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NO. 36392-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JUAN MANUEL FLORES ARROYO

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Robert B.C. McSeveney, Judge  
The Honorable T. W. Small, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to allow Juan Manuel Flores Arroyo to withdraw his guilty plea to drive-by shooting based on the inadequate and misleading advice of defense counsel pertaining to the likelihood of deportation.

2. At the withdrawal of plea hearing, the trial court unfairly restricted Flores Arroyo's ability to present evidence to attack plea counsel's credibility, depriving him of a fair hearing.

Issues Pertaining to Assignments of Error

1a. Plea counsel indicated that he advised Flores Arroyo that he would likely be deported only if Immigration and Customs Enforcement (ICE) initiated removal proceedings. Because the advice was divorced from the consequences of pleading guilty and instead tied to what ICE might or might not do, was the advice on immigration consequences inadequate, uncertain, or misleading, such that the advisement constituted deficient performance of counsel?

1b. Given that Flores Arroyo had strong connections in the United States, indicated that he feared death or serious injury if he were deported and therefore wanted to avoid deportation at all costs, and his sentence would have increased at most three years had he gone to trial and lost on all counts charged by the State, does Flores Arroyo demonstrate

that pleading guilty based on his attorney's inadequate advice was prejudicial such that he should have been allowed to withdraw his guilty plea?

2. Did the trial court violate basic due process principles in unfairly restricting Flores Arroyo's ability to present evidence that attacked his plea counsel's credibility at the hearing on his motion to withdraw the guilty plea?

B. STATEMENT OF THE CASE

Flores Arroyo was originally charged with drive-by shooting, alien in possession of a firearm, and violation of the uniform controlled substances act for possession of meth. CP 1-3. The possession of meth charge included a firearm enhancement allegation. CP 2-3.

Flores Arroyo pleaded guilty to one count of drive-by shooting. CP 4-15; 1RP<sup>1</sup> 6-12. The trial court dismissed the other two counts and sentenced Flores Arroyo to 15 months, the low-end of the standard range for the drive-by shooting. CP 19-20.

Flores Arroyo entered the United States from Mexico in 2013 on a tourist visa; he overstayed the tourist visa by about five years. 2RP 27.

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<sup>1</sup> Flores Arroyo refers to the verbatim report of proceedings as follows: 1RP—July 17, 2017; 2RP—consecutively paginated transcripts of August 16 and 29, 2018.

Flores Arroyo later moved to withdraw his guilty plea to the drive-by shooting, asserting that his attorney had not adequately advised him regarding the immigration consequences of pleading guilty. CP 30-100. In his declaration, Flores indicated that avoiding deportation was particularly important because of the danger he faced if he returned to his home town in Michoacan, Mexico. CP 50-51. He stated his father had been murdered there when he was nine years old. CP 50. He expressed fear of being killed, tortured, kidnapped, and extorted for money by local gangs working in conjunction with transnational criminal organizations. CP 50-51. Several of Flores's family members recounted similar concerns in their declarations. CP 69-70, 78-79. Flores's mother testified at the withdrawal of plea hearing that she was afraid for her son if he were deported, given the violence in their neighborhood in Mexico. 2RP 63-65. Flores himself expressed similar fears, stating he was afraid of returning to Mexico because he thought he might be murdered like his father. 2RP 16.

At the hearing to withdraw the plea, Flores and his family members testified regarding the immigration advice they received from defense counsel before entering the plea. The various testimony indicated that Flores's risk of deportation depended not on his plea of guilty, but on whether ICE would enforce immigration laws. E.g., 2RP 11 ("Sometimes they're deported and sometimes they're not."); 2RP 41 ("[Counsel] said he

didn't know and that not to worry because sometimes immigration doesn't do anything."); 2RP 43 ("Don't worry about it. They might not do anything."); 2RP 53 ("He just said he didn't think so, that sometimes Immigration does things like that; and other times, they just don't do anything.").

Flores's plea counsel, George Trejo, also testified at the hearing and had submitted written declarations. In his declaration, counsel stated he "specifically told [Flores Arroyo] that it was likely he would be removed permanently from the United States if ICE commenced removal proceedings against him." CP 133. Counsel also wrote, "I explained that if ICE stepped in after he completed his sentence," there was limited possible relief for Flores Arroyo. CP 133. Counsel stated his advice to Flores Arroyo was contingent on ICE's actions because in his prior experience there were instances where ICE took no action despite a defendant's removability from the United States. CP 133-34. At the plea withdrawal hearing, Trejo also stated that his immigration consequences advice to Flores Arroyo was contingent on ICE commencing removal proceedings. 2RP 132-33. According to Trejo, he told Flores Arroyo that it was more likely than not that he would be taken to ICE. 2RP 133.

