FILED
COURT OF APPEALS
DIVISION II

2017 DEC -7 AM 11:04

STATE OF WASHINGTON

BY
DEPUTY

No. 50608-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE PERS. RESTRAINT OF NELSON

REPLY AND REDRESS BRIEF

Austin R. Nelson (Pro Se)

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OTHER AUTHORITY

Nelson had assistance preparing his Pro Se filings per Department of Corrections Policy DOC 590.500 in the law library.

A. IDENTITY

Austin Nelson, appellant pro se, brings forth this reply and redress brief.

B. REPLY ARGUMENT AND REDRESS

1. Prosecutor James Schacht has brought forth a vigorous, even ambitious response in opposition to Nelsons Personal Restraint Petition. Though Nelson is only Pro Se in his appearance before the court, he will attempt to reply and redress each area of law respondent takes issue with. (It should be noted that respondents brief does not conform to the rules of Appellate Procedure with regard to his format and margins.)

i. At first blush, respondent seems to take issue with Nelson because, with the exception of Nelsons first issue, he has not met his burden of proof. BOR pg. 2.

ii. There are no lawyers here on this end of the petition. Nelson is pro se and therefor

should be held to a less stringent standard. Hebbe v. Pliler, 627 F.3d 338, 341 (9th Cir. 2010), (The Courts must "continue to construe Pro Se filings liberally.") Eldridge v. Block, 832 F.2d 1132, 1136 (9th Cir. 1987). Neverthe less, Nelson will attempt to articulate the "preponderance of evidence" for each error respondent takes issue with.

2. Respondent brings forth his next argument misnumbered as 1., BOR pg. 3., which seems to argue that:

> THE DEFENDANT ENTERED A VALID GUILTY PLEA PREDICATED ON A CORRECT OFFENDER SCORE AND CORRECT APPLICATION OF THE FIREARM ENHANCEMENT.

i. Respondent follows this assertion with an inaccurate summary of grounds for which Nelson argues for relief. Respondent declines to address each question of law Nelson presents and instead presents his argument that the Division III, COA, was wrong in deciding Soto and Vasquez, and that Nelson is challenging his plea and sentence on the grounds that his offender score

and sentence enhancement were improperly calculated and that therefor his sentence is invalid. Mr. Schacht says Nelson's issues are not well taken and should be dismissed. BOR pg. 3.

ii. Respondent next appears to concede that Nelson's first issue is correct, that he should not have received a weapons enhancement on an unranked felony. But since he cannot say that Nelson is wrong, nor can he admit that the Holier-than-thou Pierce County Prosecutors Office was wrong, he points to the COA, Division III and says they were wrong in deciding Soto. It should be noted that apparently Division III was wrong again because it just decided another case the same way in State v. Vasquez, (No. 33790-1-III)(Aug 22, 2017).

iii. Although we the pro se are not college educated lawyers, we understand the concept of stare decicis and the arduous task of overturning case precedent. "Adherence to past decisions

through the doctrine of stare decisis promotes clarity and stability in the law, thereby enabling those impacted by the courts decisions to make personal and perfessional decisions that comply with legal mandates." In Re Rights To Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

iv. Horizontal stare decisis is fairly well defined at the supreme court level. While it is not strictly bound by prior decisions, a litigant seeking to upend a prior case faces an arduous task. Our supreme court does not lightly set aside a prior decision. State v. Otton, 185 wn.2d 673, 678, 379 P.3d 1108 (2016). Because of the many benefits of adhering to precedent, the suprem court will revisit prior decisions only upon "a clear showing that an established rule is incorrect and harmful." Id. (Qouting Stranger Creek, 77 wn.2d at 653). Both prongs of this analysis are required. Deggs V. Asbestos Corp, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016), State v. Barber, 170 wn.2d 854, 864,

248 P.3d 494 (2011). A prior case that is merely incorrect, but is not also harmful, does not meet the criteria for reversal. Deggs, 186 Wn.2d at 727-28; Barber, 170 Wn.2d at 864. It should be noted that the Washington Supreme Court has recently accepted review of Horizontal Stare Decisis and its applicability between different Divisions of the COA. See In Re Arnold, 198 Wn. App. 842, 847-50 (2017). citing Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d. 569 (2015).

v. It is understandable that Mr. Schacht would seek to avoid the stigma of being included in the Confederacy of Dunce's catagory at the Pierce County Prosecutors office. In fact It wouldn't be a suprise that Mr. Schacht's ceremonial doning of the cap in to the [2]confederacy took place shortly after the matter of State v. Thomas Oyen.

