

65562-1

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COA NO. 65562-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICARDO PEREZ,

Appellant.

REC'D  
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King County Prosecutor  
Appellate Unit

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COURT OF APPEALS  
FILED~~

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

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in denying appellant's request for an exceptional sentence downward.

2. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining To Assignments Of Error

1. The court rejected appellant's request for an exceptional sentence downward based on its belief that it did not have authority to order appellant into a supervised residential facility as part of the sentence. Where the court misapprehended its authority on this point, did the court err in addressing appellant's request for an exceptional sentence downward?

2. Did defense counsel provide ineffective assistance at sentencing in failing to correctly inform the trial court of its sentencing authority or in failing to put her client in a position where the trial court could exercise its authority?

B. STATEMENT OF THE CASE

Ricardo Perez pleaded guilty to two counts of first degree robbery. CP 9-33, 35. He admitted robbing two banks by handing a note to the teller, which stated he had a gun and wanted money. CP 18-19. The standard range sentence was 129-171 months confinement. CP 36. Perez admitted the aggravating factors of multiple offenses going unpunished and rapid

recidivism. CP 19. The State requested an exceptional sentence upward based on these aggravating factors. Supp CP \_\_ (sub no. 59A, State's Request for Exceptional Sentence, 5/20/10).

Perez, through defense counsel, requested an exceptional sentence downward of 60 months, based on the mitigating factor that Perez's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired. Supp CP \_\_ (sub no. 73, Defense Presentence Report, 11/16/10); 2RP<sup>1</sup> 11.

In support of the request for an exceptional sentence downward, Perez presented the report of clinical psychologist Dr. Robin LaDue. Supp CP \_\_ (sub no. 73, supra). Based on evaluation, Dr. LaDue opined Perez's organic brain damage significantly impaired his ability to appreciate right from wrong. Id. at 14. Dr. LaDue also reported Perez was unable to understand the consequences of his actions and lacked the mental resources to refrain from criminal activity due to brain damage. Id. at 11-14.

Perez's parents were alcoholic. Id. at 4. His mother drank alcohol while pregnant and died of liver cirrhosis at young age. Id. at 4, 6. Perez has facial features associated with fetal alcohol spectrum disorder (FASD). Id. at

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 3/11/10; 2RP - 5/21/10.

6. His multiple disabilities included those commonly associated with prenatal alcohol exposure and FASD. Id. at 11-13.<sup>2</sup>

Dr. LaDue's listed diagnoses included polysubstance abuse (alcohol, marijuana, heroin), depression (by history), and posttraumatic stress disorder (PTSD) (by history). Id. at 2. Perez was chronically addicted to heroin and alcohol. Id. at 11. Perez told Dr. LaDue that his criminal activity was related to his inability to maintain gainful employment, drug use, and his need for money for food and basic living needs. Id. at 9.

According to Dr. LaDue, Perez clearly had cognitive deficits and mental health problems. Id. at 13. He had organic brain damage, likely from a variety of sources including prenatal alcohol exposure, head trauma, and chronic substance abuse. Id. at 11, 13. This brain damage severely limits his functioning. Id. at 13-14. At the sentencing hearing, Dr. LaDue told the court of the probability that Perez had organic brain damage due to prenatal alcohol exposure. 2RP 5.

Perez obtained his GED but demonstrated significant cognitive deficits, including in the areas of problem solving and reasoning. Supp CP \_\_\_ (sub no. 73, supra at 6, 9-11); 2RP 6-7. Perez scored in the mildly retarded to borderline range on the Wechsler Adult Intelligence Scale-IV.

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<sup>2</sup> Defense counsel informed the court that Perez's younger brother has fetal alcohol syndrome. 2RP 12.

Supp CP \_\_\_ (sub no. 73, supra at 10). His full scale IQ score was in the mildly retarded range. Id.