Plea counsel also stated in his declarations that he advised Flores Arroyo of the immigration consequences just as he advises all noncitizen

clients of such consequences. CP 113, 139. Trejo also referred to himself as a highly experienced and competent criminal defense attorney, listing several cases he had handled that resulted in acquittal. CP 101-06, 117-22. According to Trejo, “There should be no doubt that I am amongst the top criminal defense attorneys in the Country. Counsel’s attempt to disparage me is pointless. His record does not compare to mine. Very few attorneys have a record of success comparable to mine.” CP 106-122-23.

Flores’s immigration attorney also testified at the hearing. Upon questioning of the trial court, she acknowledged that the outcome of removal proceedings could not be predicted with certainty in advance because the outcome was dependent on an immigration judge’s factual analysis and legal ruling. 2RP 87-89.

At the plea withdrawal hearing, Flores Arroyo wished to present the testimony of Christian Ulloa Duenas, a former client of the same plea counsel, Trejo. 2RP 34-35. The State objected that such testimony violated ER 404, and the trial court agreed, stating that the focus of the hearing should be “exclusively on this defendant.” 2RP 35-38. The trial court also disallowed defense counsel to question Trejo about his history of discipline by the Washington State Bar Association, ruling that it was irrelevant. RP 133-34.

The trial court denied Flores Arroyo's motion to withdraw the guilty plea, concluding that his attorney was required only to advise that Flores faced possible adverse immigration consequences. CP 187-98. The trial court specifically credited the testimony of Trejo, noting he always advises his noncitizen clients regarding immigration consequences. CP 194.

Flores Arroyo timely appeals. CP 209-21.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING FLORES ARROYO'S MOTION TO WITHDRAW HIS GUILTY PLEA BASED ON THE EQUIVOCAL AND MISLEADING IMMIGRATION ADVICE OF HIS ATTORNEY

- a. Defense counsel rendered ineffective assistance by minimizing the risk of deportation, stating the risk of deportation was wholly contingent on whether Immigration and Customs Enforcement would commence removal proceedings

The Sixth Amendment and article I, section 22 right to effective assistance of counsel "encompasses the plea process." State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). "Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent." Id. (citing Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); McMann v. Richardson, 397 U.S. 759, 770-71, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). To establish ineffectiveness based on counsel's inadequate advice, the defendant must demonstrate objectively deficient performance

and prejudice under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Sandoval, 171 Wn.2d at 169.

Generally, the precise advice required depends on the clarity of the law as to the immigration consequences of the plea, given that “[i]mmigration law can be complex.” Sandoval, 171 Wn.2d at 170 (quoting Padilla v. Kentucky, 559 U.S. 356, 369, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)). If the law is “truly clear” that an offense is deportable, defense counsel must advise that pleading guilty would lead to deportation. Id. If the law is not succinct and straightforward, then counsel must provide only a general warning that the criminal conviction created by pleading guilty carries potential adverse immigration consequences. Id.

However, “if defense counsel couches advice about immigration consequences with uncertainty, it may negate the effect of any warning included in the plea statement or given by the trial court.” State v. Manajares, 197 Wn. App. 798, 807, 391 P.3d 530 (2017) (citing Sandoval, 171 Wn.2d at 172-73), review denied, 189 Wn.2d 1045, 415 P.3d 99 (2018).

Flores Arroyo does not take issue with the trial court’s determination that immigration consequences of pleading guilty to drive-by shooting under RCW 9A.36.045 are not truly clear. As the trial court determined, ostensibly correctly, the immigration consequences were not truly clear that pleading guilty would necessarily lead to deportation. See CP 196-98 (trial court’s

“truly clear” analysis); see also 2RP 87-89 (Flores Arroyo’s immigration attorney acknowledging that the outcome of removal proceedings could not be predicted with certainty in advance and was dependent on an immigration judge’s ruling).

