FILED
COURT OF APPEALS
DIVISION II

06 APR 24 PM 2:02

STATE OF WASHINGTON
BY _____
DEPUTY

No. 34488-2-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF

MICHAEL J. GONZALES

APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II Judge

Cause No. 02-1-00415-6

REPLY BRIEF OF PETITIONER, TO RESPONDENT'S RESPONSE TO PERSONAL RESTRAINT PETITION

Michael J. Gonzales
Pro se
724909, AHCC
P.O. Box 1809, Unit LB60
Airway Heights, WA 99001-1809

REPLY PREFACE

Petitioner hereby replies to the 'Brief Of Respondent's Response To PRP', per RAP 10.3(c). Petitioner submits to this Court that adequate compelling facts, arguments, case law, support each issue presented in Petitioner's PRP.

To avoid being redundant, Petitioner cites to relevant sections of his PRP, addressing the Respondent's responses.

Collectively, the responses of Respondent attempt to ignore the prima facie facts & evidence presented, and the basis rights of due process which were clearly violated, articulated in the PRP, and which resulted in the deprivation of a direct appeal, actual & substantial prejudice, harm, and a manifest injustice.

In addition, the Respondent does not contest the "Fifth Ground" - Issue, of "Perjury Of The State's Primary Witness", (Mr. Dustin Jeffery) and Petitioner requests that this Court rule that the State/Respondent is acquiescent to the Fifth Ground, facts and arguments, and therefore grant the relief requested.

REPLY TO RESPONSE BRIEF No. 1.

Petitioner was harmed from inaffective assistance of counsel. Petitioner again emphasizes that he was seriously prejudiced, in part, by inaffective assistance of counsel (hereafter IAC) depriving him of his State and Federal Constitutional rights, as articulated in Petitioner's brief, First Ground Pages 9-21, and clearly meets the requirements to meet the IAC standard for relief, and collectively, there is a reasonable probability that, but for counsel's errors, the result of the plea agreement process, and resentencing hearing, the results would have been significantly different, and would have a drastically different result on the Petitioner's guilt and liberty interests.

Petitioner believes that it is extremely important to again point out that Court Appointed Counsel, Ms. Linda Callahan, appointed by the Superior Court, on November 29, 2004, never ever represented Petitioner, as was Ordered & Directed to by the Court, and without the consent of Petitioner, 'attempted' to substitute counsel for representation. Instead, trial counsel, Mr. Pimentel (who Defendant previously fired & who withdrew from the case) and Ms. Callahan

took it upon themselves to circumvent the Court's Order, thereby prejudicing Petitioner's Constitutional rights, and the integrity of the 'process' with harm and actual and substantial prejudice.

Petitioner believes the following new case law supports his arguments.

> "To prevail in a PRP, [Defendant] must show, by a preponderence of the evidence, actual and substantial prejudice resulting from alleged constitutional errors, or for alleged nonconstitutional errors, a fundamental defect that inherently results in a miscarriage of justice."
> In the Matter of the Personal Restraint of Jorge Valenzuela Fonseca, No. 23740-1-III; Published Decision; Filed April 11, 2006.

citing, In re Pers. Restraint of Cook, 114 Wn.2d 802, 813 (1990); see also In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298 (2004).

REPLY TO RESPONSE BRIEF No. 1.A.

Petitioner swears that he absolutely requested Attorney Mr. Pimentel to file a Direct Appeal of the resentencing, judgement & sentence.

The record should not nor would not reflect such an indication of intent to appeal, because Petitioner in his private conversation with Mr. Pimentel, at the resentencing hearing, promptly expressed his direct request for an appeal in private conversation.

Private conversations to attorneys are rarely if ever a matter of record, which I believe this Court would agree. Contrary to the Respondent's assumption, Petitioner believes that he was severely prejudiced by IAC at the resentencing hearing. Please see PRP Pages 9-22.

Petitioner argues that he 'could not' be more clear, adamant or blatant than to say, "...file a direct appeal challenging the conviction and sentence ...". PRP at Page 10.

Petitioner relied on Mr. Pimentel despite the circumstances, and neither a Notice Of Appeal or a Direct Appeal were ever filed.

Mr. Pimentel stated specifically, after Defendant's request to appeal, that he "would handle it". Please see PRP at Page 12, Sec. 1.7 .

Interestingly, Mr. Pimentel did not offer an 'Affidavit'. Mr. Pimentel states he did not "...recall..." Petitioner requesting him to file an appeal, 'not' that Petitioner did 'not' specifically make the request. Please see Respondent's Appendix 'D', Declaration of Mr. Pimentel.

