that is obvious, directly observable, overt, not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Manifest injustice in this context includes situations where the defendant's guilty plea was not knowing, intelligent, and voluntary. *State v. A.N.J.*, 168 Wn.2d 91, 119, 225 P.3d 956 (2010). The defendant bears the burden of proving a manifest injustice. *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 282-83, 319 P.3d 53 (2013).

Because of the safeguards<sup>11</sup> that precede a guilty plea, the defendant's burden is a heavy one. *State v. Wilson*, 162 Wn. App. 409, 414, 253 P.3d 1143 (2011).

A written plea statement is *prima facie evidence* that a guilty plea is voluntary when the defendant acknowledges reading and understanding the written statement and that the contents of the statement are true. *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Where, as here, the trial

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<sup>11</sup> An examination of the other and connected criminal rules adopted by this court on the same date reveals the logic of applying a demanding test.

CrR 4.2(d) prevents a court from accepting a plea of guilty until it has ascertained that it was 'made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.' A trial court is not permitted to enter judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. CrR 4.2(e) provides that '(i)f a plea of guilty is based upon an agreement between the defendant and the prosecuting attorney, such agreement must be made a part of the record at the time the plea is entered.' In addition, the trial judge must inform the defendant that an agreement cannot be made which attempts to control exercise of the judge's discretion.

Finally, CrR 4.2(g) requires the defendant to file, with his plea of guilty, a detailed written statement which not only itemizes his basic constitutional rights, but sets forth the requirements of CrR 4.2(d) and (e) and specifies that the statement has been read by or read to the defendant. The statement must be signed by the defendant in the presence of his attorney, the prosecuting attorney, and the judge. In short, CrR 4.2(d), (e) and (g) are carefully designed to insure that the defendant's rights have been fully protected before a plea of guilty may be accepted.

*Taylor*, 83 Wn.2d at 596.

court has inquired into the voluntariness of the plea on the record, the presumption of voluntariness is “well nigh irrefutable.” *Perez*, 33 Wn. App. at 262.

Here, the defendant submitted a written plea statement, in which he acknowledged his understanding that the plea agreement would require him to serve 30 years in prison.<sup>12</sup> The trial court found this language to be unambiguous. The plea statement itself is prima facie evidence that Mr. Luna’s plea was voluntarily made.

Furthermore, the trial court entered into a lengthy colloquy with Mr. Luna to determine whether his plea was voluntary. During the colloquy, Mr. Luna informed the trial court that he (1) read, understood, and signed the statement of defendant on plea of guilty form, (2) understood the charges against him, including the elements of the charges the State would have to prove at trial, (3) had sufficient time to discuss his case with his defense counsel, (4) understood the maximum possible penalties for the charges, the standard ranges and potential legal financial obligations, (5) understood that he would give up a number of significant rights associated with trial by pleading guilty, (6) understood that he was agreeing to the maximum penalty on each of the charges, and (7) understood immigration, voting, and

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<sup>12</sup> Defense counsel, Mr. Trageser, admitted during the hearing, “I don’t know how the plea agreement could get any clearer.” RP 44.

firearms possession consequences attendant with a felony guilty plea. RP 17-23. In light of this lengthy colloquy, the presumption that Mr. Luna's plea was voluntary is nearly "irrefutable." *Perez*, 33 Wn. App. at 262.

Moreover, the trial court was also aware of Mr. Luna's lengthy history with the court system and his involvement with his attorneys:

One other thing I wanted to address which I forgot to but I need to point this out now, there was some argument made that Mr. Luna is somehow unsavvy or inexperienced with plea agreements or sentencings. I don't know -- there was a representation about how many trials or other --

...

-- times Mr. Luna has been in court, but what I can -- I don't know how many of these were pleas versus trials; and if Counsel wants to bring that up, he can. But what I can say is that there have been sentencings -- and I'm going to work my way backwards from the understanding of criminal history's -- on a felony riot charge in November of '09; two sentencings for two different riots in March of '08; two sentencings for two more riots in June of '07; four sentencings for three counts of second-degree attempted assault and escape from community -- I'm sorry, three sentencings for second-degree attempted assaults March 10 of '06; a sentencing March 18 of '05 for escape from community custody; a sentencing September 26 of '02 for first-degree robbery; a sentencing on two charges, attempting to elude and possession of stolen property, April 9 of '02; and a sentencing on May 1 of '01 for assault-second. Those are the felony assaults. I see there's another - I'm sorry, felony charges.

