NO. 51673-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PETER ABARCA,

Appellant.

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

The Honorable Kevin D. Hull, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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C. STATEMENT OF THE CASE

Following two "controlled buys" conducted by the West Sound Narcotic Enforcement Team (WestNET), Peter Abarca was charged in Kitsap County Superior Court as an accomplice with delivery of methamphetamine (Count I), possession of methamphetamine with intent to manufacture or deliver (Count II), and possession of a controlled substance with intent to manufacture or deliver (Count III) on July 14, 2017. Clerk's Papers (CP) 1-8. The State alleged that Count I took place between June 11 and June 30, 2017, and Counts II and III occurred on July 12, 2017. CP 1-4. The State alleged that each offense is a major violation of the Uniform Controlled Substances Act (VUCSA) under RCW 9.94A.535(3)(e). CP 2-4. The State filed an amended information on September 14, 2017. CP 28-33.

Yenilen Guzman faced similar charges as the result of "controlled" drug buys on June 11, June 30, and July 12, 2017.

On January 8, 2018, Mr. Abarca waived his trial rights and pleaded guilty to the offenses and aggravating circumstances as alleged. Report of Proceedings[1] (RP) (1/8/18) at 2-11; CP 53-63. According to the plea

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[1]The record of proceedings consists of the following transcribed hearings: August 14, 2017, September 14, 2017, October 18, 2017, November 1, 2017, November 6, 2017, November 11, 2017, November 30, 2017, January

agreement, the State gave notice it would recommend that Mr. Abarca be sentenced to 60 months for each count to be served consecutively for a total of 180 months, community supervision, and legal financial obligations. RP (1/8/18) at 4-6; CP 47-52. Mr. Abarca's Offender Score was initially thought to be "3," but was subsequently corrected to reflect a standard range of 12+ to 20 months.[2] CP 72-78. Counsel for Mr. Abarca filed a sentencing memorandum on February 23, 2018. Relying in part on the holding of ***State v. O'Dell***, counsel requested a sentence within the standard range. CP 67-71.

Mr. Abarca and Yenilen Guzman came on for sentencing on February 26, 2018, before the Honorable Kevin D. Hull. RP (2/26/18) at 4-126.

At sentencing, Sean Kirkwood, a detective with the Kitsap County Sheriff's Office, testified regarding the circumstances of a drug investigation and arrest of Mr. Abarca and Ms. Guzman. RP (2/26/18) at 9-83.

Beginning in mid-2016 the West Sound Narcotic Enforcement Team (WestNET) investigated a suspected drug dealer named Robert Pacheco, whose street name is "Primo." RP (2/26/18) at 9-10. During the course of the two - year investigation, Detective Kirkwood became aware of Yenilen Guzman, Mr. Pacheco's then-girlfriend. RP (2/26/18) at 10. Detective

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8, 2018 (change of plea hearing), and February 26, 2018 (sentencing).

[2]The State initially believed Mr. Abarca's Offender Score was "3," but his score was reduced to "2" based on his California juvenile history. RP (2/26/18) at 5. An Amended Plea Agreement was filed February 26, 2018 reflecting the lower Offender Score and standard range. CP 72-78.

Kirkwood described Mr. Pacheco as being "very cautious and very sophisticated in how he did things." RP (2/26/18) at 11. Detective Kirkwood was told by an informant that Ms. Guzman was interested in "starting her own" drug operation in Los Angeles, California after a falling out with Mr. Pacheco, and that she would use connections she developed when she was a drug runner for him. RP (2/26/18) at 13-14. Detective Kirkwood stated that WestNet started investigating Ms. Guzman and conducted two controlled buys from her in June 2017 and then a "buy/bust" on July 12, 2017. RP (2/26/18) at 17-21.

The first controlled buy in June, 2017 from Ms. Guzman resulted 2.06 pounds of methamphetamine. RP (2/26/18) at 18. Mr. Abarca was not involved in the first buy. RP (2/26/18) at 79.