[2] Confederacy, N. (14c) 1. A league of states or countries that have joined for mutual support or joint action; an alliance. 2. An association of two or more persons, usu. for unlawful purposes; CONSPIRACY

Foolscap, the cap, usually of conical shape, with a cockscomb running up the center of the back with bells attached, worn by jesters and fools: also a conical cap worn by DUNCES See also John Duns Scotus (13th Century). Resistence to new learning and theology.

vi. Mr. Oyen is decorated war veteran that had experienced a PTSD episode at his home following multiple tours in our most recent and ongoing war. Police responded and were promptly handed their lunch. (Including the K9 unit having to take a nap). The animal was not injured, it was placed in a modified sleeper hold. In an attempt to secure an assault conviction, Mr. Schacht paraded out over 100 confirmed combat kills that included children that had bombs straped to their chest sent to blow up U.S. troops and Mr. Oyen personally over seas. The Honorable Jack Nevin was not amused and aquitted Mr. Oyen at a bench trial. So, in recognizing the overzelous nature of the Pierce County Prosecutors office and the reason for such desperation, this court should decline Mr. Schacht's invitation to overturn Soto and Vasquez, and avoid opening the door to a [3]Parade of Horribles, as counsel has failed to even argue how it is both incorrect and harmful.

[3]Parade of Horribles. (1941) A litany of detrimental or retro-grade consequences that will, in the view of an apponent of some proposed action, occur if the action is taken. Cf. SLIPPERY SLOPE

3. Respondent next takes issue with Nelson's argument that some of his offenses should have been considered and or atleast argued by counsel as same criminal conduct. Respondent states that "the defendant offers no evidence and little argument in support of his same criminal conduct allegation." BOR pg. 9.

i. Nelson brought forth his same criminal conduct as both a stand alone issue and as part-and-parcel of his Ineffective assistance of counsel claim. "The court considers the totality of the circumstances when deciding if a plea meets the requirements of Due Process. State v. Branch, 129 wn.2d 835, 642, 919 P.2d 1228 (1996), Isadore, 151 Wn.2d 294.

ii. Respondent first points to defendants statement of guilt. It should be considered that the statement of guilt was prepared and typed by defense counsel Ed DeCosta. This fact is also part-and-parcel of Nelson's argument that he was pressured and coerced into pleading guilty.

The defendants statement of guilt has no baring on the question of whether any of Nelson's crimes constitute same criminal conduct or perhaps whether counsel was deficient.

iii. Respondent provides a summary of the case that is quite disingenious. Resondent states: "The defendant vandalized a vehical (three days before the murder) belonging to Ms. Ryan's daughter and killed a dog." BOR pg. 10. This is wrong. Looking at Respondents own "APPENDIX "B"", Amended Information. Page 2, Count III. It is clear that the dog was killed the same day as Ms. Ryan. Nelson does not argue that the Malicious Mischief on January 15, 2016 should be considered as same criminal conduct. Nelson asserts that the crimes committed on January 18th 2016, encompased the same criminal conduct. Specifically Count I and Count II. Murder in the first degree and Burglary in the first degree. Relying on the charging information gives no indication that these were seperate and distinct conduct. The dog was Ms. Ryan's **PROPERTY** that was destroyed. It does not have civil rights and should not be considered as a seperate victim or seperate point for purposes of sentencing.

iv. Infact the state has two theories of what happened on January 18th, 2016. The states theory was that Nelson either went to Ms. Ryan's to commit a Burglary or went there to commit a Murder. Aside from this argument, Nelson provides an affidavit admitting what he did, he is not presuming to be innocent. He is asserting that these offenses do constitute same criminal conduct and that counsel was deficient for not arguing the issue. The courts have looked at the issue of prepared statements on guilt in the past. Nelson asks the court to consider these facts toward the totality of the circumstances and asserts that he has carried his burden of proof. Respondent cites the anti-merger statute and argues that the court did not abuse its discretion. However, because there was no challenge, the court did not conduct any sort of meaningful analysis into the issue. This weighs in favor of Nelson's IAC claim. Besides, Nelson's affidavit discribes how he ran inside the house in flight. No items were taken and he did not stay inside the residence.