Instead, Flores Arroyo’s contention is that his attorney’s advice was nonetheless inadequate because it was couched with uncertainty, thereby negating, confusing, or minimizing the likelihood of deportation. According to plea counsel’s declaration, “I specifically told him [Flores Arroyo] that it was likely he would be removed permanently from the United States if ICE commenced removal proceedings against him.” CP 133. He further stated, “I explained that if ICE stepped in after he completed his sentence, the only possible relief I could see for him was to seek political asylum but give what he had told me that relief was very weak.” CP 133. He explained the reason for couching his advice as contingent on whether “ICE *may* step in is because in my extensive criminal experience there has [sic] been occasions that ICE takes no action when in fact the defendant is removable from the United States.” CP 133-34 (boldface omitted). Trejo’s testimony at the plea withdrawal hearing similarly recounted his advice to Flores Arroyo was contingent on ICE commencing removal proceedings. 2RP 132-33. In addition to this contingent advice based on what ICE would or would not do,

Trejo did state he told Flores Arroyo it was more likely than not that he would be taken to ICE. 2RP 133.

The testimony of Flores Arroyo and his family members was consistent with Trejo's inasmuch as it reflected advice that the risk of deportation was primarily a function of whether ICE chose to initiate removal proceedings rather than a function of pleading guilty. See, e.g., 2RP 11 ("Sometimes they're deported and sometimes they're not."); 2RP 41 ("[Counsel] said he didn't know and that not to worry because sometimes immigration doesn't do anything."); 2RP 43 ("Don't worry about it. They might not do anything."); 2RP 53 ("He just said he didn't think so, that sometimes Immigration does things like that; and other times, they just don't do anything.").

Counsel's advice was too uncertain to qualify as adequate under Sandoval and Manajares. Rather than attaching the potential adverse immigration consequences to Flores's plea itself, defense counsel attached them to whether Immigration and Customs Enforcement would enforce immigration laws. As Sandoval states, "The required advice about immigration consequences would be a useless formality if, in the next breath, counsel could give the noncitizen defendant the impression that he or she should disregard what counsel just said about the risk of immigration consequences." 171 Wn.2d at 173.

While counsel did not outright dismiss the risk of deportation, he made those risks contingent on the actions of third parties, ICE agents, over which neither counsel nor Flores Arroyo has any control. This erroneous advice divorced the immigration consequences from the guilty plea and made them dependent on how and whether ICE commenced removal proceedings. By divorcing the plea and risk of deportation in this manner, counsel couched his advice about immigration consequences with uncertainty. His advice minimized the likelihood of deportation and distorted this likelihood with the unknown and unknowable actions of third parties, suggesting that sometimes these third parties do not enforce immigration laws. Because this was not adequate advice, counsel's performance in advising Flores Arroyo of the immigration consequences of pleading guilty to drive-by shooting was deficient under the first Strickland prong.

- b. Because Flores Arroyo establishes that he would not have pleaded guilty but for the inadequate advice of counsel, he demonstrates prejudice that entitles him to withdraw his guilty plea

Flores Arroyo establishes prejudice under Strickland because he establishes that avoiding deportation was the determinative factor for him consistent with recent United States Supreme Court precedent, Lee v. United States, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017). Flores

Arroyo would not have risked significant additional prison time had he refused to plead guilty and insisted on a trial for all three charges he faced—drive-by shooting, unlawful possession of a controlled substance, and alien in possession of a firearm. Because the record establishes that Flore Arroyo would have insisted on going to trial but for his counsel’s misleading advice, he demonstrates Strickland prejudice.

In Lee, Lee’s attorney advised him that he would not be deported if he pleaded guilty to possessing ecstasy with intent to distribute. 137 S. Ct. at 1962. Because this offense required mandatory deportation, his attorney’s advice was incorrect and therefore easily satisfied the deficient performance prong of Strickland. Lee, 137 S. Ct. at 1962, 1964.

The more nuanced question in Lee was prejudice. The Court reaffirmed that the relevant question is “whether the defendant was prejudiced by the ‘denial of the entire judicial proceeding . . . to which he had a right.’” Id. at 1965 (alteration in original) (quoting Roe v. Flores Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). “[W]hen a defendant claims that his counsel’s deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a ‘reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” Id. (quoting Hill, 474 U.S. at 59).