One sign of organic brain damage was Perez's inability to understand abstract concepts, which was in the very significantly impaired range. 2RP 7. Perez had been incarcerated for most of his adult life due to multiple crimes. Supp CP \_\_\_ (sub no. 73, supra at 8-9). Perez is not able to connect cause and effect or appreciate the consequences of his behavior. Id. at 12. This characteristic is commonly seen in people with organic brain damage and often leads to participation in criminal activities. Id. He has a great deal of difficulty understanding social rules and expectations. Id. He is highly institutionalized and it was unlikely he could function on his own. Id. at 14. His cognitive limitations, social impairment and institutionalization are such that he has little personal resources to assist in staying out of the judicial system. Id. at 12.

Perez's behavior was associated with frontal lobe damage, likely caused by prenatal alcohol exposure, head trauma and chronic substance abuse. Id. at 11. These deficits are permanent and impact Perez's ability to form intent and to understand the consequences of his actions. Id.

According to Dr. LaDue, it was not surprising that Perez had not learned from his past legal problems. Id. A prominent feature of organic

brain damage is the inability to connect cause and effect and to learn from past experiences. Id.

Perez, however, was a good candidate for a supported living program in the community if the program included 24/7 supervision, a FASD evaluation at the University of Washington's specialized clinic to confirm the FASD diagnosis, vocational support, ongoing counseling, drug and alcohol treatment and ongoing care in a supervised living situation. Id. at 14.

Dr. LaDue reported Perez should be eligible for Social Security and Developmental Disabilities Services, the funds from which would help Perez participate in supported living services. Id. Perez had not learned or benefited from his previous incarcerations, as jails and prisons do not have the resources to address the fundamental deficits that have been a part of Perez's life since childhood. Id. Dr. LaDue therefore recommended enrollment in the Community Protection Program, in addition to application for social security developmental disability funds, drug and alcohol treatment with aftercare in a structured, sober and stable housing environment, and therapy to address Perez's PTSD and depression. Id.

The State opposed the request for an exceptional sentence downward, claiming Perez's criminal conduct was not based on any sort of mental defect, but simply a need and desire to continue his heroin usage. Supp CP \_\_ (sub

no. 59A, supra at 4). The State did not present any expert report to rebut Dr. LaDue's assessment.

At the sentencing hearing, the trial court asked Dr. LaDue how the court was going to keep Perez from robbing banks. 2RP 8. The court's first concern was public safety. 2RP 9.

Dr. LaDue responded there were programs for people with Perez's disorders called "Community Protection Programs." 2RP 9. Community Protection Programs are live-in programs that provide 24/7 staff supervision and access to drug and alcohol treatment, which Perez desperately needed. 2RP 9.

At one point, the court asked the lawyers if they were "amenable" to a Community Protection Program. 2RP 9. The following exchange took place:

Ms. Griffin: That is something that counsel and I did look into. The offer certainly had to include quite a bit of a lesser charge with a lesser range for him to be eligible for that, and that is not something that --,

The Court: The question I asked is given this, can I even order him into such a program?

Ms. Griffin: I don't believe you can. He has to apply. We looked into applying and Ms. LaDue and I kind of put that together ahead of time.

The Court: I am a little hamstrung. I only get to do what the law lets me do; even though I am a judge, I can't [unintelligible], and you're saying, "Well, put him in this program and that will protect the community, and I can't order him into the program -- as a substitute for the sentence.

Dr. LaDue: We often have people released from DOC directly into the program at the completion of their sentence.

The Court: Well, that may be, but I can't order [unintelligible].

Dr. LaDue: I understand that, Your Honor.

The Court: So short of that, I don't know what I can do to keep him from robbing banks?

Dr. LaDue: Well I think clearly 24/7 supervision is warranted. My hope would be that he would be able to get in a situation where the community would be protected, as well as him getting services that would be appropriate.

The Court: Unfortunately, the only place I think that I have to put him where he has 24/7 supervision is the department of corrections. If somebody has got an alternative to that, let me know, but that is the only place I can put him so he will quit robbing banks. My first duty to the community is to put him where he will quit robbing banks.

2RP 9-11.

Responding to the court's concern for community safety, defense

counsel stated the following:

Ms. Griffin: I guess it was my hope that he would do 60 months, and because he has a diagnosis of fetal alcohol syndrome, that he is, and I actually already did apply for him for disability insurance. He would be eligible to get some kind of assistance and -- with housing, with life skills and that things that he has really never had an opportunity to do before -- possibly living in a situation where he is supervised. That would --

The Court: That would be fine if I could order it.

