Supreme Court No.: _____
Court of Appeals No.: 75502-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HUSSAN DRAMMEH,

Petitioner.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

In *State v. A.N.J.*, this Court held that, to be constitutionally effective, "at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010). Because the Court of Appeals failed to adhere to this Court's precedent, Hussan Drammeh, petitioner here and appellant below, asks this Court to grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Drammeh*, No. 75502-1-I, filed January 16, 2018. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. This Court's decisions in *State v. Jones* and *State v. A.N.J.* hold that the Sixth Amendment right to the effective assistance of counsel includes counsel's obligation to investigate the State's case before advising a defendant during plea negotiations. Does the Court of Appeals decision conflict with this Court's jurisprudence and the constitutional guarantee to the effective assistance of counsel where it holds counsel was effective despite failing to interview the State's complaining witness and

therefore failing to learn of her unavailability for trial? RAP 13.4(b)(1), (3).

2. A guilty plea is voluntary only if made with an accurate understanding of its direct consequences. Mr. Drammeh was misinformed of the actual maximum sentence that could be imposed, yet the Court of Appeals affirmed. Should this Court grant review because the decision below conflicts with the Court of Appeals decision in *State v. Knotek* and misapplies this Court's decision in *State v. Weyrich*? RAP 13.4(b)(1), (2).

3. Whether the Court should grant review of the significant question left open in *State v. A.N.J.*: whether the sex offender registration requirement is a direct consequence of a guilty plea such that Mr. Drammeh had to be accurately informed of the requirement for his plea to be deemed knowing, intelligent and voluntary? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

Hussan Drammeh and codefendant Rico Lopez were charged with first degree rape, alleging they engaged in sexual intercourse with a prostitute, N.L., by forcible compulsion and under circumstances where serious physical injury was inflicted on N.L. CP 1-5 (citing RCW 9A.44.040(1)(c)).

Mr. Drammeh hired an attorney who did not interview the complaining witness, N.L. CP 160. Nonetheless, trial counsel advised Mr.

Drammeh to plead guilty to third degree rape, which he did. RP 5-17, 36-38; CP 12-37.

By failing to interview N.L., defense counsel failed to learn she suffered from serious substance abuse that affected her abilities as a witness. *See* CP 165. Before sentencing several months later, the prosecutor informed trial counsel that the State was "forced" to dismiss the charge against the codefendant due to the unavailability of the complaining witness, N.L. CP 165. N.L. had become unavailable because she was enrolled in a "lengthy inpatient treatment program outside the State of Washington." CP 165. The State was unsure how long N.L. would remain unavailable. CP 165.

Mr. Drammeh moved to withdraw his plea for ineffective assistance of counsel and to have independent counsel appointed. RP 19-20. After he was provided with new counsel, his motion to withdraw was denied. RP 19; CP 38, 167.

He appealed, arguing the trial court improperly denied his motion to withdraw and his plea was involuntary, but the Court of Appeals affirmed. *See* Appendix.

D. ARGUMENT

1. The Court of Appeals decision conflicts with *State v. A.N.J.* and *State v. Jones* by holding defense counsel acted effectively despite his failure to interview the only complaining witness prior to advising his client to plead guilty.

"To discharge" the constitutional right to the effective assistance of counsel, "trial counsel must investigate the case, and investigation includes witness interviews." *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015); *see* U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"During plea bargaining, counsel has a duty to assist the defendant 'actually and substantially' in determining whether to plead guilty." *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267 (1993) (quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)); *see also Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) ("During plea negotiations defendants are entitled to the effective assistance of competent counsel." (internal citation omitted)). "[A]t the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *A.N.J.*, 168 Wn.2d at 111-12 (emphasis added).

Thus, the duty to investigate includes the obligation to investigate all witnesses who may have information concerning his client's guilt or innocence. *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.").

In *Jones*, defense counsel failed to interview three witnesses identified in police reports, one of whom could have corroborated another witness who testified that Mr. Jones had acted in self-defense in a second degree assault case. This Court held counsel was ineffective. *Jones*, 183 Wn.2d at 340-41, 344.