This reasonable probability does not necessarily turn on the defendant's likelihood of success at trial. In Lee, the defendant "knew, correctly, that his prospects of acquittal at trial were grim" so the "error was instead one that affected Lee's understanding of the consequences of pleading guilty." Id. "Lee insist[ed] he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States." Id. at 1966.

The Court agreed with Lee:

The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was *the* determinative factor for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial.

Id. at 1966-67 (citation omitted). The Court credited Lee's statements and determined it would not be irrational for a defendant in Lee's position to reject a plea offer in favor of trial if he knew that pleading guilty would certainly lead to deportation but going to trial with a weak defense would almost certainly lead to deportation. Id. at 1968. The Court considered

factors including Lee's length of residence and connections to the United States and the fact that the "consequences of taking a chance at trial were not markedly harsher than pleading." Id. at 1968-69. The Court also emphasized that deportation was a particularly severe penalty, so there was "no reason to doubt the paramount importance Lee placed on avoiding deportation." Id. at 1968.

As in Lee, Flores Arroyo indicated how important avoiding deportation was. His declaration submitted in support of the motion to withdraw the plea recounted the murder of his father as a child in the dangerous area of Michoacan, Mexico. CP 50. He expressed fear of being killed, tortured, kidnapped, and extorted for money at the hands of transnational criminal organizations informed by corrupt Mexican officials. CP 50. He specifically identified a criminal organization local to his town in Mexico that had threatened and stolen from his family as well as most others in the community. CP 50-51. Flores's other family members recounted similar violence and extortion in their declarations. CP 69-70, 78-79. Flores's mother testified at the withdrawal of plea hearing that she was fearful Flores would be deported because of the danger of certain violent people in their neighborhood. 2RP 63-65. Flores also expressed fear of being murdered like his father was during his own testimony. 2RP 16. Based on the serious danger Flores Arroyo and his family members

perceived, Flores Arroyo establishes that “avoiding deportation was *the* determinative factor for him[.]” Lee, 137 S. Ct. at 1967.

In addition, as the various persons who testified at the hearing on behalf of Flores Arroyo establish his strong connections to persons in the United States. His wife, mother, and sister all testified at the hearing. 2RP 40-69. These family members are obviously in the United States. Although Flores Arroyo had been in the country for only five years, 2RP 27, as opposed to the “nearly three decades” Lee had, Lee, 137 S. Ct. at 1968, Flores Arroyo still demonstrated that he has strong connections in the United States, supporting his assertion that avoiding deportation was his principal concern.

Nor was it irrational for Flores Arroyo to reject a plea that resulted in 15 months of incarceration in favor of a trial. See CP 7, 19 (statement on pleas of guilty reciting recommendation of 15 months and judgment and sentence imposing 15 months). In addition to the drive-by shooting he pleaded guilty to, Flores was charged with violation of the uniform controlled substances act (VUCSA) for possession of meth (RCW 69.50.4013) and alien in possession of a firearm (RCW 9.41.171). CP 1-3. The meth possession charge included a firearm allegation that, if proved, would have supported a firearm enhancement. CP 2-3.

Assuming Flores Arroyo was convicted of all charges at trial, his offender score for each of the felony convictions would be two given that Flores has no other criminal history and the other two current offenses for each conviction would count as one point each in the offender score. CP 18 (no criminal history); RCW 9.94A.525(1) (“Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.”); RCW 9.94A.589(1)(a) (“[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current . . . convictions as if they were prior convictions for the purpose of the offender score . . . .”)

As for the drive-by shooting, its seriousness level is VII. RCW 9.94A.515. With an offender score of 2 based on two other current offenses, his standard range would be 26 to 34 months. RCW 9.94A.510. No firearm enhancement may be imposed for a drive-by shooting. RCW 9.94A.533(3)(f).

As for the VUCSA, methamphetamine is a schedule II drug. RCW 69.50.206(d)(2). Possession of a controlled substance that is either heroin or narcotics from Schedule I or II carries a seriousness level of I. RCW 9.94A.518. With an offender score of 2, Flores Arroyo’s standard range was zero to six months. RCW 9.94A.517(1). VUCSA meth possession is a class

C felony. RCW 69.50.4013(2). The firearm enhancement that would have been imposed on the class C felony is 18 months, which would run consecutive to all other sentencing terms. RCW 9.94A.533(3)(c), (e).

