

NO. 36412-3
(Consolidated No.)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES EUGENE BAKER, APPELLANT

&

IN RE THE PRP OF:
JAMES EUGENE BAKER

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
00 APR 17 PM 1:40
BY [Signature]

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 06-1-05269-4

BRIEF OF RESPONDENT/STATE'S RESPONSE TO PRP

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Does the record below demonstrate that defendant entered a knowing, voluntary, and intelligent plea? 1

2. Has defendant failed to show that there was any reason for the trial court to doubt defendant's competency to plea guilty when there was a recent order finding defendant competent and defense counsel represented that he did not question defendant's competency?..... 1

3. Has defendant failed to preserve his claim regarding compliance with the factual basis requirement of CrR 4.2 by failing to raise this procedural claim in the trial court?..... 1

Issue pertaining to personal restraint petition

4. Has petitioner failed to demonstrate prejudicial error of a constitutional magnitude or that there was a complete miscarriage of justice necessary to obtain relief by personal restraint petition?..... 1

B. STATEMENT OF THE CASE. 1

C. ARGUMENT.....4

1. THE TRIAL COURT PROPERLY ACCEPTED DEFENDANT'S GUILTY PLEA, AFTER DETERMINING IT WAS MADE VOLUNTARILY, COMPETENTLY AND WITH A FULL UNDERSTANDING OF THE NATURE AND CONSEQUENCE OF THE PLEA.....4

2. PRP..... 13

D. CONCLUSION. 19

Table of Authorities

State Cases

<i>In re Barr</i> , 102 Wn.2d 265, 269, 684 P.2d 712 (1984).....	12
<i>In re Cook</i> , 114 Wn.2d 802, 792, 810-11 P.2d 506 (1990)	14
<i>In re Hagler</i> , 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982).....	13
<i>In re Haverty</i> , 101 Wn.2d 498, 681 P.2d 835 (1984)	13
<i>In re Hews</i> , 108 Wn.2d 579, 592, 741 P.2d 983 (1987)	12
<i>In re Hews</i> , 99 Wn.2d 80, 88, 660 P.2d 263 (1983)	14
<i>In re Hilyard</i> , 39 Wn. App. 723, 726 7, 695 P.2d 596 (1985).....	12
<i>In re Keene</i> , 95 Wn.2d 203, 207, 622 P.2d 13 (1981)	5, 7
<i>In re Ness</i> , 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), <i>review denied</i> , 123 Wn.2d 1009, 869 P.2d 1085 (1994).....	5
<i>In re Personal Restraint of Riley</i> , 122 Wn.2d 772, 782, 863 P.2d 554 (1993)	17
<i>In re Rozier</i> , 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).....	14
<i>In re Williams</i> , 111 Wn.2d 353, 365, 759 P.2d 436 (1988).....	14, 15
<i>State v. Armstead</i> , 13 Wn. App. 59, 63-65, 533 P.2d 147 (1975).....	9
<i>State v. Branch</i> , 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).....	5, 7
<i>State v. Calvert</i> , 79 Wn. App. 569, 576, 903 P.2d 1003 (1995).....	8, 9
<i>State v. Cameron</i> , 30 Wn. App. 229, 232, 633 P.2d 901 (1981)	17
<i>State v. Hystad</i> , 36 Wn. App. 42, 45, 671 P.2d 793 (1983)	8
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, <i>cert. denied</i> , 497 U.S. 922 (1986)	16

<i>State v. Kelly</i> , 502 S.E.2d 99, 108, n.5, 331 S.C. 132 (1998).....	11
<i>State v. Marshall</i> , 144 Wn.2d 266, 281, 27 P.3d 192 (2001)	8
<i>State v. Maurice</i> , 79 Wn. App. 541, 544, 903 P.2d 514 (1995).....	16
<i>State v. McCollum</i> , 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wn.2d 1035 (1999)	17
<i>State v. Perez</i> , 33 Wn. App. 258, 261, 654 P.2d 708 (1982).....	5
<i>State v. Smith</i> , 134 Wn.2d 849, 852, 953 P.2d 810 (1998).....	5
<i>State v. Stephan</i> , 35 Wn. App. 889, 894, 671 P.2d 780 (1983)	5
<i>Wood v. Morris</i> , 87 Wn.2d 501, 507, 554 P.2d 1032 (1976).....	4, 5