Here, trial counsel could not reasonably evaluate the evidence against Mr. Drammeh or the likelihood of a conviction without interviewing the complaining witness. Trial counsel failed to interview the complaining witness against Mr. Drammeh on the charge of rape by forcible compulsion and under circumstances where serious physical injury was inflicted. CP 160 (declaration of Timothy Leary: "By the time of entry of the plea, we had not yet interviewed the victim N.L."). Yet, counsel advised Mr. Drammeh to enter a guilty plea to third degree rape. RP 36-38. Counsel's performance was ineffective.

The failure to interview key witnesses is not an informed and reasonable strategic decision. *Jones*, 183 Wn.2d at 340-41. Unless he evaluates the State's evidence, a "defendant's counsel cannot properly evaluate the merits of a plea offer." *A.N.J.*, 168 Wn.2d at 109.

As *A.N.J.* holds, "a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109. The Court of Appeals opinion renders *A.N.J.* virtually meaningless by holding that defense counsel's interview of law enforcement officers involved in the case was sufficient. Slip Op. at 9. Interviewing law enforcement, in fact, did not provide defense counsel with an adequate understanding of the State's evidence.

Because trial counsel did not interview the complaining witness, trial counsel did not know and could not advise Mr. Drammeh that the complaining witness' credibility and recollection could be compromised by her significant drug addiction. CP 165. Defense counsel also failed to learn that the complaining witness was made unavailable due to out-of-state in-patient substance abuse treatment. *Id*. In short, had counsel interviewed N.L., he would have learned the State could not produce evidence from N.L. sufficient to sustain its burden at trial.

The very information defense counsel failed to collect caused the State to dismiss the charge against Mr. Drammeh's codefendant. CP 165.

Yet, Mr. Drammeh was unaware of this information when counsel advised him to plead guilty. RP 36-38.

The Court's review of this issue is de novo. *A.N.J.*, 168 Wn.2d at 109 (quoting *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)). The Court should grant review and hold that defense counsel rendered ineffective assistance by failing to interview the complaining witness in a rape allegation and thus failed to discover that she was unavailable to testify and could otherwise be compromised as a witness due to her serious substance abuse problem. RAP 13.4(b)(1), (3).

2. The decision below conflicts with the Court of Appeals opinion in *State v. Kennar* and misapplies this Court's decision in *State v. Weyrich*.

Mr. Drammeh's guilty plea is not voluntary and thus cannot be valid because it was made without an accurate understanding of the direct consequences. *E.g.*, *State v. Buckman*, __ Wn.2d __, ¶¶16-17, 409 P.3d 193 (Feb. 1, 2018); *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001). The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

Before pleading guilty, Mr. Drammeh needed to understand the direct consequences of his plea, not the maximum possible sentence for a hypothetical defendant. *State v. Knotek*, 136 Wn. App. 412, 424-25 & n.4,

149 P.3d 676 (2006), *review denied*, 161 Wn.2d 1013(2007). *Blakely v. Washington* recognized that a judge may not impose a sentence beyond what is supported by the facts reflected in the verdict or admitted by the defendant. 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

While the statutory maximum might be an eventual consequence if the State pleaded additional facts to support a higher sentence, it was not a direct consequence of Mr. Drammeh's plea. Nonetheless, Mr. Drammeh was told the maximum sentence that could be applied to other, hypothetical defendants yet could not be imposed on him. CP 15; RP 8; *see Buckman*, 409 P.3d 193 at ¶18 ("That a hypothetical third party charged with the same crime might face life in prison is irrelevant.").

"A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); *see* U.S. Const. amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Thus, a plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Mendoza*, 157 Wn.2d at 591.

Here, the standard range is the maximum possible sentence the court could impose for the offenses of which Mr. Drammeh was

convicted. Mr. Drammeh's guilty plea states the charged crime carries a standard range sentence of 13 to 17 months and a maximum term of 5 years and a $10,000 fine. CP 15; RP 8. He stated he understood "that those are the penalties that would flow from a conviction if the Court accepts your plea of guilty." RP 8.