Ms. Griffin: -- be fine, certainly --

The Court: I can't.

Ms. Griffin: I understand the Court can't order that. I am just suggesting that he is 53 years old and in five or six years of prison, and then he gets out and for the first time has not only a disability diagnosis for disability and some kind of assistance, which will enable him to manage and to live

outside of the institution, as was for the first time he has an entire family who is here to support him.

2RP 11-12.

After family members spoke on his behalf, Perez told the court he was remorseful and that "I just need some type of program or something to build some structure for myself because it is hard for me; I don't know how."

2RP 16.

The court imposed a standard range sentence of 171 months on each count to run concurrently. CP 36, 38. In pronouncing sentence, the court stated:

I am a little hamstrung here. I don't have a way to protect the community other than to incarcerate. I wish that 18 offenses ago they made some effort to intervene. At this point when he gets out of prison, he re-offends, and banks robberies are very, very serious offenses. I can't overlook that.

My first priority is to protect [unintelligible] send you to prison, I'm stuck. I could order him into a 24/7 halfway house where they would keep an eye on him all the time and give him treatment [unintelligible] I could do that. I don't have that. There no such facilities [unintelligible].

The sentence will be 171 months. The only place I can put you where you won't be robbing banks . [unintelligible] -- it's a tragedy. But it is not an exceptional sentence. [unintelligible].

2RP 17.

This appeal follows. CP 46-47.

C. ARGUMENT

1. THE COURT MISAPPREHENDED THE SCOPE OF ITS SENTENCING AUTHORITY IN DECLINING PEREZ'S REQUEST FOR AN EXCEPTIONAL SENTENCE.

Perez is currently warehoused in the Department of Corrections (DOC) system as part of a standard range sentence, without the tools and support needed to refrain from criminal activity upon his eventual release. The court, in addressing Perez's request for an exceptional sentence downward, labored under the misapprehension that it lacked authority to order Perez into the Community Protection Program. Remand for resentencing is required because this misapprehension formed the basis for the court's denial of Perez's request for an exceptional downward.

A trial court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence and there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535; RCW 9.94A.535(1). The mitigating factor at issue here is "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded." RCW 9.94A.535(1)(e).

The court did not deny Perez's request for an exceptional sentence downward on the basis that the mitigating factor was not established by a preponderance of the evidence or that there was no substantial and compelling reason for such a sentence. Instead, the court declined to order an exceptional sentence on the ground that it lacked authority to order Perez into the Community Protection Program as a means to ensure community safety. 2RP 9-12, 17.

The court, however, had authority to order Perez into the Community Protection Program as a condition of community custody. Perez was not asking to be directly placed in a Community Protection Program facility without serving prison time in a DOC facility. Rather, Perez requested an exceptional sentence downward of 60 months confinement time and subsequent placement in a Community Protection Program facility upon his release from DOC confinement.

Having committed a "violent offense," Perez was subject to community custody. CP 39; RCW 9.94A.701(2) (18 months community custody for a violent offense); RCW 9.94A.030(53)(a)(i) ("violent offense" means any felony defined under any law as a class A felony); RCW 9A.56.200(2) (first degree robbery is a class A felony). As a standard condition of community custody, the court had the authority to order Perez to "[p]articipate in rehabilitative programs or otherwise

*perform affirmative conduct* reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d) (emphasis added).

The term "affirmative conduct" is broad enough to encompass residence in a Community Protection Program facility with its attendant treatment and support programs that could address Perez's cognitive deficits and attendant criminal behavior. The only statutory limitation is that the affirmative conduct be "reasonably related to the circumstances of the offense." Here, that requirement is easily satisfied. Dr. LaDue's report provided a sound basis to find Perez's brain damage, ultimately traced back to prenatal alcohol exposure, was intimately tied to Perez's criminal behavior.