Federal and Other Jurisdictions

<i>Campbell v. Knicheloe</i> , 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988)	17
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir. 1990).....	17
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	16
<i>North Carolina v. Alford</i> , 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	8
<i>People of the Territory of Guam v. Taitano</i> , 849 F.2d 431, 432 (9th Cir. 1988)	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	16, 17
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	16
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989).....	17

United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)..... 14

United States v. Riggin, 732 F. Supp. 958, 964 (D. Ind. 1990) 11

Constitutional Provisions

Article 4, section 4, Washington State Constitution..... 13

Sixth Amendment, United States Constitution..... 16

Statutes

RCW 9.94A.030(33)(b).....4, 18

Rules and Regulations

CrR 4.2.....i, 1, 4

CrR 4.2(d).....11, 12

RAP 16.11(a).....14

RAP 16.1214

RAP 16.7(a)(2)15

RAP 2.5(a)(3)12

Other Authorities

J. Bond, Plea Bargaining and Guilty Pleas § 3.54 (1982) 12

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the record below demonstrate that defendant entered a knowing, voluntary, and intelligent plea?
2. Has defendant failed to show that there was any reason for the trial court to doubt defendant's competency to plea guilty when there was a recent order finding defendant competent and defense counsel represented that he did not question defendant's competency?
3. Has defendant failed to preserve his claim regarding compliance with the factual basis requirement of CrR 4.2 by failing to raise this procedural claim in the trial court?

Issue pertaining to personal restraint petition

4. Has petitioner failed to demonstrate prejudicial error of a constitutional magnitude or that there was a complete miscarriage of justice necessary to obtain relief by personal restraint petition?

B. STATEMENT OF THE CASE.

On November 6, 2006, the Pierce County Prosecutor's Office charged appellant, JAMES EUGENE BAKER ("defendant"), with four counts of child molestation in the first degree in Pierce County Cause No. 06-1-05269-4. CP 1-2, 3-4. The State also filed a notice alerting

defendant to the possibility that he could be classified as a persistent offender upon conviction. CP 5-6.

On November 30, 2006, the court signed an order for defendant to be evaluated for competency at Western State Hospital and an order appointing Dr. Mark Whitehill to do an independent assessment of defendant's competency. CP 10-13, 54-55. The report from Western State Hospital indicated that defendant was competent to stand trial. CP 57-63. The report from Dr. Whitehill indicated that defendant was competent to stand trial. CP 64-67. On January 17, 2007, after receiving these reports, the court entered an order finding defendant competent to stand trial. 2RP 3-4; CP 14-15.

Defendant was before the court to enter a guilty plea to the original information on February 27, 2007. 3RP 2. Defendant's counsel made it clear to the trial court that the defendant was entering a guilty plea against his advice. 3RP 2-3. Counsel indicated that he had tried to dissuade defendant from this course of action and that there were alternatives such as a jury trial, bench trial, or trial on stipulated facts - all of which would preserve his right to appeal a determination of guilt. *Id.* Counsel indicated that he had discussed the fact that defendant was facing a sentence of life without the possibility of parole if convicted. 3RP 2. Counsel indicated that, despite being fully aware of this risk, defendant wanted to plead guilty over counsel's objections. *Id.* Defense counsel

noted that as both psychological examinations found defendant to be competent and because counsel also believed the defendant was competent, that he had to assist defendant in his decision to plead guilty. 3RP 3.

Counsel represented that he had gone over the elements of the crime, the maximum penalty and the rights that he was giving up. He reiterated that he explained to defendant that if the State proved his prior strike offense that the court would have no discretion but to impose a sentence of life without parole. 3RP 3-4. The court then went through a colloquy with defendant verifying that defendant could read and write and that he had gone over the plea form with his attorney. 3RP 5. The court asked questions of the defendant to verify the information in the plea form; defendant confirmed his written representations. 3RP 5-7. After hearing defendant's responses, the court found that the defendant was making a free and voluntary plea with a complete understanding of the rights being waived and of the potential sentence that could be imposed; the court accepted defendant's plea of guilty to four counts of child molestation. 3RP 7-8.