However, there were no circumstances in Mr. Drammeh's case which would have permitted the imposition of any sentence above the standard range. Consequently, the "maximum term" was not "5 yrs" as the plea stated. Rather, the maximum was the top-end of the standard range. Mr. Drammeh was misadvised of the maximum punishment he faced as a consequence of his guilty plea. *See Knotek,* 136 Wn. App. at 424-25.

Knotek is directly on point, yet the Court of Appeals does not address its own prior decision. *See* Slip Op. at 10-11. In *Knotek*, the Court acknowledged that before pleading guilty, a defendant needs to understand the "direct consequences of her guilty plea, not the maximum potential sentence if she [or another defendant] went to trial. . . ." 136 Wn. App. at 424 n.8. The *Knotek* Court further agreed that *Blakely* "reduced the maximum terms of confinement to which the court could sentence Knotek . . . [to] the top end of the standard range[] . . . ." *Id*. at 425. The top of the standard range was the "effective maximum" for the defendant's plea. *Id*. Thus, where a defendant is told the maximum sentence is five years when

in fact the maximum sentence is the top of the standard range, the defendant is misadvised of the consequences of the plea.[1]

Rather than address *Knotek*, the Court of Appeals misapplies this Court's decision in *State v. Weyrich*, 163 Wn.2d 554, 182 P.3d 965 (2008). In *Weyrich*, this Court held the petitioner should have been allowed to withdraw his plea because he was misinformed of the statutory maximum. 163 Wn.2d at 557. Mr. Drammeh does not contend he was misinformed of the statutory maximum, he argues he was misinformed of the maximum sentence that could be imposed. *Weyrich* does not resolve this issue. Moreover, this Court did not have occasion in *Weyrich* to address *Blakely*'s holding that a judge may not impose a sentence beyond that which is supported by the facts reflected in the verdict or admitted by the defendant.

The Criminal Rules do not require a different result. *See Weyrich*, 163 Wn.2d at 557 (citing CrR 4.2). Criminal Rule 4.2 does not require

[1] *Knotek* concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she "clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose." 136 Wn. App. at 426. In this case, no discussion of *Blakely* occurred.

advisement of the statutory maximum, which may only be applicable to hypothetical other defendants. Rather, CrR 4.2(d) provides:

> Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Nothing in the rule requires the trial court inform the defendant of the statutory "maximum." Instead, the rule requires the court to inform the defendant of the "direct consequences" of his plea. As discussed, a direct consequence is one that has a definite, immediate and largely automatic effect on the range of the punishment. It is the applicable maximum sentence; not the hypothetical statutory maximum as set by the legislature.

Likewise, the plea agreement form at CrR 4.2(g) does not state that the statutory maximum term must be held out as the maximum applicable term. *See* CrR 4.2 (g) & Form. Rather, the form indicates the "standard range" sentence and the "maximum term and fine" should be supplied. *Id*. The form provides, in relevant part:

(b) Each crime with which I am charged carries a maximum sentence, a fine, and a ***Standard Sentence Range*** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1					
2					
3					

*The sentencing enhancement codes are: (RPh) Robbery of a pharmacy, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude. The following enhancements will run consecutively to all other parts of my entire sentence, including other enhancements and other counts: (F) Firearm, (D) Other deadly weapon, (V) VUCSA in protected zone, (JP) Juvenile present, (VH) Veh. Hom., see RCW 9.94A.533(7), (P16) Passenger(s) under age

The "maximum term," *i.e.*, the maximum applicable term, is not coextensive with the statutory maximum term that could be applied on other hypothetical defendants.

As *Knotek* recognized, without an aggravator the statutory maximum is not a direct consequence of the plea. 137 Wn. App. at 424 n.8.

"Where a plea agreement is based on misinformation generally the defendant may choose . . . withdrawal of the guilty plea." *Walsh*, 143

Wn.2d at 8). As *Mendoza* made clear, when reviewed on direct appeal it does not matter whether the misadvisement was material to Mr. Drammeh's decision to plead guilty. 157 Wn.2d at 590-91.

