SUPREME COURT NO. 91111-8
NO. 69453-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Petitioner



---

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

The Honorable Richard Eadie, Judge

---

# PETITION FOR REVIEW

---

DAVID B. KOCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

## TABLE OF AUTHORITIES (CONT'D)

Page



OTHER JURISDICTIONS

## TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Vinay Bharadwaj, the appellant below, asks this Court to review the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Bharadwaj requests review of the Court of Appeals decision in State v. Bharadwaj, COA No. 69453-7-I, filed October 27, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. Federal and state courts consistently hold that criminal defendants are entitled to Sixth Amendment guarantees of competent representation during the plea-negotiation process. Without supporting authority, the Court of Appeals held – as a matter of law – that defendants cannot establish prejudice from incompetence during plea negotiations unless the prosecution has made a plea offer affirmatively addressing each and every potential material term of a plea agreement. Is review appropriate under RAP 13.4(b)(1)-(3) where this decision conflicts with prior precedent and involves a significant Sixth Amendment issue?

2. Where petitioner has established deficient performance and a reasonable likelihood the parties otherwise would have consummated a plea deal, was petitioner denied his Sixth Amendment right to effective

representation during plea negotiations, thereby warranting vacation of his convictions under CrR 7.8(b)?

3. Is review also warranted, under RAP 13.4(b)(3), where petitioner was denied his constitutional rights to representation when his trial attorney, recognizing he had a conflict of interest, refused to argue a Motion for New Trial, and the trial judge denied a motion for the appointment of new counsel?

D. STATEMENT OF THE CASE

1. Trial Proceedings

A full recitation of the facts concerning Vinay Bharadwaj's attempts to resolve his criminal case with a plea deal that would have greatly reduced the time he spent in prison and avoided his deportation from the United States is found in Bharadwaj's briefing in the Court of Appeals. See Brief of Appellant, at 30-42. A summary is provided here.

The King County Prosecutor's Office charged Vinay Bharadwaj with three counts of Child Molestation in the Second Degree and one count of Communication with a Minor for Immoral Purposes. CP 484-486. Bharadwaj was living in Los Angeles, had no experience with the criminal justice system, and depended on his Seattle lawyers – John Henry Browne and Colleen Hartl – for advice. CP 1210-1211. Bharadwaj was

disposed to accept a plea offer because conviction following trial meant at least 57 months in prison. CP 1211. He also desperately wanted to avoid deportation, which had devastating consequences for him personally and professionally. CP 1211-1212.

The King County Prosecutor's Office was aware of Bharadwaj's concerns over deportation and was willing to negotiate a plea deal. In an email to defense counsel, Senior Deputy Prosecuting Attorney Hugh Barber indicated deportation was not the State's goal and offered Bharadwaj the opportunity to plead guilty to Communicating with a Minor for Immoral Purposes ("CMIP"). Barber did not know whether a CMIP conviction would result in deportation but indicated that if Browne knew of a crime that did not result in deportation, Barber was willing to consider it. CP 1232. Barber subsequently indicated, "Word on the street is Asst 3 SM is not deportable." CP 1232.

Thereafter, Bharadwaj got incomplete, inconsistent, or incorrect advice from his attorneys regarding the immigration consequences of pleading guilty to CMIP or Assault 3 with sexual motivation and eventually was forced to seek the assistance of California immigration attorney Leon Hazany. CP 1213, 1220. Hazany explained to Bharadwaj precisely what he would need to determine immigration consequences of

any conviction, including copies of several documents (police reports, criminal complaint), specific details about the current charges, the potential sentences, and the exact wording of the charging language to which he might plead. CP 1213, 1221. Bharadwaj was never able to get this information from his Washington attorneys. CP 1213.

On July 23, 2012, Bharadwaj met with Browne and Hartl at their Seattle office. CP 1214. Trial was scheduled for Monday, July 30, and he asked his attorneys to obtain a continuance so that they could work out the details of a plea, including the immigration consequences. CP 1214. Bharadwaj continued to press Browne and Hartl for specific details regarding the proposed plea, including the precise elements of the offenses. He continued to get only vague responses. CP 1214.

This same day, Barber sent Hartl an e-mail warning, "Last chance for CMIP or Asslt 3 with SM!" CP 1242. Hartl responded that "Asslt. 3 w/SM" appeared to be the only possible option for immigration purposes. CP 1242. Barber said the range on that would likely be one to three months plus a one-year enhancement, and he would have to "run it by the powers that be." CP 1241.