RCW 9.94A.703(3)(d) allowed the court to order Perez to live in the type of facility recommended by Dr. LaDue as a condition of community custody upon Perez's release from confinement. The trial court was mistaken that it lacked the authority to order Perez into such a facility as part of his sentence.

Even if the court lacked standard sentencing authority to order Perez into the Community Protection Program facility, the court still retained the authority to order such placement as an exceptional sentencing condition. "[T]he power to impose an exceptional community

supervision sentence includes authority to name exceptional conditions." State v. Bernhard, 108 Wn.2d 527, 528, 741 P.2d 1 (1987) (trial court had authority to impose 12 months inpatient treatment as an exceptional sentencing condition outside the range of conditions allowed under a standard community supervision sentence), overruled on other grounds, State v. Shove, 113 Wn.2d 83, 88-89, 776 P.2d 132 (1989). Community supervision and community custody, while technically distinct, are functionally similar in that both provisions extend the trial court's discretionary range to the duration and conditions when a sentence is imposed and both authorize imposition of a term of community supervision or custody designed to further the protection and personal self-improvement objectives of the Sentencing Reform Act. See State v. Guerin, 63 Wn. App. 117, 120, 816 P.2d 1249 (1991) (comparing community supervision and community placement, the latter of which included community custody). There is no good reason why the Bernhard holding on exceptional conditions would not apply to community custody conditions as well.

The court ultimately rejected Perez's exceptional sentence request based on its mistaken belief about the extent of its discretionary authority to order Perez into a Community Protection Program facility as part of the sentence. The failure to exercise sentencing discretion is an abuse of

discretion. See In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-34, 166 P.3d 677 (2007) (trial court mistakenly believed it was without discretion to impose concurrent sentences for separate serious violent offenses); State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005) (failing to exercise discretion on whether to grant exceptional sentence downward).

Further, the exercise of sound discretion presupposes the trial court has a correct understanding of the applicable law, including its standard and exceptional sentencing authority. State v. McGill, 112 Wn. App. 95, 100, 102, 47 P.3d 173 (2002). A trial court necessarily abuses its discretion when applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

"Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." McGill, 112 Wn. App. at 100. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." Id. at 102.

After defense counsel agreed the court could not order Perez into the Community Protection Program, the court stated he was "hamstrung"

because "I can't order him into the program -- as a substitute for the sentence." 2RP 10. Whether the court had the authority to impose an exceptional sentence that completely substituted placement in the Community Protection Program facility for a sentence of confinement in the DOC is an issue that need not be reached because Perez was not asking for such a sentence. Again, Perez's exceptional sentence request consisted of 60 months confinement, which would be served in a DOC facility, as opposed to a standard range sentence of 129-171 months confinement. Residence and participation in the Community Protection Program would not have taken place until after he was released from DOC confinement.

The record shows the court considered the Community Protection Program, with its 24/7 supervision and support services, to be adequate to protect the community if the court had the authority to order Perez into the program. The court was open to the possibility of granting Perez an exceptional sentence downward if Perez could be ordered into such a program. 2RP 9-12, 17. This is sufficient to justify remand for resentencing, where the trial court would be given an opportunity to exercise its discretion on whether to grant Perez's exceptional sentence request based on a correct understanding of the range of its sentencing authority.

Mulholland supports this remedy. In that case, the trial court failed to recognize it had discretion to impose concurrent sentences for several first-degree assault convictions as a mitigated exceptional sentence. Mulholland, 161 Wn.2d at 333-34. Although the record did not indicate the trial court would necessarily have imposed a mitigated exceptional sentence if it had know it had the authority, the trial court's remarks indicated it was a possibility. Id. at 334. Remand for resentencing was proper because a different sentence might have been imposed had the trial court applied the law correctly. Id. For the same reason, this Court should reverse Perez's standard range sentence and remand for resentencing to allow the court to consider whether to grant an exceptional sentence downward on the confinement portion of the sentence.