Mr. Drammeh was misinformed of the actual maximum sentence that could be imposed. Because the decision below conflicts with *Knotek* and misapplies *Weyrich*, the Court should grant review and remand for an opportunity for Mr. Drammeh to withdraw his plea. RAP 13.4(b)(1), (2).

3. The Court should grant review to determine that the duty to register as a sex offender is a direct consequence of a guilty plea, an important question left open by this Court in *A.N.J.*.

Mr. Drammeh's plea is involuntary for the additional reason that he was not informed of the length of time during which he would be required to register as a sex offender. "While the registration obligation does not affect the immediate sentence, its impact is significant, certain, and known before a guilty plea is entered." *A.N.J.*, 168 Wn.2d at 115. The obligations flowing from a duty to register are substantial—and have increased dramatically. *Does v. Snyder*, 834 F.3d 696, 697-98, 701-06 (6th Cir. 2016) (noting amendments to state registration provisions increased obligations dramatically so as to render registration requirement punitive for purposes of ex post facto analysis); *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1084 (N.H. 2015) (same); *see State v. Boyd*, 1 Wn. App. 2d

501, 523-25, 408 P.2d 362 (2017) (Becker, J. dissenting) (discussing onerous registration requirement and recent burdensome changes).

It is an open question whether a statutory duty to register as a sex offense is a direct consequence of a plea for purposes of establishing whether the plea was involuntarily. *A.N.J.*, 168 Wn.2d at 115. The Court did not decide the issue in *A.N.J.* because the petitioner was correctly informed that he had an obligation to register as a sex offender. *Id*.

The Court should now hold that the duty to register and the length of the requirement are direct consequences of a plea. RAP 13.4(b)(3), (4). A direct consequence is one having a definite, immediate, and largely automatic effect on the range of punishment. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). As *A.N.J.* recognized, "the obligation to register follows directly from the conviction." 168 Wn.2d at 115.

The duty to register carries an impact that is "significant, certain, and known before a guilty plea is entered." *Id.* A person under a duty to register must register with the county sheriff and an official designated by the agency that has jurisdiction over him upon release from custody. RCW 9A.44.130(1)(a). He must register again within three business days prior to attending classes at a school or institution of higher education. RCW 9A.44.130(1)(b)(i). He must register within three business days prior to starting employment at an institution of higher education. RCW

9A.44.130(1)(b)(ii). He must register within three business days following termination of enrollment or employment at an institution of higher education. RCW 9A.44.130(1)(b)(iii).

When registering, the person under the obligation must provide his "(i) Name and any aliases used; (ii) complete and accurate residential address or, if the person lacks a fixed residence, where he or she plans to stay; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) social security number; (viii) photograph; and (ix) fingerprints." RCW 9A.44.130(2)(a). And he may be required to update this information at any time. RCW 9A.44.130(2)(b), (c).

A person under a duty to register cannot travel outside the United States without notifying the county sheriff at least 21 days in advance. RCW 9A.44.130(3). The notification is subject to particular procedures and must include his "(a) Name; (b) passport number and country; (c) destination; (d) itinerary details including departure and return dates; (e) means of travel; and (f) purpose of travel." *Id.* The statute further imposes duties if the trip is canceled or postponed. *Id.*

There are specific requirements for persons who lack a fixed residence. RCW 9A.44.130(4)(vi), (vii), (6). Persons who change their

residence or address must provide notice within three days of moving. RCW 9A.44.130(5)(a), (b).

A person under a duty to register must follow particular notice requirements if he applies to change his name, and may be prevented from doing so if it will interfere with legitimate law enforcement interests. RCW 9A.44.130(7).

Failing to follow these provisions constitute the separate crime of failure to register. RCW 9A.44.130(4)(c); *see Ross*, 129 Wn.2d at 287 (holding community custody a direct consequence of plea because, in part, a person is subject to enhanced penalties for crimes committed while on community custody).

