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Division II
State of Washington
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No. 52195-4-II
(consolidated with No. 53300-6-II)

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Juan Ortiz,

Appellant/Petitioner.

Reply Brief in Support of Personal Restraint Petition

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1. Reply Argument

1.1 Standard of Review

Both direct appeals and personal restraint petitions have advantages and disadvantages to the appellant/petitioner. *In re Ramos*, 181 Wn. App. 743, 748, 326 P.3d 826 (2014). By bringing both concurrently, the appellant/petitioner gets the best of both worlds. *Id.* at 748-749. The Court may consider additional evidence presented in the PRP while still applying the more favorable standards of review for a direct appeal. *Id.* The Court may grant the relief requested outright or may remand to superior court for an evidentiary hearing on matters outside the appellate record. *See State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981).

1.2 Ortiz should have been able to withdraw his guilty plea due to ineffective assistance of counsel in recommending the plea.

“Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily.” *State v. Buckman*, 190 Wn.2d 51, 59, 409 P.3d 193 (2018). “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.” CrR 4.2(f). A manifest injustice

exists where the defendant establishes that he or she received ineffective assistance of counsel or that the plea was involuntary. *State v. Quy Dinh Nguyen*, 179 Wn. App. 271, 282, 319 P.3d 53 (2013).

Ortiz's direct appeal addressed the involuntariness of the plea, being based on misinformation about the parties' alleged waiver of the judge's mandatory duty under *Houston-Sconiers* to consider Ortiz's youth at sentencing. Br. of App. at 12-16 (the trial court's duty to consider youth), 16-20 (involuntariness of the plea due to misinformation); Reply Br. of App. at 9-15. His Personal Restraint Petition addresses ineffective assistance of counsel as a manifest injustice supporting withdrawal of the guilty plea.

"The two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The "prejudice" prong is satisfied where there is a reasonable probability that, but for counsel's errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." *Id.*

The advice of Ortiz's counsel to accept the guilty plea was deficient because it counseled acceptance of a deal that was invalid. *See* Br. of App. at 12-16. The parties could not validly waive the trial court's duty to consider youthfulness factors at

sentencing under *Houston-Sconiers*. *Id.* (quoting *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017)). The sentencing court must have “absolute discretion” to consider the mitigating qualities of youth and depart “as far as they want” below the standard range sentence. *Houston-Sconiers*, 188 Wn.2d at 9. It was deficient performance for Ortiz’s counsel to recommend a deal that improperly waived Ortiz’s valuable rights under *Houston-Sconiers*.

To make matters worse, Ortiz’s counsel did not even explain the *Houston-Sconiers* issue to Ortiz. Instead, Ortiz learned about his *Houston-Sconiers* rights on his own after already having made his guilty plea. *See* Declaration of Ortiz submitted with the PRP. When he confronted his attorney, the attorney said it was too late. *Id.* (“When I learn of Houston Sconiers on my own and then confronted him about not informing me about that case and how it applied to me, he said its to late now.”) His attorney refused to assist him in making a motion to withdraw the guilty plea. *Id.* (“When I inform him I wanted to take my plea of guilty back or withdrawal it he got upset and angry and he told me to do what I wanted but he was not going to help me file the motion to withdrawal my plea of guilty that I was going to have to do it myself.”)

Ortiz’s counsel also misled him about the effect of the plea, enticing Ortiz to accept it with a false promise that he

would be able to get a low-end sentence, only to take that promise back after the plea was made.

Ortiz testified that but for his trial attorney's deficient performance in advising him to accept the plea, Ortiz would have pled not guilty and insisted on going to trial. Decl. of Ortiz ("If my trial attorney would of told me that piece of information [about *Houston-Sconiers*] he knew I would of never agree to it and not enter the plea of guilty.") He testified that he was consistently against pleading guilty. He only accepted the plea under the unrelenting pressure and bad advice from his trial attorney.

Ortiz's declaration testimony establishes grounds for withdrawing his guilty plea due to ineffective assistance of counsel. His trial attorney gave him deficient advice about the plea deal. Ortiz was prejudiced because, but for his trial attorney's deficient performance, Ortiz would not have accepted the plea deal and would have insisted on going to trial.

The State's arguments overstate the standard of proof that is required in a PRP. A petitioner's own declaration is not disregarded simply because it is the petitioner's own word. While "bald assertions" and "conclusory allegations," such as, "he gave me ineffective assistance of counsel" would be properly disregarded, all that is required of a petitioner is to "state with

particularity facts which, if proven, would entitle him to relief.”
In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Ortiz’s declaration states particular facts regarding his conversations with his trial attorney and the ways in which his trial attorney gave him bad advice to accept the plea, lied to him about the low-end sentence, and failed to explain *Houston-Sconiers* prior to Ortiz accepting the deal. The State provides no evidence to refute these particular facts. The State’s arguments are built instead on conjecture. The particular facts set forth in Ortiz’s declaration, if proven, would entitle him to relief.

2. Conclusion

This Court should reverse the judgment and sentence, withdraw the plea, and remand for trial, or else remand for an evidentiary hearing.

Respectfully submitted this 22nd day of November, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 22, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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SIGNED at Lacey, Washington, this 22nd day of November, 2019.

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