v. Respondent cites Tresenriter and Lessley for his contension that even if the crimes constitute same criminal conduct they should be run consecutively. However, Nelson's case is very much so different from either of those cases. Nelson was at the residence and Ms. Ryan came home. (Nelson was involved in a relationship with Ms. Ryans daughter, but had not entered the home.) In Nelson's affidavit, he describes how he panicked under the influence of PCP, shot Ms. Ryan and ran into the house where he was confronted by a large dog. He shot the dog and fled the residence. No items were taken and he did not stay inside the residence. See Affidavit in support of PRP. Nelson was 19 years old and admittedly high on PCP.

4. Respondent next takes issue with Nelson's claim that the court should not have allowed a district court clerk, and co-worker of Ms. Ryan, to give a victim impact statement. (Especially where the clerk invokes the powerful and emotional influence of several other members of the judicial community by name in her statement to the court.)

i. Respondent attempts to roll Nelson's issue into a standard Appearance of Fairness Doctrine violation. BOR 12.

Respondent states:

> THE APPEARANCE OF FAIRNESS GROUND FOR RELIEF SHOULD BE DISMISSED WHERE IT IS NOT SUPPORTED BY "SUFFIENT" EVIDENCE AND WHERE, ON THE MERITS, IT IS INVALID.

Quite frankly, Mr. Schacht has provided the preponderance of evidence Nelson was required to produce. Nelson did not have the transcripts of sentencing until Mr. Schacht supplied them. See Plea and sentence hearing, State v. Nelson - September 9, 2016. Page 14-18.

ii. District Court Clerk Jamie Childs delivered an emotional and heartfelt eulogy to Ms. Ryan as a victim impact statement. She describes how there were "countless office pranks between her, Jeff, Chris and Grant, all of them filling the office with laughter." On Page 17, THE COURT: the judge goes on record and describes how he received approx. 23 additional letters and names the people who wrote them. Most of which are known in the judicial community and or work for the county.

iii. This is not a standard appearance of fairness doctrine claim. Nelson articulates the issue in his PRP quite clearly. See PRP pg. 5. A clerk of the court is a Ministerial officer of the court. Swanson v. Olympic Peninsula Motor Coach Co., 190 Wash. 35, 66 P.2d 842, (1937). And a quasi judicial officer is a substantial arm of the prosecution. State v. MacDonald, 183 wn.2d 1, 346 P.3d 748 (2015). The transcripts speak for themselves. This case obviously required extra caution. Nelson maintains that he, and Mr. Schacht, have provided the necessary preponderance of evidence and that Nelson did not receive a fair, impartial, and neutral hearing State v. Solis-Diaz, 187 Wn.2d 535 (2016).

5. Respondent next takes issue with Nelson's IAC claim. BOR 14. Respondent states:

> THE INEFFECTIVE ASSISTANCE GROUND FOR RELIF SHOULD BE DISMISSED WERE THE DEFENDANT HAS FAILED TO SUSTAIN HIS COLLATERAL ATTACK BURDENS OF PROOF AND PRODUCTION AND HAS NOT ESTABLISHED DEFICIENT PERFORMANCE UNDER THE **STRICKLAND** STANDARD.

i. Nelson first points to counsel deficiency for proposing and or failing to object to a plea deal that imposed a weapons enhancement on an unranked felony. Nelson suffered 18 months prejudice. Strickland, 466 U.S. at 688.

ii. Nelson next points to coercion. Nelson provided an affidavit asserting that his defense counsel, Mr DeCosta, pressured him and coerced him into pleading guilty as charged. Mr. Decosta has been accused of this before, State v. Watson, 138 Wn. App. 1027 (2006). Nelson also asserts that DeCosta continued to pressure his family into convincing Nelson to plead guilty. Mr. DeCosta also prepared and provided the defendants statement of guilt. You can see its typed. BOR APPENDIX "C", page 9 of 11. It is clear what Mr. DeCosta's stategy was in this case, what attorney in his right mind would want to defend it. Nelson asserts that he was coerced and asks the court to consider these facts toward the totality of the circumstances.