Petitioner believes he has met his burden of proof for IAC.

REPLY TO RESPONSE BRIEF No. 1.B.

Conflict of interest and specific prejudice have been demonstrated. The Respondent attempts to allege [sic] "... specious ..." possibly attempting to mean suspicion in light of Mr. Pimentel's declaration, Appendix 'D', when in fact Mr. Pimentel states in part, "... I do not recall any discussion wherein Gonzales requested that I file a notice of appeal following his re-sentencing ...". To the contrary, I know for sure the conversation and request for appeal was discussed. Please see PRP Page 10, Sec. 1.4 .

Petitioner argues that this Court should agree that it would be extremely difficult for Mr. Pimentel to remember all confidential client conversations, which I believe he nor most attorneys are able to remember. Further, I believe it is fair and proper to accept the sworn statement of Petitioner, herein and in my PRP, that the request was 'absolutely' made, contrary to Mr. Pimentel's uncertainty. Granted, counsel probably handles hundreds of cases per year, and has hundreds of confidential 'off the record' conversations with individuals, such as this specific request at such a critical stage of a case.

Contrary to Mr. Pimentel's declaration, I was never consulted by Mr. Pimentel or anyone else prior to the resentencing hearing, agreeing that Mr. Pimentel would appear on my behalf. I had no idea why he was there instead of Ms. Callahan who I fully expected to represent me.

Ultimately, by not being represented by Attorney, Ms. Callahan, and instead Mr. Pimentel showing up without my consent, and who I had previously fired, and who withdrew from my case prior, conflict of interest occurred, and a manifest injustice resulted, and the specific prejudices are demonstrated.

REPLY TO RESPONSE BRIEF No. 1.C.

Petitioner did not receive the full remedy of a complete resentencing hearing. The resentencing hearing was insufficient as described in PRP pages 25-26, in part, by the Court relying on the transcript of the prior sentencing, instead of fully addressing 'each' issue at the resentencing hearing. Lack of a 'full & complete' resentencing hearing amounted to a manifest injustice.

Respondent's brief refers to "...costs and conditions..." at "[App. D at 15]" which is incorrect.

REPLY TO RESPONSE BRIEF No. 1.D.

Petitioner was not allowed to accept an Alford Plea which Mr. Pimentel said was an available option. The record does not nor should not reflect our confidential conversation concerning an Alford Plea. Please see PRP page 21.

REPLY TO RESPONSE BRIEF No. 2.

Failure to fully advise Petitioner of all the direct consequences of his plea, resulted in a manifest injustice. Due process requires that a defendant be informed of, and understand, the direct consequences of a plea agreement. Please see PRP pages 22-24.

Respondent attempts to make an analysis by citing State v. Barton, 93 Wn.2d 301 (1980), which amounts to an inaccurate, invalid & misleading analysis. There is a protected constitutional Due Process requirement, contrary to Respondent's assertion.

> "Due process requires knowing, voluntary, and intelligent guilty plea. Boykin v. Alabama, 395 U.S. 238, 242 (1969); In re Pers. Restraint of Isadore, Id. at 297. A guilty plea is not knowingly made if based on misinformation as to the sentencing consequences. State v. Miller, 110 Wn.2d 528,531 (1988). A defendant must be

> informed of all direct consequences of the plea. Isadore, id. at 298 (citing State v. Ross, 129 Wn. 2d 279, 284 (1996))."
>
> "Under CrR 4.2 (f), a Court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice. An involuntary plea produces a manifest injustice. Isadore, id at298 (citing Ross, 129 Wn.2d at 284; State v. Walsh, 143 Wn.2d 1, 8 (2001) (mutual mistake regarding sentencing consequences renders guilty plea invalid)). A "direct" consequence includes one that "'represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" Ross, at 284 (quoting State v. Barton, 93 Wn.2d 301,305 (1980))."

In the Matter of the Personal Restraint of Jorge Valenzuela Fonseca, No. 23740-1-III; Published Decision; Filed April 11, 2006.

REPLY TO RESPONSE BRIEF No. 3.

Petitioner's right to appeal was denied in part due to IAC. Petitioner demonstrates the actual and substantial prejudice throughout his PRP and this reply. Attorney, Mr. Pimentel failed to file defendant's protected direct appeal as he agreed to, and was entitled to.

REPLY TO RESPONSE BRIEF No.4.