At the initial date set for sentencing the court set the matter over because it had not yet had the opportunity to review the presentence investigation report. 4RP 2-4; CP 68-78. On April 20, 2007, the court found that defendant had a prior conviction for attempted child

molestation in the first degree which meant that he was a persistent offender under RCW 9.94A.030(33)(b) and subject to a sentence of life without parole on each count. 5RP 2-5; CP 35-50. The court also imposed \$1200.00 in legal financial obligations and gave defendant credit for 168 days time served. CP 35-50.

Defendant filed a timely notice of appeal from entry of this judgment. CP 51. On May 24, 2007, defendant filed a timely first time personal restraint petition alleging that his attorney was ineffective for not arguing for a lesser sentence or other wise defending him. The court consolidated this petition with the direct appeal.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ACCEPTED DEFENDANT'S GUILTY PLEA, AFTER DETERMINING IT WAS MADE VOLUNTARILY, COMPETENTLY AND WITH A FULL UNDERSTANDING OF THE NATURE AND CONSEQUENCE OF THE PLEA.

A court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2. The State bears the burden of proving the validity of a guilty plea. *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976). The record from the plea hearing must establish that the plea was entered voluntarily and

intelligently. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) citing *Wood*, 87 Wn.2d at 511. When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). Furthermore, when a defendant, who has received the information, pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent, and voluntary. *In re Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *review denied*, 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant’s signature on the plea form is strong evidence of a plea’s voluntariness.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court orally inquires into a matter that is on this plea statement, the presumption that the defendant understands this matter becomes “well nigh irrefutable.” *Branch*, 129 Wn.2d at 642 n.2; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After a defendant has orally confirmed statements in this written plea form, that defendant “will not now be heard to deny these facts.” *In re Keene*, 95 Wn.2d 203, 207, 622 P.2d 13 (1981).

In this case the defendant with the assistance of counsel completed the statement of defendant on plea of guilty. CP 16-30. The plea form advised defendant of the elements of the crime, the rights that he was giving up, and of the direct consequences of his plea. CP 16-30. Defendant presents no argument on appeal that the plea form was deficient

in these respects. Furthermore, defendant's counsel represented that he had gone over the plea form with defendant and that in his opinion defendant was making a knowing, voluntary, and intelligent guilty plea. 3RP 3-4. Defendant's signature was on the plea form averring that his lawyer had explained the contents of the form to him, that he understood all of the paragraphs and that he had no further questions to ask. CP 16-30.

At the plea hearing, counsel verified on the record that that he had gone over the content of the form with his client. 3RP 2-4. Defense counsel concluded his representations by stating:

Paragraph 11 is a statement in my printing that he initialed as being true and accurate. It provides a factual basis for the crimes and admits the crimes that he's charges with. He's doing this of his own free will, knowingly, willingly and intelligently, albeit against the advice of competent, experienced counsel, but I have to ask the Court to accept it because that's his choice.

3RP 4. Thus, counsel represented to the court that he and defendant understood there to be a factual basis for the crimes as defendant was admitted his guilt in paragraph 11. Defense Counsel did not wish his client to plead guilty and, thus, would not have represented to the court that defendant was acting knowingly and voluntarily if he had had any doubt as to that fact.

The court went on to inquire of the defendant as to his understanding of the plea. 3RP 5-7. Defendant indicated to the court that

he understood the elements of the crime with which he'd been charged. *Id.* He understood the rights that he was giving up. *Id.* The court verified that defendant understood it was likely that he would receive a sentence of life without the possibility of parole and that defendant still wanted to plead guilty with that in mind. 3RP 6. The court read the contents of paragraph 11 to the defendant and asked him if he was adopting that paragraph as his own; the defendant indicated that he was. 3RP 6-7. The defendant assured that court that he was entering his plea freely and voluntarily. 3RP 7. Defendant assured the court that no one was forcing him to plead guilty and that no one had made him any special promises. 3RP 7. Only after these assurances did the court accept the guilty pleas. 3RP 8.