There's another two, four, six, eight, ten, eleven different charges with one, two, three, four, five, six, seven different sentencing dates on misdemeanors; and an additional two, four, five juvenile adjudications and dispositions with one, two -- at least three different disposition dates.

So I lost count how many I said there, but there have been numerous sentencings. So I'm not satisfied that Mr. Luna somehow doesn't understand the sentencing procedure. My belief is that many of those have been pleas. There may have been some trials. I'm not going to challenge that if that's the case. But many of those, especially the riots, are very common plea agreements.

And so I believe Mr. Luna has been through pleas, guilty pleas, many more times so that the novice or inexperienced argument just doesn't seem consistent with the evidence that I have. So I just want that to be on the record. Any other findings you want me to address, Mr. Trageser?

RP 56-58.

But even without the weapon, even without the bail-jumping charges, I've known from the time this case first got on my desk in front of me the importance of it because it was a third-strike case; that if Mr. Luna was convicted on either one of the robbery charges, that I would have no choice at sentencing but to sentence him to life in prison without the possibility of parole.

I can't speak to the other six third-strike cases that Mr. Luna's had. You know, if they were overcharged and reduced, then hopefully the system worked well and appropriately and that happened, but *all the more reason why there's no question in my mind that Mr. Luna knew the risk, the peril he was facing when we were getting ready to start trial on March the 2nd.*

There were two separate requests from Mr. Luna's previous attorneys to withdraw because of ethical concerns that both were made at the time of trial. I granted Mr. Griffin's motion; and when it was made the second time, I denied the motion to withdraw because I was concerned that we were in a never-ending cycle that that could be an issue that would

come up every time. So I know that Mr. Luna was not wanting to go to trial on March 2nd.

RP 72-73 (emphasis added).

A fact finding hearing would have done nothing to change the court's ruling in this case – and the court made that express finding.<sup>13</sup> RP 45. The court was aware that Mr. Luna had done everything in his power to stall the trial – to the point where the case was two years old, and he had exhausted the services of two prior attorneys due to conflicts of interest. The court recalled that it was *Mr. Luna* who passed his attorney a note during the pretrial motions resulting in the recess that, in turn, resulted in an agreed negotiation. RP 39. The court recalled asking Mr. Christianson whether the negotiations had been ongoing, or whether it was something that had been arrived at suddenly in the 11<sup>th</sup> hour before trial; Mr. Christianson indicated that the negotiations had been ongoing. RP 40. And, the court detailed all of the questions that were asked of Mr. Luna that were designed to safeguard his rights and ensure a voluntary plea.<sup>14</sup> RP 51-52.

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<sup>13</sup> “I don’t see how a fact-finding hearing is going to change things.”

<sup>14</sup> Mr. Luna was questioned, as I do in every case, and my record will reflect that I went over all of the portions of this plea agreement with him. I’ve already read -- I’m not going to repeat - - what I think is fairly unequivocal language regarding the agreed recommendation for 30 years in prison, discussing that 10 years on each count to run consecutively; that Mr. Luna understood this sentence was outside the standard range, and that he has agreed to an exceptional sentence.

The trial court did not abuse its discretion in declining to afford the defendant a fact finding hearing when all of the necessary facts were already available to the court, it weighed those facts, and determined that Mr. Luna voluntarily entered the plea agreement for 30 years instead of risking a life sentence as a persistent offender, and that no manifest injustice had occurred.

**C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CONSIDER THE DEFENDANT'S ARGUMENT THAT THE CRIMES TO WHICH HE PLED CONSTITUTED THE SAME COURSE OF CONDUCT.**

The defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-540, 295 P.3d 219 (2013). Because the finding that two crimes constitute the same criminal conduct favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme – and the burden – could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and

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And he verified that there were no other promises made to him, no other threats of harm to him or anyone else to cause him to enter that plea, and that it was a free and voluntary decision. And again, he verified to me and I certified that not only had he read that statement, but I went through that statement with him orally.