On July 24, Hartl asked whether there was any offer that would avoid incarceration, to which Barber replied, "CMIP could." CP 1241.

Hartl forwarded this e-mail string to Bharadwaj with the comment: "here's the answer – possibility of no jail!!!" CP 1241. She did not explain why CMIP was the "answer" when there were no assurances a conviction for CMIP would avoid deportation.[1] CP 1241. This left Bharadwaj confused regarding the consequences of a plea to one charge or the other. CP 1213.

While Hartl had forwarded to Bharadwaj some of her e-mail exchanges with Barber, one she did not forward includes a warning from Barber that any plea deal must be done by Friday, July 27 to avoid weekend trial preparation. Bharadwaj was under the misimpression he had until the following Monday. CP 1214, 1237.

Bharadwaj called Hartl on Thursday, July 26 and explained that he would take a plea deal but would need to talk to his immigration lawyer the next day to confirm which charge he would plead to and how the plea should be worded. CP 1214. To do so, he would need the details about the charges and their penalties. Hartl did not provide this information. Instead, she told Bharadwaj to speak with Browne. CP 1214.

Bharadwaj contacted Browne by e-mail. He asked whether there would be time for him to review any plea documents with Hazany. He also asked about the impact of a sex offender registration requirement. CP

[1] In fact, a conviction for CIMP results in deportation. See CP 1224.

1214. Bharadwaj had an appointment to meet Hazany again the following morning. CP 1215. After receiving no response from Browne, Bharadwaj wrote, "I will really feel let down if I cannot get a response today even for this at this critical juncture." CP 1244.

Browne sent a heated response later that evening:

> Vinay you are wearing us down, you must know that. It is unreasonable for you to expect immediate replies particularly when your conversations today were all about matters we have discussed many many many times. It has turned into a game you ARE your worst enemy.
>
> If you plea to the misdemeanor there are NO promises other than you won't go to prison, probably not go to jail, but could, and most likely will not be deported (not certain) you will have to register. That is as clear as we can be. Jhb

CP 1245. The misdemeanor Browne referenced was necessarily CMIP, the only misdemeanor under consideration by the parties.[2] See RCW 9A.68.090(1) (with certain exceptions, crime is a gross misdemeanor).

Bharadwaj was "strongly considering" taking the plea offer. CP 1215, 1250. He sent two more e-mails to Browne seeking the information he needed for his meeting later that morning with Hazany. He noted that his questions about the plea offer still were unanswered. CP 1215, 1245-1246. At about 10:00 a.m., Bharadwaj called Browne's office in one last

[2] It is impossible to reconcile Browne's assertion that CMIP most likely would *not* lead to Bharadwaj's deportation with Browne and Hartl's earlier e-mails to Barber in which they indicate their belief CMIP *would* lead to deportation. See CP 1242; CP 1358, 1360.

attempt to get the information. He left a message with Browne's assistant, but had not heard back from Browne by his 11:00 a.m. appointment with Hazany. CP 1215.

At that appointment, Bharadwaj met with Hazany and his associate. CP 1215, 1221. As Hazany would later recall:

> At that time he indicated to both of us that although he had requested the necessary information and documents from his criminal defense attorney he was unable to obtain the needed information and documents. I told him that without that information I would not be able to give him proper immigration advice. Accordingly, I was unable to assist him.

CP 1221-1222. At 11:50 a.m., while Bharadwaj was still meeting with Hazany, Browne responded to Bharadwaj's e-mails sent earlier that morning. CP 1215, 1247. But the response contained only very general information on the charges Bharadwaj was considering. CP 1247.

As Bharadwaj left Hazany's office around noon, he received a telephone call from Browne, who made a strong pitch for going to trial rather than pleading guilty. CP 1215. According to Bharadwaj, Browne emphasized that Bharadwaj was lucky to have Judge Eadie assigned to the case, mentioning that he had attended a charitable dinner with the judge, who had once acquitted one of Browne's clients despite a strong prosecution case. CP 1215, 1228. Browne also said Judge Eadie did not

like to send well educated and successful people to jail and he would likely find Bharadwaj not guilty or, at worst, guilty only of CMIP. Therefore, Browne recommended a bench trial. CP 1215.