A second buy from Ms. Guzman took place two weeks later on June 30, 2017. The buy resulted in WestNet receiving approximately two pounds of methamphetamine from a police informant. RP (2/26/18) at 23. During the June 30, 2017 buy, Ms. Guzman brought Peter Abarca with her. RP (2/26/18) at 25. Detective Kirkwood stated that it was the first time that Mr. Abarca, who was 19 years old at the time of the drug transactions in June and July, 2017, had met the police operative who facilitated the controlled buy. RP (2/26/18) at 25, 26, 27.

Detective Sean Kirkwood testified that he did know who Mr. Abarca was before the June 2017 controlled buy, and only knew that Mr. Abarca was

Ms. Guzman's boyfriend and that WestNet had learned that he was potentially anticipated to be accompanying Ms. Guzman to the drug deal. RP (2/26/18) at 27, 74.

At the controlled buy, which took place at a motel in Kitsap County, Mr. Abarca was observed on police surveillance video unpackaging and weighing the narcotics. RP (2/26/18) at 27, 29. Detective Kirkwood testified that there were no firearms or weapons involved. RP (2/26/18) at 77.

The following month, on July 12, 2017, Detective Kirkwood conducted a "buy/bust" involving Ms. Guzman and another woman who traveled by car from Southern California to Kitsap County. RP (2/26/18) at 29. After arriving, Ms. Guzman sat in the car and then called the police operative and stated that she believed she saw a police vehicle at restaurant near the place where the drug transaction was expected to occur. RP (2/26/18) at 31. Either the operative or Ms. Guzman called Mr. Abarca, who was believed by police to be in California, and engaged in a three-way call regarding the possibility that a police vehicle was in the area. RP (2/26/18) at 31. Mr. Abarca appeared to be negotiating the price of the drugs with the police operative. RP (2/26/18) at 42. Ms. Guzman said that she was feeling uncomfortable about doing the deal because she believed she saw an unmarked police vehicle. RP (2/26/18) at 42. Detective Kirkwood testified that Mr. Abarca told Ms. Guzman to drive a couple streets away and "ditch" the narcotics. RP (2/26/18) at 31, 32. Police then stopped Ms. Guzman's

vehicle and approximately five pounds of meth and .3 pounds of heroin were seized from panels located in the car trunk. RP (2/26/18) at 32, 38. The total amount of methamphetamine obtained from the two controlled buys and the arrest in July totaled approximately 9.7 pounds. RP (2/26/18) at 32, 38.

Detective Kirkwood testified that the amount seized amounts to approximately 4400 "servings" of meth and 1350 to 1360 "servings" of heroin, with a street value of $176,000 for the meth and $20,000 for the heroin. RP (2/26/18) at 38, 39.

After the arrest, Ms. Guzman was permitted to return to California with the anticipation that she would work as a police informant. RP (2/26/18) at 43, 78. However, after her release Mr. Abarca stated that he would not cooperate with police and that he and Ms. Guzman were going to Mexico. RP at 78.

Detective Kirkwood testified that Mr. Abarca, who was involved romantically with Ms. Guzman, appeared to provide security for her because she "was coming up with an extremely high level of narcotics." RP (2/26/18) at 41.

Following the arrest of Ms. Guzman on July 12, 2017 in Kitsap County, Detective Kirkwood spoke with Mr. Abarca's parole officer who had called after learning about the arrest. RP (2/26/18) at 44-45. Detective Kirkwood testified that he was concerned about how young Mr. Abarca was, and he wanted to see if there was something he could do for Mr. Abarca. RP

(2/26/18) at 44-45. Detective Kirkwood testified that he asked Mr. Abarca to "work" with him following Ms. Guzman's arrest and that Mr. Abarca did not do so. Mr. Abarca and Ms. Guzman were arrested in Ventura, California. RP (2/26/18) at 47-48.

Detective Kirkwood testified that Mr. Abarca is a gang member and the State introduced photos of his tattoos taken by jail staff, which Detective Kirkwood stated were gang tattoos. RP (2/26/18) at 49.