As for the alien in possession of a firearm, the legislature has not provided a seriousness level, so it cannot be sentenced using the grid in RCW 9.94A.510. RCW 9.94A.515. The maximum that could be imposed for such an unranked felony is 12 months of confinement. RCW 9.94A.505(2)(b). Sentencing enhancements “apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.” RCW 9.94A.533(1). Because alien in possession of a firearm cannot be sentenced with a standard range, RCW 9.94A.533’s sentence enhancements, including the firearm enhancement, cannot be imposed. See State v. Soto, 177 Wn. App. 706, 714, 309 P.3d 596 (2013) (“Reading all subsections of RCW 9.94A.533 in the context of the statute, we conclude that the statute does not apply to unranked felonies.”).

“Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1)(a). The State did not allege nor is there a basis to believe that an aggravating factor exists that would support an exceptional sentence above the standard range. See RCW 9.94A.535(2)–(3) (enumerating aggravating factors supporting an

exceptional sentence upward). Flores Arroyo's sentence for each of the three convictions would therefore have been run concurrently.

Adding this all together, then, Flores Arroyo faced a 26- to 34-month standard range on the drive-by shooting. This would have been run concurrently with the 12-months he faced for the firearm conviction and with the six months he faced for the VUCSA. The VUCSA would have carried a consecutive 18-month firearm enhancement. Thus, Flores Arroyo faced a total term of confinement of 44 months to 52 months had he been convicted of all three counts following trial.

Comparing these consequences to the 15-month sentence he received by pleading guilty, it would not have been irrational for Flores to insist on a trial. Even in the worst case scenario, he would have faced only an additional 29 to 37 months beyond the 15-month sentence he received. This two-and-a-half to just-over-three-year additional sentence term was not so markedly harsher that no person would ever choose to risk it, especially considering Flores Arroyo's strong connections to the United States and his (and his family members') credible fears of violence if he were deported.

In Lee, the defendant faced "a year or two more of prison" time had he gone to trial and lost. 137 S. Ct. at 1969. Based on that additional term, the Court surmised, "Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so." 137 S.

Ct. at 1969. The same is true here: given Flores Arroyo's connections, his fear of death or violence up on deportation, no court can say it would be irrational for Flores Arroyo to reject the plea and proceed to trial. Flores Arroyo was prejudiced by his attorney's misadvice and accordingly satisfies the second prong of Strickland.

The State might respond by arguing that the plea statement and colloquy show that Flores Arroyo was warned that deportation was a possibility following criminal conviction. See CP 8; 1RP 9-10. But the United States and Washington Supreme Courts have already determined that "such warnings do not excuse defense attorneys from providing the requisite warnings. Rather, for the Court, these plea-form warnings underscored 'how critical it is for *counsel* to inform her noncitizen client that he faces a risk of deportation.'" Sandoval, 171 Wn.2d at 174 (emphasis in original) (quoting Padilla, 559 U.S. at 373-74). The focus is on counsel's advice and where that advice is inadequate, no other set of warnings or advisements can cure it.

Flores Arroyo's attorney advised him of immigration consequences in a contingent manner that minimized the possibility of deportation. The advisement was not adequate and constituted deficient performance. Given that a person in Flores Arroyo's position might have rationally risked trial rather than pleaded guilty had he been properly advised, he demonstrates that he was prejudiced by his attorney's uncertain advice. Because his plea

counsel was constitutionally ineffective, Flores Arroyo asks that this matter be remanded to the trial where he be permitted to withdraw his plea.

2. THE TRIAL COURT DEPRIVED FLORES ARROYO OF A FAIR PROCESS WHEREIN HE COULD LEGITIMATELY ATTACK HIS PLEA COUNSEL'S CREDIBILITY

The trial court refused to allow testimony of a witness who had previously been represented by plea counsel. The trial court also refused to allow defense counsel to cross-examine plea counsel, George Trejo, regarding prior Washington State Bar discipline imposed against him. These errors deprived Flores Arroyo of fully presenting his arguments in support of withdrawing his plea, in turn denying him of basic due process.

Flores Arroyo began presenting the testimony of Christian Ulloa Duenas, a former client of plea counsel. 2RP 34-35. Ulloa Duenas had also submitted a declaration in support of Flores's motion to withdraw the plea. CP 86. The State objected on ER 404 grounds, arguing that testimony from another of plea counsel's clients was improper propensity evidence. 2RP 35-37. The court agreed and excluded the witness,

This is a collateral matter that's not before the Court. And if this is all the witness is going to testify to as to Mr. Trejo's dealings with this witness, I believe it would not be proper to introduce it into this hearing for many of the reasons the State stated.