According to Bharadwaj, Browne also claimed he had never lost a trial involving a sex offense. CP 1215, 1229. As Bharadwaj would later find out, this was not true. He had lost two such trials. CP 1205. But at the time, this was very important to Bharadwaj, who figured if Browne had never lost a trial involving charges similar to those he faced, it seemed unlikely his case would be the first. CP 1215. Browne also said it might be too late to take a plea offer anyway and, if they waited until Monday, it would certainly be too late. CP 1216.

Bharadwaj felt he now had no choice but to go trial since he had not been told a plea could avoid deportation. He felt his prospects at trial were very good given Browne's unblemished record and the fact Judge Eadie would be disinclined to convict him. Moreover, since Browne was saying the worst result was likely a conviction for CMIP, it appeared he had nothing to gain by pleading guilty to that charge. As far as he knew, deportation was no more certain if he were convicted as charged than it would be with a plea. CP 1216.

By 12:35 p.m. that afternoon, Browne notified Judge Eadie and opposing counsel that Bharadwaj would proceed by bench trial. CP 1252. At that trial, Judge Eadie found Bharadwaj guilty as charged of three counts of Child Molestation in the Second Degree and one count of CMIP. 12RP 10-11; CP 1174-1178. Instead of pleading guilty to Assault 3 with sexual motivation, which would have required just over a year in jail and allowed him to stay in the United States, Bharadwaj faced a minimum sentence of 57 months in prison and, upon serving that sentence, automatic deportation. CP 1160-1170, 1222-1225, 1241.

Browne filed a Motion for New Trial on Bharadwaj's behalf. CP 488-991. By the time the motion was set for consideration at sentencing, however, Bharadwaj had been in touch with attorney David Zuckerman and was alleging Browne had been deficient in his handling of the plea negotiations. Consequently, Browne moved to withdraw, and Bharadwaj requested the appointment of new counsel and a continuance to supplement the motion for new trial with additional claims, including claims against Browne. 13RP 3-6, 8-11, 14-15.

Judge Eadie believed he could solve the conflict by simply dispensing with oral argument on the motion for new trial (thereby avoiding Browne acting as an advocate for Bharadwaj at the hearing).

13RP 15. He denied the motion for new trial based solely on the written materials Browne had prepared. 13RP 15-19. He then sentenced Bharadwaj to 57 months and, only then, permitted Browne to withdraw. 13RP 31, 34-45.

Zuckerman filed a motion for reconsideration, arguing that by refusing to appoint new counsel to handle the motion for new trial and refusing a continuance despite Browne's clear conflict of interest, Judge Eadie had denied Bharadwaj his constitutional right to counsel. CP 1180-1185. The motion was denied. CP 1188-1189.

Zuckerman then filed a CrR 7.8 motion to vacate Bharadwaj's convictions – supported by sworn declarations and supporting documents – arguing that Browne and Hartl had violated his right to effective assistance of counsel by botching plea negotiations with the State and overstating the chances of success at trial. See CP 1190-1341. Bharadwaj made it clear he would not have risked conviction at trial had he known that, in truth, Browne had lost trials involving sex offenses. Nor would he have gone to trial had he known that conviction meant certain deportation or that deportation could be avoided with a guilty plea to Assault 3. CP 1216. The CrR 7.8 motion also was denied. 14RP 32-33; CP 1342.

2. Court of Appeals Decision

The Court of Appeals did not attempt to justify Browne and Hartl's serious failures during plea negotiations.[3] Instead, the Court concluded that Bharadwaj could not demonstrate a Sixth Amendment violation because he could not establish prejudice. Specifically, citing Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), the Court held that – in order to demonstrate prejudice during the plea negotiation process – the defendant must show that the State tendered a "formal offer," meaning an offer that addresses every single material term of a plea. Slip Op., at 1, 5-8. The Court recognized that the State had proposed a plea to Assault 3 with sexual motivation to avoid deportation, insisted upon registration as a sex offender, and had set a deadline for Bharadwaj's decision to plead guilty. But because this plea offer did not address every single material term of a plea, i.e. it was not a "formal offer," it was impossible to establish prejudice. Slip Op., at 7.

The Court also rejected Bharadwaj's claim that Judge Eadie left him without counsel by refusing to appoint new counsel for the Motion for New Trial, concluding Bharadwaj had not clearly established Browne's conflict of interest and there had been no right to oral argument on the

[3] The State did not try, either. See Brief of Respondent, at 28.

motion, thereby rendering Browne's non-participation irrelevant. Slip Op., at 1-2, 8-11.