The length of the requirement is material to its impact. These requirements are less burdensome if their duration is short. Their impact is plainly greater the longer they attach. Moreover, the length of the duty is certain at the time of the plea. *Ross*, 129 Wn.2d at 284-85 (holding community custody a direct consequence of plea where the term of a mandatory community placement is certain); RCW 9A.44.140(3) (setting forth 10-year term of registration for third degree rape).

Omitting the length of the registration requirement denied Mr. Drammeh from knowing the lengthiest consequence of his plea. Mr. Drammeh was advised of the length of his sentence (13-17 months) and

the length of the term of community custody (36 months) that would result from his plea. CP 15, 19, 172; RP 8, 9. Mr. Drammeh was also informed that he would be required to register as a sex offender. CP 178; RP 12. But he was not advised as to the period of registration, which, at 10 years, was significantly longer than the other requirements. *Id*.

The Court should grant review and hold the 10-year registration requirement is a direct consequence of a guilty plea, and Mr. Drammeh had to be informed of the length of the onerous registration requirement before entering a valid plea.

E. CONCLUSION

The Court should grant review to determine (1) whether the failure to interview the only complaining witness prior to advising a defendant to plead guilty constitutes ineffective assistance of counsel, (2) whether a defendant must be advised of the maximum applicable sentence, or only the statutory maximum sentence, before pleading guilty, and (3) whether a defendant must be advised of the length of an onerous sex offender registration requirement before pleading guilty.

DATED this 15th day of February, 2018.

Respectfully submitted,
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. HUSSAN DRAMMEH, Appellant.	)	No. 75502-1-I DIVISION ONE UNPUBLISHED OPINION FILED: January 16, 2018

MANN, J. —Hussan Drammeh was charged with codefendant Rico Lopez with the crime of rape in the first degree. Drammeh accepted a plea agreement and pleaded guilty to rape in the third degree. Prior to sentencing, Drammeh moved to withdraw his plea. The trial court denied the motion. Drammeh appeals and argues that the trial court abused its discretion by denying his motion to withdraw his guilty plea because he received ineffective assistance of counsel. Drammeh also contends that he did not enter his guilty plea knowingly, voluntarily, and intelligently. We affirm.

FACTS

Early one morning in June 2014, N.L. ran to the front desk at the Jet Motel on International Boulevard and told the desk clerk that she had just been beaten

and raped by two men with guns. N.L., was naked, dripping wet, and bleeding from a head wound. N.L. saw Lopez run by the front window and told the motel desk clerk that "he was the worst one." Lopez was arrested shortly afterwards and read his Miranda[1] rights. Lopez identified the other man as "Saine." Lopez told the responding King County sheriff's deputy that he and Saine had consensual sex with N.L. while she was bleeding from the head, and afterwards Saine "put [N.L.] in the shower to clean her off."

After learning that Saine was Hussan Drammeh, a King County detective arrested Drammeh. Drammeh and Lopez were charged with rape in the first degree.[2]

After his arraignment in November 2014, Drammeh retained defense counsel Timothy Leary. Leary, a former deputy prosecuting attorney, was experienced in handling felony matters, including sex offenses. Leary received and reviewed discovery from the State. Leary met with Drammeh before and after his court hearings and discussed the nature of the charges, the significance

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[1] Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
[2] Under RCW 9A.44.040:
(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
(b) Kidnaps the victim; or
(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or
(d) Feloniously enters into the building or vehicle where the victim is situated.
(2) Rape in the first degree is a class A felony.

of the penalties Drammeh faced upon a conviction, his review of the discovery including witness statements, and a review of jail call recordings.

The State sought and obtained an order compelling a buccal swab of Drammeh in order to collect a deoxyribonucleic acid (DNA) sample for comparison with the physical evidence collected from the crime scene and the sexual assault examination kit ("rape kit") taken from N.L. The Washington State Patrol Crime Laboratory provided a report detailing its findings with respect to the DNA analysis. Drammeh's DNA matched DNA recovered from swabs of N.L.'s "perineal/vulvar, internal anal, and external anal" areas. The forensic testing estimated the presence of Drammeh's DNA to be accurate such that "[t]he estimated probability of selecting an unrelated individual from the U.S. population with a matching profile [as] 1 in 5.5 sextillion."