iii. Nelson also contends that counsel was deficient for not arguing same criminal conduct. The failure to make a same criminal conduct argument is prejudicial if the defendant shows that with the argument the sentence would have differed. State v. Beasley, 126 Wn. App. 670, 686, 109 P.3d 849 (2005). Strickland. Also see State v. Rattana Keo Phuong, 174 Wn. App. 494, 299 P.3d 37 (2013). "Although a Robbery and attempted murder would not merge for purposes of inictment, the crimes were part of a single, continuing sequence of events, thus, for sentencing purpose, the crimes encompased the same criminal conduct and should not have been counted on the others scoring form. State v. Green, 46 Wn. App. 92, 730 P.2d 1350, (1986). Rev.d 109 Wn.2d 207, 743 P.2d 1237 (1987)." "Where Burglary was committed in furtherance of an assault and occured at the same time and in the same place, the Burglary and assault were considered a single crime for the purpose of calculating the offender score." State v. Collins, 110 Wn.2d 252, 751 P.2d 837, (1998).

iv. Respondent seems to argue that Nelson is attacking his plea because he got a high sentence. BOR 16. Without considering that maybe defense counsel told Nelson just to say yes to the Judge and sign as Nelson claims, Respondent points to the plea and the transcripts and says see he knew what he was getting into. Nelson had never been in this position and was only 19 years old. While counsel points to the fact that the MILLER case was brought up, there was no indication of any kind of meaningful analysis required now due to the courts holding in Lightroth, which the courts are calling a significant change of law in that O'dell is to be considered retro-active.

v. While respondent has taken issue with the formentioned claims, he hardly mentions whether Nelson should be able to withdraw his plea. Respendent states that Nelson is only asking for specific performance. BOR pg. 12 at 7. This is incorrect. See PRP pg. 10-11. Nelson asks if in light of all the issue and arguments herein and the judgements facial invalidity (meaning count III unranked enhancement), is his plea

still considered voluntary. As well as on page 11, Nelson asks: Should Nelson be allowed to demand the specific performance and OR the withdrawal of his plea? There should be no confusion, Nelson is requesting to withdraw his plea. However, were the court to rule that each one of his assignments of error were correct, and this resulted in a significant reduction in presumptive range, he would consider just asking for a full resentencing. But he still asserts that Murder in the first degree is not what he committed. He didnt plan to kill Ms. Ryan.

vi. Nelson maintains that his plea was involutary, that his counsel was deficient, that he did not receive a fair, impartial, and neutral hearing, that some of his crimes constituted same criminal conduct, that he should not have been given a weapons enhancement on an unranked felony, and that he has timely sought to withdraw his plea.

vii. Respondent and the court, were they to test the mental maturity of Nelson might come to a second light in terms of how important the consideration of developmental age is. We leave reply to the respondent and his office from the the courts very own past and forgotten case on principal. "The safeguards which of ages has thrown around persons accused of a crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness towards the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims." State v. Montgomery, 56 Wash. 443, 105 P. 1035, 134 AM. St. 1119 (1909) (DIVISION TWO)

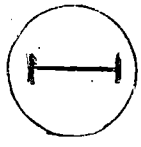
C. CONCLUSION

Nelson asserts that he has demonstrated with a preponderance of evidence that counsel was deficient, that he suffered prejudice, and that under the totality of the circumstances, he should be allowed to withdraw his plea.

Dated this 27th day of November 2017.

Austin Nelson Pro Se

Authors Symbol **(/'Oeiten/)** **(OT III)**



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STATE OF WASHINGTON

BY _____

State of Washington)
V.)
Austin R. Nelson)

NO. 50608-4-II

AFFIDAVIT OF SERVICE BY MAILING

I, Austin R. Nelson **, being first sworn upon oath, do hereby certify that I have served the following documents:** REPLY BRIEF

Upon:

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By placing same in the United States mail at:

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1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 2 **day of** December **,** 2017 **.**

Austin Nelson #393654
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.