The inclusion of prior juvenile offenses in calculation of defendant's offender score did violate defendant's Due Process and Sixth Amendment rights.

Petitioner believes this Court should follow the Ninth Circuit Court's precident in United States v. Tighe, 266 F.3d 1187, because it cannot be assumed that sufficient safeguards were in place at the time of the juvenile convictions, and proof beyond a reasonable doubt 'cannot' be assumed. Petitioner believes this Court should rule that Petitioner's juvenile Due Process rights should have as much or more protections as any adults Due Process rights, and provide the requested relief.

REPLY TO RESPONSE BRIEF No.5.

The trial Court did error by including juvenile offenses that washed-out. The sentence must be in accord with the laws at the time of the crime, and at the very least, should be remanded for resentencing with an offender score of Zero (0) points.

Petitioner believes his collective arguments support this claim, and the incorrect and invalid Judgment and Sentence documents (x2) further support his claims for relief. Judgment and Sentence inaccuracies noted in PRP at page 30, and Exhibits A,B,C,D herein submitted, indicating the same, and were also previously submitted in PRP.

Respondent has offered "[Appendix C]" Judgement and Sentence marked, "Received & Filed Jan 14,2005", which is identical to Exhibit 'D' which Petitioner offers, and which is further explained.

Petitioner did make a mistake articulating the inaccuracies within his PRP, concerning the second J & S, and again argues that both are invalid. Please see both J & S's, dated June 13, 2003, and January 14, 2005. EXHIBITS A,B,C,D.

First, the original J&S dated June 13,2003, page 2, §2.2, Assault 2°, is absolutely incorrect, and invalidates the J&S. Please note that the"Date Of Sentence" of 4-19-1993, and the "Date Of Crime" of 4-19-1993. The dates are identical, impossible and absolutely incorrect, and invalidate the J&S. Please see EXHIBITS A & B.

Second, the resentencing J&S dated January 14, 2005, page 2, §2.2, #2, Assault Second Degree, is absolutely incorrect, and again invalidates the resentencing J&S. Please note the "Date Of Sentence" of 2-10-1993, and the "Date Of Crime" of 4-19-1993. The date of the sentence is a date 'before' the date of the crime. The dates are an impossibility, incorrect, and invalidate the J&S. Please see EXHIBITS C & D.

CONCLUSION

The collective ineffective assistance of counsel and constitutional errors were not harmless, and amounted to a manifest injustice.

Petitioner submits that his collective Grounds/Issues, supporting arguments, caselaws, and precedents, fully sustain the arguments, and merit relief.

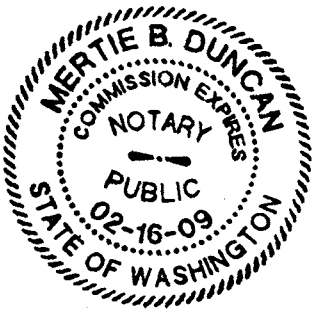
Petitioner prays for the relief requested within PRP at pages 33,34 & 41, or any other form of relief that this Court finds just.

I declare under penalty of perjury, and pursuant to 28 U.S.C. § 1746, and under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 19th day of April, 2006.

Michael Gonzales

Michael J. Gonzales
724909, AHCC
P.O. Box 1809, Unit LB60
Airway Heights, WA 99001-1809



This document was subscribed and sworn to before me on this 19 day of April, 2006

Notary for the State of Washington. Mertie B. Duncan

My commission expires on 2-16-09

RECEIVED & FILED
JUN 13 2003
PAT SWARTOS, Clerk of the
Superior Court Mason Co. Wash.

SUPERIOR COURT OF WASHINGTON
COUNTY OF MASON

STATE OF WASHINGTON, Plaintiff, v. MICHAEL JESSE GONZALES, Defendant. SID:WA14896056 If no SID, use DOB: 122575	No. 02-1-00415-6 **JUDGMENT AND SENTENCE** (JS) [X] Prison [ ] RCW 9.94A.712 Prison Confinement [ ] Jail One Year or Less [ ] RCW 9.94A.712 Prison Confinement [ ] First-Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] **Clerk's Action Required, para 4.1 and 5.8**

724909
06/13/03

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on MAY 27, 2003 by [X] plea [ ] jury-verdict [ ] bench trial of: (Date)

COUNT	CRIME	RCW	DATE OF CRIME
II	MURDER IN THE SECOND DEGREE	9A.32.050	061402

as charged in the Second Amended Information, provided, the firearm enhancement in such Count II is stricken.