Leary believed this evidence was "of great significance, as [it] indicate[d] a strong likelihood that the State would be able to prove that [Drammeh] had sexual contact with N.L., as alleged by the State." Evidence recovered from the crime scene also included N.L.'s blood in Lopez's car, the motel room, and in the motel room's shower. Because N.L.'s head wound required sutures, Leary also believed that the State would be able to prove that serious physical injury was inflicted on N.L. Leary told Drammeh that he believed the State would be able to prove the charge of rape in the first degree.

Leary spoke with Drammeh about the potential for plea negotiations, particularly with the objective to negotiate a "non-Indeterminate" sentence. Drammeh agreed with Leary's approach to plea negotiations. The State sought

input from N.L. and learned that Drammeh was "the less-cruel of the two offenders." Ultimately, Drammeh and the State agreed that Drammeh would plead guilty to rape in the third degree in return for pleading guilty to two counts of identity theft in the first degree in another unrelated criminal matter. On November 20, 2015, Drammeh pleaded guilty to rape in the third degree, and the court accepted the plea. At the time Drammeh entered his plea Leary had only interviewed the law enforcement officers involved in the case. Leary had not yet interviewed the victim, N.L.

In April 2016, before Drammeh was sentenced, Leary and Drammeh learned that the State had dismissed the charge of rape in the first degree against Lopez because N.L. was unavailable to testify. The State "was forced to dismiss the matter" against Lopez because N.L. was undergoing a lengthy inpatient drug treatment program outside of Washington. Because the State did not know when N.L. would be available to testify, it dismissed the charges against Lopez without prejudice. After he learned that the State dismissed the charges against Lopez, Drammeh informed Leary that he wished to withdraw his guilty plea to rape in the third degree. The trial court granted Leary's motion to withdraw as counsel due to Drammeh's decision to move to withdraw his plea. The trial court then denied Drammeh's motion to withdraw his guilty plea. Drammeh was sentenced to a 17-month determinate sentence with 36 months of community custody.

Drammeh appeals.

ANALYSIS

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). This constitutional principle is reflected in CrR 4.2(d). CrR 4.2(d) states that a court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." The court shall allow the withdrawal of a guilty plea only "to correct a manifest injustice." CrR 4.2(f). This is a demanding standard; under it, the defendant bears the burden of establishing "an injustice that is obvious, directly observable, overt, not obscure." State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996) (quoting State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). Both the ineffective assistance of counsel and an involuntary plea may constitute a manifest injustice that permits a defendant to withdraw her or his guilty plea. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

Motion to Withdraw Guilty Plea

Drammeh argues first that the trial court erred in denying his motion to withdraw his guilty plea because the plea was the product of his counsel's ineffective assistance, namely failing to interview N.L. before Drammeh entered his plea. We disagree.

We review a trial court's order on a motion to withdraw a guilty plea for abuse of discretion. State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or based

on untenable grounds or reasons. Lamb, 175 Wn.2d at 127. We review claims of ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). In order to establish ineffective assistance, Drammeh must meet the two-part Strickland v. Washington test for ineffective assistance: that Leary's representation fell below an objective standard of reasonableness and that prejudice resulted. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Strickland, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice in this context "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

When counsel's alleged error is the failure to investigate potentially exculpatory evidence, the determination of whether the error prejudiced the defendant depends on the likelihood that discovering the potentially exculpatory evidence would have led counsel to change his or her recommendation as to the plea. That assessment, in turn, depends on "whether the evidence likely would have changed the outcome of a trial." Hill, 474 U.S. at 59.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure

of deference to counsel's judgments." Strickland, 466 U.S. at 691. "Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010). The duty to investigate "does not necessarily require that every conceivable witness be interviewed." In re Pers. Restraint of Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). But a counsel's "failure to interview a particular witness can certainly constitute deficient performance." State v. Jones, 183 Wn.2d 327, 340, 352 P.3d 776 (2015). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

When assessing an attorney's performance during the plea-bargaining stage, "strict adherence" to the Strickland standard is essential. Premo v. Moore, 562 U.S. 115, 125, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011). This is because plea bargaining is complex and risky. "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." Premo, 562 U.S. at 124. One risk for the defendant is that an early plea bargain might come before the State finds its case is getting weaker, not stronger. Premo, 562 U.S. at 124-25.