2RP 38-39.

The trial court and State were mistaken. The purpose of the evidence was not propensity but to attack plea counsel's credibility. See 2RP 38 (defense counsel arguing, "I expect the Court to receive a different version of events from Mr. Trejo as to what . . . exactly Mr. Trejo explained to my client about immigration consequences"). Plea counsel Trejo indicated in his declarations that he had fully advised Flores Arroyo of the immigration consequences, that he advises all noncitizen clients of such consequences, and that has done so for 20 years. CP 113, 139. Thus, defense evidence that contradicted Trejo's claims of advising all noncitizen clients of immigration consequences went directly to Trejo's credibility. The evidence was not offered under ER 404 as substantive evidence but as evidence of impeachment of a critical witness for the State. The trial court erred in excluding such evidence.

Along similar lines, during defense counsel's cross examination of Trejo, he asked whether Trejo had been the subject of bar association disciplinary proceedings. 2RP 133. The trial court sustained the State's relevancy objection. 2RP 133. Defense counsel explained that prior discipline was relevant to attack Trejo's representations in declarations about his experience and success. 2RP 133-34. The court determined that prior discipline was not "related to this case and they're collateral. And I don't think they have any bearing on the Court's decision in this case." 2RP 134.

The court was again mistaken—the bearing prior discipline had on the case was assessing Trejo’s credibility. Trejo submitted two declarations prior to the hearing that are, frankly, over the top. Trejo represented that he was highly experienced in criminal defense, directly comparing himself to Flores’s current attorney. CP 101-02, 117-18. Trejo proceeded to list several cases he had handled where he obtained the result “NOT GUILTY ALL CHARGES,” describing each. CP 102-06, 118-22. Then Trejo claimed, “There should be no doubt that I am amongst the top criminal defense attorneys in the Country. Counsel’s attempt to disparage me is pointless. His record does not compare to mine. Very few attorneys have a record of success comparable to mine.” CP 106, 122-23. Trejo also unfortunately decided to disclose detailed confidential information about the facts of this case without Flores Arroyo’s consent. CP 107-13, 124-30; 2RP 22-23.

Given that Trejo represented himself as one of the best attorneys in the United States based on his experience and results, attacking Trejo with prior bar disciplinary actions was relevant to attack the credibility of his self-aggrandized view. Would such an excellent attorney take money from clients and families and do virtually nothing for them, thereafter receiving reprimand from the bar association for a lack of diligence? CP 38. Would one of the best attorneys in the country be suspended from the practice of

law for mismanaging his trust accounts? CP 40. The fact of Trejo's previous discipline went directly to the question of his credibility, as Flores Arroyo attempted to establish. The trial court erred in concluding that such evidence was collateral and irrelevant. See State v. Gunderson, 181 Wn.2d 916, 930-31, 337 P.3d 1090 (proof of bias and credibility of witness always relevant).

The trial court's erroneous exclusions of defense evidence were prejudicial. The trial court relied on Trejo's testimony that he advises all noncitizen clients about immigration consequences, apparently finding Trejo's representation credible. CP 194. Yet the trial court denied Flores Arroyo the opportunity to rebut such evidence by presenting at least one other of Trejo's clients who indicated he was not advised of such consequences. The trial court also relied on Trejo's statements regarding his advisements to Flores Arroyo specifically. CP 194. Yet the trial court denied Flores Arroyo the opportunity to present evidence of Trejo's rather extensive disciplinary history to attack Trejo's representations of his experience and success, which would have undermined Trejo's overall credibility with the factfinder within a reasonable probability.

By denying defense evidence to attack the credibility of plea counsel, the trial court denied Flores Arroyo a fair opportunity to be heard on his motion to withdraw the guilty plea. Had the trial court not committed these

errors, there is a reasonable probability that the outcome of the plea withdrawal hearing would have differed. Flores Arroyo asks that the trial court's denial of his motion to withdraw the guilty plea be reversed.

D. CONCLUSION

For the reasons stated, Flores Arroyo should have been permitted to withdraw his plea, requiring reversal of the trial court's order denying this relief.

DATED this 7th day of June, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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