In noting its first concern was public safety, the court pointed out Perez had previously received an exceptional sentence upward and "he was out robbing banks within a few months after he got out." 2RP 9; see Supp CP \_\_ (sub no. 59A, supra at 4, 20-21) (120 month exceptional sentence). That is precisely why the Community Protection Program is needed. Perez lacks the resources to refrain from criminal activity in the absence of such a program. The sentence, as it now stands, sets up Perez for the same type of failure he experienced earlier and increases the risk of

future public harm upon Perez's release. Warehousing Perez in the DOC system does not address the root of the problem.

It may also be noted the court had authority to impose an exceptional term of community custody beyond the standard range of 18 months presumptively applicable to Perez. In re Postsentence Petition of Smith, 139 Wn. App. 600, 601, 161 P.3d 483 (2007) (the trial court's statutory authority to impose exceptional sentences to include exceptional community custody terms). Thus, if the trial court were concerned that 18 months was an insufficient amount of time to protect the community and rehabilitate Perez, it has the authority to order Perez to remain at that facility for an exceptional upward term. See Guerin, 63 Wn. App. at 121 (trial courts may impose an exceptional term of community placement that does not exceed the statutory maximum); CP 36 (first degree robbery carries a statutory maximum term of life).

2. IN THE ALTERNATIVE, DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO APPRISE THE TRIAL COURT OF ITS SENTENCING AUTHORITY OR IN FAILING TO ENSURE THE TRIAL COURT COULD EXERCISE ITS AUTHORITY IN PEREZ'S FAVOR.

a. Counsel Provided Ineffective Assistance In Maintain The Trial Court Lacked Authority To Order Perez Into The Community Correction Program.

In the event this Court determines defense counsel invited error by telling the trial court it lacked authority to order Perez into the Community Protection Program, then counsel provided ineffective assistance in so doing.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

The right to effective assistance extends to the sentencing stage. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Wakefield,

130 Wn.2d 464, 475, 925 P.2d 183 (1996). But the invited error doctrine does not preclude review where, as here, defense counsel was ineffective in inviting the error. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Competent counsel would know the trial court had authority to order Perez into the Community Protection Program as part of the sentence. Counsel has a duty to know the relevant law. Kylo, 166 Wn.2d at 862. And only legitimate trial strategy or tactics constitute reasonable performance. Id. at 869. The failure to inform the court that it had authority to order Perez into the Community Protection Program cannot be explained as a legitimate tactic. This was a misstatement of the law that operated to her client's detriment. Counsel advocated for an exceptional sentence downward but the court declined to impose one based on its misunderstanding that it had no authority to order Perez into the program.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to

undermine confidence in the outcome. Id. As set forth above, confidence in the outcome is undermined because the record shows the court was willing to impose an exceptional sentence if it had the authority to order Perez into the Community Protection Program. 2RP 9-12, 17.

In McGill, defense counsel was ineffective in failing to cite authority showing the court had discretion to impose an exceptional sentence downward and in failing to request the court to exercise its discretion based on that authority. McGill, 112 Wn. App. at 101-02. Remand for the trial court to exercise its principled discretion was appropriate where the court's comments indicated it would have considered an exceptional sentence had it known it could. Id. at 100-01. The same holds true here.

b. Perez's Conviction And Sentence Range Did Not Render Him Ineligible For The Community Protection Program.

Another comment made by defense counsel should be addressed. At one point, defense counsel said "The offer certainly had to include quite a bit of a lesser charge with a lesser range for him to be eligible for that, and that is not something that --." 2RP 9. The import of this comment is not clear, as it was not responsive to the court's question. However, defense counsel seems to be saying Perez was not eligible for the Community Protection Program because the charge was too serious and the standard range too long. If that is what counsel meant to convey,

then counsel was again mistaken. Perez's convictions and standard range did not preclude his eligibility for the Community Protection Program.

"Community protection program" means services specifically designed to support persons who meet the criteria of RCW 71A.12.210. RCW 71A.12.220(3). The RCW 71A.12.210 criteria are the following: (1) the person has been convicted for one or more violent offenses as defined by RCW 9.94A.030 and constitutes a current risk to others as determined by a qualified professional; and (2) the person has been determined to have a developmental disability as defined by RCW 71A.10.020(3).<sup>3</sup> RCW 71A.12.210.