Here, Drammeh's claim for ineffective assistance of counsel fails because he cannot establish prejudice. Drammeh fails to demonstrate that if Leary had interviewed N.L. before entry of the guilty plea, Leary would have changed his

recommendation regarding the plea. Leary's recommendation regarding the plea was unlikely to change because the evidence that N.L. was at least temporarily unavailable to testify would not have changed the outcome. See Hill, 474 U.S. at 59.

First, Drammeh points to no evidence showing that had Leary interviewed N.L. before the plea's entry, he would have changed his recommendation regarding the plea. Drammeh contends that an interview with the victim "could have" shown that (1) N.L. was addicted to drugs, (2) the addiction would eventually require N.L. to attend an out-of-state drug treatment program, and (3) participation in the program would foreclose the possibility of N.L. testifying against Drammeh in a future trial. This contention is unsupported by the record. It is also unreasonable; the Sixth Amendment requires counsel to be reasonably competent, not prescient.

Second, even if we assume that Leary had interviewed N.L. and learned that she would be unavailable to testify, Drammeh cannot show that this would have changed the outcome of a trial. The State's evidence was strong at the time Drammeh entered his plea. For example, the certification for probable cause shows that Drammeh and Lopez knocked N.L. unconscious, brought her into the motel room, and then raped her. N.L.'s blood was found on the motel room's bedding, shower wall, on towels, on Lopez's clothes and face, and in Lopez's car. The motel clerk stated that N.L., bleeding from a head wound and dripping wet, ran up to the desk while screaming that she had been raped and beaten by two armed men. Lopez identified "Saine" as the other rapist and Saine

was later identified as Drammeh. Drammeh's DNA matched the DNA recovered from N.L.'s rape kit. This evidence was, in Leary's professional opinion, "of great significance, as [it] indicate[d] a strong likelihood that the State would be able to prove that [Drammeh] had sexual contact with N.L., as alleged by the State." Although Leary had not yet interviewed N.L. at the time of the plea, he had interviewed the law enforcement officers involved in the case. Drammeh cannot show that an interview with N.L. "likely would have changed the outcome of the trial." Hill, 474 U.S. at 59.

Finally, the charge against Lopez was dismissed without prejudice. As the State argues, the State will be free to refile the rape in the first degree charge against Lopez if N.L. becomes available to testify. State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). Lopez might yet be charged and convicted of rape in the first degree.[3]

Because Drammeh cannot show prejudice, we need not address his argument that Leary's conduct was objectively unreasonable. See Strickland, 466 U.S. at 697. The trial court did not abuse its discretion by denying Drammeh's motion to withdraw his guilty plea.

Guilty Plea

Drammeh contends next that he did not enter his plea knowingly, voluntarily, and intelligently because he did not understand the direct consequences of his plea. Specifically, Drammeh argues that he was (1)

[3] Under RCW 9A.04.080(b)(iii)(A), the statute of limitations for rape in the first degree will not run until June 18, 2024.

misinformed about the maximum sentence that could be imposed for the charged crime and (2) not informed of the length of the sex offender registration requirement. These arguments are unavailing.

The State implicitly and correctly concedes that this issue may be raised for the first time on appeal. An allegation that a guilty plea was not knowingly made because it was based on misinformation of sentencing consequences is a constitutional error that a defendant can raise for the first time on appeal. State v. Kennar, 135 Wn. App. 68, 72, 143 P.3d 326 (2006).

"A defendant 'must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea.'" A.N.J., 168 Wn.2d at 113 (quoting State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)). A direct consequence has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." Barton, 93 Wn.2d at 305. For example, "[a] defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea." State v. Weyrich, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). "The State bears the burden of proving the validity of a guilty plea, including the defendant's knowledge of the direct consequences of the plea." State v. Knotek, 136 Wn. App. 412, 423, 149 P.3d 676 (2006).