[ ] The court finds that the defendant is subject to sentencing under RCW 9.94A.712

[ ] A special verdict/finding for use of **firearm** was returned on Count(s) . RCW 9.94A.609, .510.

[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) . RCW 9.94A.602 .510.

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) . RCW 9.94A.835.

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) , RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic

EXHIBIT (A)

center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) . RCW 9.94A.605.

[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.575.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s) _involve(s) **domestic violence.**

[ ] The offense(s) in Count(s) was/were commited in a county jail or state correctional facility. RCW 9.94A.510(5)

[ ] A special verdict/finding determining aggravating circumstances was returned on Count(s) , as follows: . RCW 10.95.020.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): [ ]

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): [ ]

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	DATE OF RELEASE	A or J Adult, Juv.	TYPE OF CRIME
1	RESIDENTIAL BURGLARY	022792	YAKIMA; WA	011392		J	
2	ASSAULT 2°	041993	YAKIMA; WA	041993		J	
3	VUCSA (2 Counts)	072994	YAKIMA; WA	031794		A	

V = Violent; SV = Serious Violent; Sex = Sex Offense; Vsex = Violent Sex; SVSex = Serious Violent Sex

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score. (RCW 9.94A.525: .....

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS -NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
II	4	XIV	165 – 265 MONTHS	N/A	165 - 265 MONTHS	LIFE

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

EXHIBIT (B)

RECEIVED
FEB 1 1 2005
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JAN 14 2005
PAT SWARTOS, Clerk of the
Superior Court Mason Co. Wash

SUPERIOR COURT OF WASHINGTON
COUNTY OF MASON

STATE OF WASHINGTON, Plaintiff,	No. 02-1-00415-6
vs.	**JUDGMENT AND SENTENCE** (JS) (RESENTENCED PER COA II MANDATE)
MICHAEL JESSE GONZALES, Defendant.	[X] Prison
SID: WA148960056 If no SID, use DOB: 12-25-1975	**[X] Clerk's Action Required, para 4.15.2, 5.3, 5.6 and 5.8**

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present. This is a resentencing with a corrected offender score pursuant to a mandate from COA II.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on MAY 27, 2003 by [x] plea [ ] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
II	MURDER IN THE SECOND DEGREE	9A.32.050	06-14-2002

(If the crime is a drug offense, include the type of drug in the second column.)
as charged in the (_____ Amended) Information.

[ ] Additional current offenses are attached in Appendix 2.1.

[ ] The court finds that the defendant is subject to sentencing under **RCW 9.94A.712**.

[ ] A special verdict/finding for use of **firearm** was returned on Count(s) _____. RCW 9.94A.602, 9.94A.533.

[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) _____ _____. RCW 9.94A.602, 9.94A.533.

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _____. RCW 9.94A.835.

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) _____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) _____ _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s) _____ involve(s) **domestic violence.**

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	RESIDENTIAL BURGLARY 1/2 pt	02-27-92	YAKIMA, WA	01-13-92	J	NV
2	ASSAULT SECOND DEGREE 2 pt	02-10-93	YAKIMA, WA	04-19-93	J	V
3						
4						
5						

[x] Additional prior convictions which have washed and are no longer counted in offender score: 2 counts VUCSA (marijuana) 03-1994 Yakima WA.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

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COURT OF APPEALS
DIVISION II

06 APR 24 PM 2:02

STATE OF WASHINGTON

BY _____ DEPUTY

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

In re Personal Restraint Petition of Michael J. Gonzales Petitioner.	)	No: 34488-2-II **CERTIFICATE OF SERVICE**

I, Michael J. Gonzales, Petitioner in the above entitled cause, under the penalty of perjury, do hereby certify that on the date noted below, I sent copies of: Reply Brief Of Petitioner, To Respondent's Response To PRP; Exhibits A,B,C,D. (Pages 1 & 2 of both J & S's)

(Brief 12 pages, Exhibits 4 pages, Total 16 pages.)

To: Court Of Appeals Division II, Clerk Of The Court
950 Broadway, Suite 300, Tacoma, WA 98402-4454

By processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 1809, Airway Heights, WA 99001-1809.

Dated this 20th day of April, 20 06.

CERTIFICATE OF MAILING
I certify that I mailed 1 copies of Petitioner Reply Brief brief to Gary Paul Burkson & _____.
5/2/06 _____
Date Signed

Respectfully Submitted,

Michael J. Gonzales
Petitioner

CERTIFICATE OF SERVICE