RP 51-52.

victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

*Id.*

Where a defendant fails to request the court to exercise its discretion in sentencing, any error in that regard is waived. *See, In Re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). More specifically, the failure of a defendant to argue at sentencing that two crimes constituted the same criminal conduct waives the argument on appeal. *State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013), *review denied*, 182 Wn.2d 1022, 347 P.3d 458 (2015); *see also, In Re Pers. Restraint of Shale*, 160 Wn.2d 489, 495, 158 P.3d 588 (2007); *State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000) (“failure to identify a factual dispute for the court’s resolution” and “failure to request an exercise of the court’s discretion” waived the challenge to defendant’s offender score).

The court was not required to exercise its discretion in determining whether the crimes of burglary and theft were the same course of conduct for two reasons. First, the defendant *agreed* to consecutive sentences on all three charges in exchange for the State dismissing the charges that would result in a persistent offender sentence. The court was not required to

undertake a same criminal conduct analysis when the defendant expressly agreed in the plea agreement that the offenses should be run consecutively. However, that being said, the court acknowledged that it did have discretion to deviate from the agreed negotiation, but declined to do so. RP 43, 45, 75. No error may be predicated where the court acknowledges its discretion and simply does not exercise it. See, e.g., *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Secondly, the burden is on the defendant to prove that the charges constituted the same criminal conduct. The defendant bears the burden of production and persuasion on this issue. The argument that he made at sentencing that his crimes were the same course of conduct was no argument at all:

So as far as consecutive and concurrent, the only other thing I understood about consecutive and concurrent sentence is that if it's the *same course of conduct and happened at the same time* and there was no acts of cruelty and no aggravating factors stipulated by the state, which there was none, I understood that it would be run concurrently.

RP 63.

I understand it's a serious case, a third-strike case, but I just -- I thought I was going to get a concurrent sentence. That's what I thought. I knew I was taking 10 years in each charge, but I thought it was going to get ran concurrent because it was the *same course of conduct*, at least that was by my -- Eric Christianson was whispering to me as you were reading

the statement of plea or telling me that you don't have to follow the recommendation and stuff like that.

RP 76.

The defendant gave no analysis demonstrating his acts were, in fact, the same course of conduct. The mere mention that his crimes *could be* the same course of conduct is insufficient to sustain his burden of production and persuasion.

The court ultimately acknowledged its discretion but did not exercise it in favor of any deviation from the defendant's bargained-for sentence. The trial court expressly stated, "I always have discretion to do otherwise. Certainly, if there was some compelling reason in this case, I would consider that. But there just isn't in the context, the entire context of this case, any compelling reason in my mind to deviate from the joint recommendation." RP 75-76. No error may be found upon these facts.

## **V. CONCLUSION**

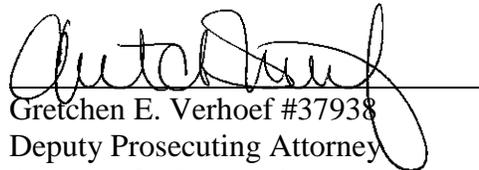
Mr. Luna suffered from a serious case of buyer's remorse, having unambiguously and voluntarily agreed to a 30-year prison sentence rather than risking conviction at trial and being sentenced to life in prison as a persistent offender. However, buyer's remorse is not a basis for withdrawing a guilty plea. The defendant did not demonstrate any manifest injustice requiring the court to allow the withdrawal of his guilty plea.

Mr. Luna received effective assistance of counsel. The trial court did not err in declining to afford him a fact-finding hearing when it already had all pertinent facts before it. It also did not err in declining to conduct a same course of conduct analysis when such an analysis was not contemplated by the bargained-for agreement to three consecutive ten-year sentences rather than a life sentence as a persistent offender.

The State respectfully requests this Court affirm the trial court's rulings and the judgment imposed.

Dated this 10 day of February, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JESSE LUNA, JR.,

Appellant.

NO. 34183-6-III

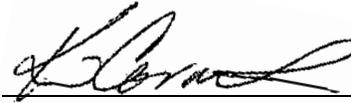
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 10, 2017, I e-mailed a copy of Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan  
nodblspk@rcabletv.com

2/10/2017  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)