At sentencing, the State argued that Mr. Abarca had an offender score of "2" that Counts II and III for delivery of methamphetamine and heroin on July 12, 2017 constitute the same criminal conduct. RP (2/26/18) at 90. The State recommended that Mr. Abarca be sentenced to ten years for Counts II and III, and five years for Count I, to be served consecutively. RP (2/26/18) at 90-91. Defense counsel argued that the court, when fashioning a sentence, should look at the purposes of the Sentencing Reform Act of RCW 9.94A.10 to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. RP (2/26/18) at 102.

Defense counsel further argued that Mr. Abarca had two prior felony juvenile offenses and his involvement in the drug deals in this case was solely to accompany Ms. Guzman on a buy, and at most, talking about the price for the drugs with a police informant. RP (2/26/18) at 101, 103. Counsel argued that Mr. Abarca was 20 at the time of sentencing and 19 at the time

the first buy took place. RP (2/26/18) at 101. Defense counsel argued:

> [courts] recognize, through studies that was in the cases I cited, that just because someone turns legally 18 doesn't necessarily mean that the person is still an adult. They still have a developing brain. They still are—they are more susceptible to outside influences. They are more impulsive, commonsense type of stuff that studies now indicate is the case.

RP (2/26/18) at 101-02.

Counsel, however, did not argue that Mr. Abarca's youth was a mitigating factor and that the court should impose a sentence below the standard range. RP (2/26/18) at 102. Counsel instead argued:

> The case law says that the Court can go below the guidelines in taking youth into consideration. We're not even asking that the Court in this case go below the guidelines. We're asking the Court to go above the guidelines, but I believe it is a factor for the Court to consider when to give a 20-year-old 180 months.

RP (2/26/18) at 102.

Defense counsel conceded that the court would impose an exceptional sentence above the top of the standard range of 20 months. RP (2/26/18) at 105. Mr. Abarca's attorney requested an exceptional sentence of 60 months---the top of his standard range. RP (2/26/18) at 106.

The trial court imposed an exceptional sentence of 120 months; 60 months for each count, to be served consecutively. RP (2/26/18) at 121; CP 81.

The trial court entered written findings, which stated in relevant part:

> The Court finds each plea of guilty to be made voluntarily, knowingly and intelligently, and, based upon the certification of probable cause filed in the case, the Court finds facts sufficient to support each of the individual pleas of guilty, including with respect to the aggravating circumstance of major violation of the Uniform Controlled Substances Act as charged in each of the three counts, respectively.

CP 123 (Finding of Fact 5).

The court concluded that the "exceptional sentence is justified by the aggravating circumstances described in the above Findings of Fact." CP 123 (Conclusion of Law 3).

The court also imposed legal financial obligations including $500.00 for crime victim assessment, $200.00 in court costs, and $100.00 felony DNA fee. CP 86.

Explaining its reasons for the 120–month sentence, the sentencing court stated:

> I believe 120 months appropriately reflects the conduct. It appropriately reflects whatever mitigating factors that may exist. It appropriately reflects the quantity that was brought into our county. I suppose it would be the low end of the federal range. We're not in federal court. Be that as it may, I think that 120 months appropriately punishes each defendant while recognizing the situation in its entirety.

RP (2/26/18) at 121.

Timely notice of appeal was filed on March 26, 2018. CP 99-111. This appeal follows.

D. ARGUMENT

1. TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING AN EXCESSIVE EXCEPTIONAL SENTENCE

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a trial court may impose a sentence outside the standard range if it finds "that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. This Court may reverse an exceptional sentence if 1) the sentencing court's reasons are not supported by the record, 2) the sentencing court's reasons do not justify an exceptional sentence, or 3) the length of the sentence is clearly excessive. RCW 9.94A.585. Here, the sentencing court's reasons do not justify a departure from the standard range and the length of the sentence is clearly excessive.