This oral confirmation of the written representations in the guilty plea form makes the presumption that the defendant understood what he was doing by pleading guilty “well nigh irrefutable” and defendant should not now be heard to deny these facts. *Branch*, 129 Wn.2d at 642 n.2; *In re Keene*, 95 Wn.2d at 207. The record shows a constitutionally voluntary and intelligent plea.

a. The Record Does Not Reveal Any Reason To Question Defendant's Competency To Plead Guilty.

When a petitioner claims that he was incompetent to plead guilty, it is the same as claiming that the plea was involuntary. *State v. Marshall*,

144 Wn.2d 266, 281, 27 P.3d 192 (2001). The competency standard for pleading guilty is the same as that for standing trial. *Marshall*, 144 Wn.2d at 281. A defendant is incompetent “if he is incapable of properly appreciating his peril and of rationally assisting in his own defense.” *Id.* When a defendant claims that he was incompetent to plead guilty, the court reviews “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *State v. Calvert*, 79 Wn. App. 569, 576, 903 P.2d 1003 (1995) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)).

A defendant must support his claim with evidence of his incompetency at the time of the plea. If such evidence is presented to a trial court in support of a motion to withdraw, the court must either grant the motion or hold a competency hearing. *Marshall*, 144 Wn.2d at 281. In *Marshall*, the Supreme Court vacated the defendant’s guilty plea because he presented “substantial evidence calling [his] competency into question.” *Marshall*, 144 Wn.2d at 281. Undisputed evidence showed that Marshall had suffered brain damage and had bipolar mood disorder or manic depressive disorder. He was also diagnosed as paranoid schizophrenic a few weeks before entering his plea. *Marshall*, 144 Wn.2d at 279-80. In contrast, an incompetency claim unsupported by evidence may be rejected without a competency hearing. *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983) (rejecting an unsupported claim that a

defendant's plea was involuntary because of methadone-induced confusion); *see also State v. Calvert*, 79 Wn. App. at 576 (rejecting unsupported incompetency claim based on a head injury); *State v. Armstead*, 13 Wn. App. 59, 63-65, 533 P.2d 147 (1975) (rejecting defendant's unsupported claim that he was "drunk off barbiturates" when he pleaded guilty).

In the case before the court there was no question as to defendant's competency to enter his guilty plea. Prior to the entry of the plea, defendant had been subject to competency evaluations by two experts; both examinations concluded that defendant was competent to stand trial. CP 57-63, 64-67. The experts at Western State Hospital concluded that:

Mr. Baker is a man who does not have prominent symptoms of major mental illness. His measured intelligence is near or in the Borderline Range. He has some difficulty with attention and with impulsivity. However, none of his cognitive or intellectual deficits would be expected to interfere with the capacities required to assist his attorney and understand the proceedings.

CP 61. The independent evaluator chosen by defense counsel also of had a firm opinion that defendant was competent to stand trial:

Mr. Baker demonstrated an advanced understanding of the legal system.Mr. Baker appeared rationale [sic] and devoid of symptoms which would hinder his capacity to assist counsel. He demonstrated an adequate memory of his contacts with the alleged victim and his family as well as the time period during which he interacted with them. His ability to convey relevant facts to counsel, and his motivation to do so, appeared very good.

CP 67. As there seemed to be no question as to defendant's competency to stand trial, the court entered an appropriate order on January 17, 2007. CP 14-15.

Just over a month later, defendant was before the court to enter his plea. 3RP 2. Defense counsel indicated to the court that he believed defendant to be competent. 3RP 3. No one provided any information to the court that would call defendant's competency into question prior to sentencing. 3RP 2-8; 4RP 2-4; 5RP 2-5. Defendant has never brought a motion to withdraw his plea.

In light of this record, the trial court had no reason to doubt defendant's competency to enter a plea. On appeal, defendant's only arguments that there was reason to doubt his competence are: 1) he had been sent out for a competency evaluation; and 2) he was pleading guilty against the advice of his attorney. Appellant's brief at p. 7. But the record in this case shows that the evaluations revealed that there was no question as to defendant's competency to stand trial. The *results* of the mental health evaluations provide more relevant information about defendant's competency than the mere fact that the evaluations had been ordered. The results of the evaluations established his competency.