A. Maximum Sentence

Drammeh argues first that the applicable maximum sentence was the top end of the standard range, not the statutory maximum sentence set out in the statute, RCW 9A.20.021(1)(c). Citing Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Drammeh claims that the trial court

misinformed him when it told him that the maximum sentence for rape in the third degree was confinement for 5 years and a $10,000 fine. Instead, he claims that the top end of the standard range sentence was the true maximum sentence, and the court erred by telling him otherwise.

The State counters that this claim fails in light of Weyrich. In Weyrich, our Supreme Court explained that "[a] defendant must be informed of the statutory maximum for a charged crime, as this is a direct consequence of his guilty plea." 163 Wn.2d at 557. We agree with the State.

Here, Drammeh was correctly informed of the maximum sentence for pleading guilty to the charged crime. Drammeh pleaded guilty to rape in the third degree, a class C felony. A class C felony carries a maximum sentence of 5 years confinement and a $10,000 fine. RCW 9A.20.021(1)(c). Drammeh was informed, in his statement on plea of guilty and in his plea colloquy, that the statutory maximum sentence for rape in the third degree was confinement for 5 years and a $10,000 fine. He was also correctly informed, twice, that the standard range for an offender with an offender score of 2 was 13 to 17 months.[4] The record establishes that Drammeh was correctly informed of the maximum sentence for the crime.

[4] At sentencing, Drammeh's offender score was increased to 3 because of an unrelated conviction that he pleaded guilty to before he was sentenced for rape in the third degree.

B. Length of Registration Requirement

Drammeh argues next that he did not enter his plea knowingly, voluntarily, and intelligently because he was not informed of the length of time that he would be required to register as a sex offender. This argument is also unpersuasive.

Again, a defendant must understand the "direct consequences" of her or his guilty plea. Barton, 93 Wn.2d at 305. A defendant need not, however, "be advised of all possible collateral consequences of his plea. State v. Ward, 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). In Ward, our Supreme Court concluded that the duty to register as a sex offender was not a direct consequence of the guilty plea because it did not alter the standard of punishment. 123 Wn.2d 488, 513-14, 869 P.2d 1062 (1994). Subsequently, however, in A.N.J., the Court explained that Ward did not stand for the proposition that the automatic statutory requirement of registering as a sex offender was not a direct consequence of a guilty plea. A.N.J., 168 Wn.2d at 114-15. But contrary to Drammeh's argument, A.N.J., does not stand for the proposition that a defendant pleading guilty to a sex offense must be informed of the length of the obligation to register. A.N.J., 168 Wn.2d at 115.[5]

Here, like the A.N.J. court, we are not required to decide whether the period of registration is a direct or collateral consequence of a guilty plea because Drammeh, like A.N.J., was informed that he would have to register as a sex offender as required by statute. First, Drammeh signed guilty plea stated

[5] The A.N.J. court concluded it did not need to decide whether the duty to register was a direct consequence of the guilty plea because A.N.J. was correctly informed in his written plea and the trial court's colloquy that he had a duty to register as a sex offender. A.N.J., 168 Wn.2d at 102, 115.

that "IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA(S), I UNDERSTAND THAT: . . . I will be required to register where I reside, attend school, or work." Second, during the trial court's colloquy Drammeh also confirmed that he understood that he would be required to register for a period of time:

> [STATE]: Do you also understand that you can be required to register as a sex offender for a period prescribed by statute?
>
> [DRAMMEH]: Yes.

Finally, the State's sentencing recommendation stated, under a heading entitled "SEX OFFENDER REGISTRATION," that "Every person convicted of a sex offense is required to register as a sex offender pursuant to RCW 9A.44.130." Because Drammeh was informed of his duty to register as a sex offender he entered his plea knowingly, voluntarily, and intelligently.

Affirmed.

Mann, J.

WE CONCUR:

Trickey, ACJ

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75502-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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