RCW 9.94A.535(3) provides a list of permissible aggravating circumstances. In the context of controlled substance cases, a trial court may impose an exceptional sentence under RCW 9.94A.535(3)(e) if:

> [t]he current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
>
> (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
>
> (ii) The current offense involved an attempted or

actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drag distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

RCW 9.94A.535(3)(e).[3]

a. The sentencing court failed to state the reasons for an exceptional sentence

Before the court imposes an exceptional sentence, the court must also find that "there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535; ***State v. Pappas***, 176 Wash. 2d 188, 192, 289 P.3d 634, 635 (2012); ***State v. Stubbs***, 170 Wash. 2d 117, 124, 240 P.3d 143, 146 (2010). "Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in

[3]If any one of the six factors listed in RCW 9.94A.535(3)(e) is present, an exceptional sentence is justified. ***State v. Solberg***, 122 Wn.2d 688, 707, 861 P.2d 460 (1993); ***State v. Hrycenko***, 85 Wn.App. 543, 548, 933 P.2d 435 (1997), abrogated in part on other grounds by ***State v. Gonzales Flores***, 164 Wn.2d 1, 186 P.3d 1038 (2008).

written findings of fact and conclusions of law." *Id.*; see also ***State v. Suleiman***, 158 Wash. 2d 280, 288, 143 P.3d 795, 799 (2006). The "major VUCSA" aggravator allows, but does not compel, an exceptional sentence. Therefore, the sentencing court had to make factual determinations in order to justify the exceptional sentence. In particular, the trial court had to infer the offenses were "more onerous than the typical offense." RCW 9.94A.535(3)(e).

The state did not specify the prong of RCW 9.94A.535(3)(e) upon which it relied, but during argument the prosecutor indicated that the amount of drugs involved in the transactions merited an exceptional sentence. The State argued:

> We're talking about 9.7 pounds of methamphetamine which results in 4400 uses of methamphetamine. Those are significant numbers. And then $20,000 worth of heroin, 136 grams of heroin. That's before they've been cut with other agents and divided up and gone out in the community, so I think it's a very conservative estimate. Given all of that information and Detective Kirkwood's testimony and culpability of both defendants, 15 years is appropriate.
>
> . . .
>
> Peter Abarca's youth just does not compensate for the level of operation and the amount of drugs that he was dealing to our community.

RP (2/26/18) at 93, 94.

Here, the trial court's findings and conclusions do not even attempt to justify the exceptional sentence, leaving this Court with an insufficient record to review. The court mere found that there were sufficient facts to support the pleas "including with respect to the aggravating circumstances of major violation of the Uniform Controlled Substances Act[.]" CP 123, Finding of Fact 5. The court concluded, without elaboration, that there "are substantial and compelling reasons to impose an exceptional sentence" of 60 months per count, to be served consecutively, for a total of 120 months, and that the sentence "is justifying by the aggravating circumstances described in the above Findings of Fact. CP 123; Conclusions of Law 2, 3.

This Court reviews de novo whether the reasons supplied by the sentencing court do not justify a departure from the standard range. ***State v. France***, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). When a trial court imposes an exceptional sentence, written findings of fact and conclusions of law are essential; the trial court's oral ruling will not suffice. ***State v. Friedlund***, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

The trial court's findings in this case do not provide any information to illuminate the court's reasoning. The findings do not describe how the aggravating circumstances were "substantial and compelling" or how the aggravator justified an exceptional sentence. Therefore, the sentencing court

erred by not making specific findings related to the "major violation" aggravator to justify an exceptional sentence. Therefore, the exceptional sentence should be reversed and remanded for resentencing.

b. The trial court abused its discretion by imposing an excessive exceptional sentence

An exceptional sentence should be reversed if the sentence imposed was "clearly excessive." RCW 9.94A.585(4)(b). The length of an exceptional sentence is reviewed for abuse of discretion. ***State v. Oxborrow***, 106 Wash.2d 525, 530, 723 P.2d 1123 (1986). A "sentence is excessive only if its length, in light of the record, 'shocks the conscience.' "***State v. Vaughn***, 83 Wash.App. 669, 681, 924 P.2d 27 (1996) (citations omitted), review denied, 131 Wash.2d 1018, 936 P .2d 417 (1997). The maximum sentence should be reserved for worst case scenarios. ***State v. Woody***, 48 Wn.App. 772, 778, 742 P.2d 133 (1987), review denied, 110 Wn.2d 1006 (1988).