As for his second argument, defendant provides no legal authority that the fact that a criminal defendant is disregarding the advice of his attorney, in and of itself, can be construed as a reason to doubt the competency of that criminal defendant. The State is unaware of any

authority for this contention and could only find authority for the opposite proposition. *People of the Territory of Guam v. Taitano*, 849 F.2d 431, 432 (9th Cir. 1988) (fact that defendant refuses to cooperate with lawyer does not automatically render him incompetent to stand trial); *State v. Kelly*, 502 S.E.2d 99, 108, n.5, 331 S.C. 132 (1998) (the fact that defendant chose to disregard his lawyer's advice does not make him incompetent to stand trial); see also *United States v. Riggin*, 732 F. Supp. 958, 964 (D. Ind. 1990).

Based on the record below, defendant's claims that the trial court was required to inquire into the defendant's competency to enter a plea are without merit.

b. Defendant Failed To Preserve Any Claim Regarding An Insufficient Factual Basis Under CrR 4.2(d) In Trial Court.

The requirement for a factual basis for a plea is found in CrR 4.2(d), which reads:

Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The rule requiring the trial court taking a guilty plea to be satisfied that there is a factual basis for the plea is intended simply to enable the trial court to verify the accused's understanding of the charges. *In re*

Hilyard, 39 Wn. App. 723, 726 7, 695 P.2d 596 (1985). Even though CrR 4.2(d) requires that the judge taking a plea must be “satisfied there is a factual basis for the plea” and that those underpinning facts must be developed on the record of the plea hearing, the federal and state constitutions do not impose this requirement. *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987) (“[The] factual basis is not an independent constitutional requirement and is constitutionally significant only in so far as it relates to the defendant's understanding of his or her plea.”). Only manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3) “A violation of the procedural rule [CrR 4.2(d)] does not necessarily establish, however, that a particular plea was constitutionally infirm.” *In re Barr*, 102 Wn.2d 265, 269, 684 P.2d 712 (1984) (footnote 2, quoting J. Bond, *Plea Bargaining and Guilty Pleas* § 3.54 (1982)).

Defendant did not challenge the lack of a factual basis below. He did not seek to withdraw his plea or otherwise complain at sentencing that his plea was involuntary. In order to preserve his issue for review, he was required to raise an objection to the factual basis requirement of CrR 4.2(d) in the trial court. As he did not, this claim is not properly before the court.

As argued above, the record shows an unquestionably voluntary plea. The record shows that defendant’s pleas were made voluntarily, competently, and with a full understanding of the nature and consequences

of the pleas. Defendant, who was represented by counsel completed a plea statement and affirmed his understanding of the consequences of that plea and his willingness to enter a plea to the trial court. Defendant did not enter a Newton plea but admitted his guilt to these crimes. The defendant has failed to show that his plea was anything other than a knowing, voluntary, and intelligent plea. The court did not err in accepting the plea.

2. THE PERSONAL RESTRAINT PETITION
SHOULD BE DISMISSED.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). 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. These are significant costs, and they require that collateral relief be limited in state as well as federal courts. *Id.*

A petitioner asserting a constitutional violation must show actual and substantial prejudice. *In re Haverty*, 101 Wn.2d 498, 681 P.2d 835 (1984). A petitioner relying on non-constitutional arguments, however, must demonstrate a fundamental defect that inherently results in a

complete miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 792, 810-11 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. *Id.* at 810.

Reviewing courts have three options in evaluating personal restraint petitions:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full 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 prejudicial error, the court should grant the personal restraint petition without remanding the cause for further hearing.

In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In a personal restraint petition, “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (citing *In re Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). That phrase means “more is required than that the petitioner merely claim in broad general terms that the prior convictions were unconstitutional.”

Williams, 111 Wn.2d at 364. The petition must also include the facts and “the evidence reasonably available to support the factual allegations.” *Id.*

The petition must include a statement of the facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); *Williams*, 111 Wn.2d at 365.