First degree robbery, to which Perez pleaded guilty, is a violent offense as required by RCW 71A.12.210. See RCW 9A.56.200(2) (first degree robbery is a class A felony); RCW 9.94A.030(53)(a)(i) ("violent offense" means any felony defined under any law as a class A felony). Dr. LaDue's evaluation provides the basis for believing Perez constitutes a

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<sup>3</sup> RCW 71A.10.020(3) defines "developmental disability" as "a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual."

current risk to others and that he has a developmental disability as further required by RCW 71A.12.210.

The record is unclear on whether the court relied on a purported lack of eligibility for the Community Protection Program in declining Perez's request for an exceptional sentence. But if it did, then counsel was again ineffective in failing to properly advise the court for the same reasons articulated in section C. 2. a., supra. Perez's convictions and sentencing range did not render him ineligible. Indeed, the Community Protection Program exists to service people just like Perez who have been convicted of violent offenses and present a risk to the community due to developmental disabilities.

c. Counsel Was Ineffective In By Failing To Take The Steps Necessary To Enable The Court To Exercise Its Sentencing Authority.

In the event this Court determines the trial court lacked authority to order Perez into the Community Protection Program in the absence of actual acceptance into the program, then counsel was ineffective either in failing to submit an application to the Department of Social and Health Services (DSHS) before sentencing or in failing to request a continuance in order for DSHS to act on an application for the program.

DSHS administers the Community Protection Program under its mandate to provide developmental disabilities services. RCW 71A.12.200.

DSHS must determine eligibility before a person can be accepted for developmental disability services, including placement in the Community Protection Program. RCW 71A.16.020(1); RCW 71A.16.040(1); RCW 71A.16.050(1); RCW 71A.12.230(3)(a). The person seeking a service needs to submit an application. RCW 71A.16.030(4); RCW 71A.16.040(1).

When the trial court asked if he could order Perez into the Community Protection Program, defense counsel replied "I don't believe you can. He has to apply. We looked into applying and Ms. LaDue and I kind of put that together ahead of time." 2RP 10.

The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). If the court lacked authority to order Perez into the program because Perez had not submitted an application and been approved, then there is no legitimate reason why counsel would not have submitted that application before asking the court to ultimately rule on the request for an exceptional sentence downward. In the absence of an application and DSHS approval, the request for an exceptional sentence was a futile act. Counsel put together the application ahead of time but

did not submit it before the sentencing hearing. This was deficient performance.

Dr. LaDue evaluated Perez in December 2009. Supp CP \_\_ (sub no. 73 at 2). The sentencing hearing did not take place until May 2010. Competent counsel would have submitted a timely application to DSHS so that it could formally determine Perez's eligibility before the sentencing hearing took place. At the very least, counsel was ineffective in failing to request a continuance to enable DSHS to determine eligibility for the program before the court imposed sentence. Once it became apparent that the court was not going to grant the request for an exceptional sentence in the absence of authority to order Perez into the Community Protection Program, the only objectively reasonable recourse was to take the steps necessary to give the court that authority. The record shows it is likely the DSHS would have approved the application based on the statutory criteria for acceptance into the program.

Similarly, if this Court determines the trial court did not abuse its discretion in declining to impose an exceptional sentence downward in the absence of assurance that Perez would be accepted into the program, then counsel was ineffective in failing to provide that assurance by seeking a determination of Perez's eligibility before the court ruled on the exceptional sentence request. Again, the failure to provide such assurance

was not a legitimate tactic and confidence in the outcome is undermined because the court appeared willing to impose an exceptional sentence if it had assurance that the community would be protected by Perez's entry into the Community Protection Program.

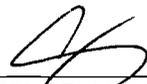
D. CONCLUSION

For the reasons stated, this court should reverse the standard range sentence and remand for resentencing.

DATED this 30<sup>th</sup> day of November 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65562-1-1
	)	
RICARDO PEREZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICARDO PEREZ  
DOC NO. 262121  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2010.

x Patrick Mayovsky

FILED  
COURT OF APPEALS DIV #3  
STATE OF WASHINGTON  
2010 NOV 30 PM 4:17