Here, Mr. Abarca faced a standard range of 12 to 20 months. The court's sentence of 120 months is six times the top the standard range. Although the amount of drugs involved in the case is large, the exceptional, consecutive sentences are clearly excessive given the circumstances. Mr. Abarca was very young; he was 19 at the time of the first buy and had just turned 20 years old six days before the second buy. His role was described by Detective Kirkwood was to provide "security" for his older girlfriend's

drug operation. Ms. Guzman is the one who had the connections, Ms. Guzman is the person who started her drug operation after separating from "Primo's" drug operation. The facts show that Mr. Abarca's role was secondary to that of Ms. Guzman. The sentencing of Mr. Abarca to 120 months by the sentencing court was an action that no reasonable person would have taken and should be reversed.

2. MR. ABARCA'S COUNSEL WAS PREJUDICIALLY INEFFECTIVE BY FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE DOWNWARD PURSUANT TO O'DELL

Mr. Abarca entered guilty pleas to two controlled drug buys that took place in June and July, 2017. CP 53-63. The June 30, 2017 buy took place when Mr. Abarca was 19 years old. Defense counsel filed a sentencing memorandum citing ***State v. O'Dell***, 183 Wn.2d 680, 358 P.3d 359 (2015). Rather than request an exceptional sentence downward, however, the defense memorandum argued for a standard range sentence. CP 71.

At sentencing, rather than proffer an argument based on ***O'Dell***, defense counsel inexplicably conceded that the court would impose an exceptional sentence. RP (2/26/18) at 105. Counsel argued the fact that Mr. Abarca's youth was a factor and that a 180 month sentence was excessive

not proportional, but did not cite ***State v. O'Dell*** and did not ask for the court to consider the mitigating factor of youth to impose an exceptional sentence below the standard range under ***O'Dell***. Mr. Abarca's counsel was prejudicially ineffective by failing to recognize that ***O'Dell*** supported a downward departure from the standard range, and reversal and remand for a new sentencing with new counsel is thus required.

Both the Sixth Amendment and Article 1, § 22 of the Washington Constitution guarantee the accused the right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Mierz***, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Counsel is ineffective if, despite a strong presumption he was effective, 1) his representation was "deficient," and 2) that deficiency prejudiced his client. See ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel is a mixed question of fact and law, reviewed de novo. ***State v. Sutherby***, 165 Wn.2d870, 883, 204 P.3d 916 (2009).

Counsel's representation is "deficient" if it fell below an objective standard of reasonableness, based on the circumstances of the case. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant establishes prejudice by showing that there is a reasonable probability that

the result of the proceeding would have been different but for counsel's unprofessional errors. ***State v. Grier***, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ***Grier***, 171 Wn.2d at 34 (quoting ***Strickland***, 466 U.S. at 694).

Under the facts of this case, Mr. Abarca falls squarely within the parameters of ***O'Dell***. Mr. Abarca, who was born July 6, 1997, was 19 at the time of the first controlled buy on June 30, 2017.

In ***O'Dell***, the defendant was eighteen when he was convicted of second degree rape. ***O'Dell***, 183 Wn.2d at 683. At sentencing, defense counsel asked the sentencing court to impose an exceptional sentence below the standard range because the defendant's youthfulness impaired his ability to appreciate the wrongfulness of his conduct and act in conformity with the law. ***O'Dell***, 183 Wn.2d at 685. The sentencing court "ruled that it could not consider age as a mitigating circumstance" because ***O'Dell*** was a legal adult. ***O'Dell***, 183 Wn.2d at 685. On appeal, the Supreme Court held that the sentencing court abused its discretion because it believed erroneously that it could not consider youth as a mitigating factor and, as a result, failed to consider whether O'Dell's youth impacted his culpability. ***O'Dell***, 183 Wn.2d at 696–97. The Court concluded: "a defendant's youthfulness can support

an exceptional sentence below the standard range applicable to an adult felony defendant," and "the sentencing court must exercise its discretion to decide when that is." ***O'Dell***, 183 Wn.2d at 698-99.