Personal restraint petition claims must be supported by affidavits stating particular facts, certified documents, certified transcripts, and the like.

Williams, 111 Wn.2d at 364. If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed.

Williams, 111 Wn.2d at 364.

In his petition defendant claims that his attorney: 1) failed to bring up defendant’s mental health history at sentencing; 2) failed to argue for a lesser sentence; 3) did not defend him. The State will interpret this as an ineffective assistance of counsel claim although the defendant did not use those words.

Defendant provides no evidence to support these claims and does not refer to the record currently before the court on direct appeal. The court should dismiss this petition under *Williams* for failing to support his claim with evidence.

Assuming the court addresses the merits, the following law is applicable. 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. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment 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).

The test to determine when a criminal defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). To demonstrate ineffective assistance of counsel, the defendant must show that (1) defense counsel’s representation was deficient and fell below an objective standard of reasonableness, and (2) defense counsel’s deficient representation prejudiced him such that it caused the outcome of the trial to be different. *State v. Maurice*, 79 Wn. App. 541, 544, 903 P.2d 514 (1995).

A reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

In order to show ineffective assistance of counsel in the plea process, the petitioner must demonstrate that his counsel failed to “actually and substantially [assist] his client in deciding whether to plead guilty.” *State v. McCollum*, 88 Wn. App. 977, 982, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035 (1999) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). Defendant must also show that “but for counsel’s failure to adequately advise him, he would not have pleaded guilty.” *Id.* In a personal restraint petition, a petitioner must present at least a prima facie showing of actual prejudice. *In re Personal Restraint of Riley*, 122 Wn.2d 772, 782, 863 P.2d 554 (1993).

In this case defendant cannot show that his attorney was ineffective for advising him to enter a guilty plea because the record is clear that

defendant entered his plea *against* the advice of his attorney. 3RP 2-4.

The record explicitly establishes that trial counsel warned defendant that if he entered a plea of guilty that he would almost certainly face a sentence of life without the possibility of parole under the “two strikes” law and that the court would have no discretion but to impose that sentence assuming proof of the prior strike. 3RP 2-4.

At sentencing, the State provided proof of defendant’s prior conviction for attempted child molestation in the first degree, a predicate strike under the “two strikes” law and asked the court to impose life without the possibility of parole. RCW 9.94A.030(33)(b); 5RP 2.

Defense counsel asked the court to make a determination regarding the existence of the prior strike, but acknowledged that if the court found the strike to exist that:

[T]here’s not a whole lot you can say in cases like this. I can come up here and spend a half hour talking about the details of the psychological evaluations and mental health and whatnot and whatnot, and the bottom line is that the sentence is dictated by statute. You have no authority but to do exactly what the State says you have to do. So I’ve kind of learned not to ramble in cases like this. But I want to reaffirm that Mr. Baker pled guilty to this over my objection, against my advice, repeatedly against my advice. ...I would rather he go to trial or do some other form that preserved his right to appeal the factual portion.

5RP 3-4. As noted above, an attorney is not required to argue a meritless claim. There was no point informing the court about defendant’s mental health issues or in arguing for a lesser sentence as the court was bound by

law to impose a life without parole sentence. Defendant has failed to provide any evidence that his attorney misinformed him as to the consequences of his plea and the record indicates that this did not occur. The fact that defense counsel could not persuade defendant to follow his advice and go to trial does not establish that he was ineffective. The situation defendant finds himself in is of his own making.

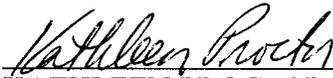
As defendant has failed to establish any error below or any resulting prejudice, his petition must be dismissed.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment below and to dismiss the personal restraint petition as meritless.

DATED: April 16, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

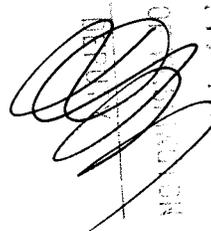


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

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 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.

4/16/08 G. Johnson
Date Signature


STATE OF WASHINGTON
BY _____
08 APR 17 PM 1:01
COURT OF APPEALS
TACOMA, WA
baker.doc