O'Dell is directly relevant to cases where, as here, the defendant was 19 at the time of the crime. ***O'Dell***, 183 Wn.2d at 699. It specifically holds that relative youthfulness is a mitigating factor which may support an exceptional sentence below the standard range. ***O'Dell,*** 183 Wn.2d at 699.

At sentencing, however, defense counsel did not mention ***O'Dell***, despite having cited the case in the sentencing memorandum. CP 67-71. Defense counsel referred to Mr. Abarca's youth several times at sentencing but did not argue that Mr. Abarca's youth was a mitigating factor meriting a downward departure from the standard range.

Defense counsel did not discuss the immaturity found in youth and made directly relevant to his client's case in ***O'Dell***, nor did counsel cite or refer to well known academic studies discussed in ***O'Dell*** showing that the psychosocial deficiencies of youth persist well into late adolescence and into early adulthood as a matter of cognitive development. ***O'Dell***, 183 Wn.2d at 697-99.

This is perplexing because the deficiencies addressed in ***O'Dell*** are logically the same quality which contributed to Mr. Abarca's conduct in

this case.

O'Dell is a relevant, applicable decision discussing the proper sentence to be imposed in a case where the defendant was very young when the crime occurred. Counsel's failure to present the court with any supporting arguments and caselaw regarding Mr. Abarca's youth, and to fail to argue for mitigation below the standard arrange, constituted deficient performance. Failure to argue or cite relevant caselaw is below the objective standard of reasonableness if that failure prevents the court from making an informed decision. It cannot be seen as a legitimate sentencing strategy to fail to cite ***O'Dell***, a case directly relevant to Mr. Abarca's unique sentencing situation which supported going even lower than the standard range in sentence.

There can be little question counsel's unprofessional failure to cite ***O'Dell*** was prejudicial. Indeed, even when arguing for an exceptional sentence upward, the failure of counsel to cite ***O'Dell*** and the mitigating qualities of youth was ineffective and prejudicial.

The sentencing judge said he was considering "whatever mitigating factors that may exist"[4] in imposing the exceptional sentence, but he did so completely without assistance or insight from the relevant caselaw from the state Supreme Court. There is more than a reasonable probability that the

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[4]RP (2/26/18) at 121.

result of the proceeding would have been different, "except for counsel's unprofessional errors." ***McFarland,*** 127 Wn.2d at 334-35. Resentencing with new counsel should be granted.

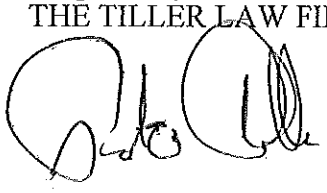
E. CONCLUSION

The sentencing court's reasoning does not justify an exceptional sentence, and the sentence imposed was excessive.

Alternatively, Mr. Abarca's exceptional sentence must be vacated and the case remanded to the sentencing court with instructions to consider his youthfulness at the time of the offense in deciding if an exceptional sentence downward is merited.

DATED: September 13, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Peter Abarca

CERTIFICATE OF SERVICE

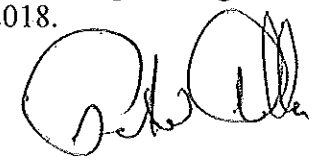
The undersigned certifies that on September 13, 2018, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Randall Sutton, Kitsap County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

Mr. Randall Avery Sutton
Kitsap Co. Prosecutor's Office
614 Division St
Port Orchard, WA 98366-4614
rsutton@co.kitsap.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Peter Abarca
DOC #406011
Washington Correction Center
PO Box 900
Shelton, WA 98584
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 13, 2018.



PETER B. TILLER