E. ARGUMENT

1. THE COURT OF APPEALS PREJUDICE ANALYSIS CONFLICTS WITH WASHINGTON PRECEDENT, IS NOT SUPPORTED BY UNITED STATES SUPREME COURT PRECEDENT, AND PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE THAT SHOULD BE RESOLVED BY THIS COURT.

The Sixth Amendment right to counsel extends to the plea-bargaining process, which is considered a critical stage of litigation. Lafler, 132 S. Ct. at 1384; Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012); Padilla v. Kentucky, 559 U.S. 356, 373, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); see also State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (counsel must "actually and substantially" assist a client in deciding whether to plead guilty).

In Frye, the United States Supreme Court recognized that, if defendants are denied effective representation during the plea negotiation process, they may be denied adequate assistance at the only stage where legal advice and aid would help them in their cases. Frye, 132 S. Ct. at 1407-1408. Consistent with this observation, in Lafler, the Court held:

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if

> loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more sever sentence.

Lafler, 132 S. Ct. at 1387.

The applicable test is based on Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Id. at 1384-1385; Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The performance prong requires the defendant to show that counsel's representation during the plea-negotiation process fell below an objective standard of reasonableness. Lafler, 132 S. Ct. at 1384. For the prejudice prong, a defendant must show a reasonable probability "the outcome of the plea process would have been different with competent advice." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

The King County Prosecutor's Office offered Bharadwaj the opportunity to plead guilty to Assault 3 with sexual motivation and thereby avoid deportation. The Court of Appeals concluded this was not the type of offer triggering a Sixth Amendment violation because it was not a "formal offer," which the Court defined as one addressing "all material terms" of a deal. Slip op., at 7. The Court of Appeals' purported authority

for this proposition is Lafler. Id. As discussed below, Lafler offers no support. Nor do other cases, including Washington precedent.

In State v. James, 48 Wn. App. 353, 358, 739 P.2d 1161 (1987), the defendants were convicted of multiple crimes in connection with a string of robberies and possession of controlled substances. On appeal, they claimed a Sixth Amendment violation because their attorney had failed to convey a proposed, tentative plea offer that could have resulted in dismissal of deadly weapon sentencing enhancements. Id. at 358, 361. Both defendants claimed they would have considered this offer as an alternative to trial. Id. at 360.

The James Court addressed the unsettled nature of the negotiations, noting that defense counsel's obligations included even "tentative plea negotiations." Id. at 362. The Court explained:

> As to the uncertainty of whether plea bargain negotiations would have resulted in a consummated bargain, uncertainty should not prevent reversal where "confidence in the outcome" is undermined. The standard is whether there is a reasonable probability that but for an attorney's error, a defendant would have accepted a plea agreement. . . .

Id. at 363-364 (citations omitted). The James Court had an insufficient record to resolve this claim, but noted that, if the record revealed deficient

performance regarding the tentative offer, it would not hesitate to conclude the defendants had been denied effective representation. Id. at 364.

In Bharadwaj's case, the Court of Appeals did not acknowledge, much less discuss James. But since James expressly does not require a "formal offer" in which every material term has been resolved in order to establish Strickland prejudice, the issue becomes whether something in Lafler dictates a change in that approach. The Court of Appeals apparently thought so in Bharadwaj's case, but Lafler reveals no such change.

Lafler was charged with four crimes and faced a possible mandatory minimum sentence of 185 to 360 months. The prosecution offered to dismiss two of the charges and recommend a more favorable sentence of 51 to 85 months in exchange for guilty pleas on the remaining charges. Lafler rejected the offer based on counsel's advice, was convicted as charged, and received the mandatory minimum sentence. Lafler, 132 S. Ct. at 1383. The parties conceded deficient performance. Id. at 1390-1391.

Thus, the only issue under Strickland was prejudice; i.e., a reasonable probability that, with proper representation, both Lafler and the trial court would have accepted the guilty plea, resulting in a far shorter sentence.[4] The Supreme Court found this standard satisfied. Id. at 1391.

In finding that Bharadwaj could not establish prejudice, the Court of Appeals relied on one portion of Lafler to conclude there can be no Sixth Amendment claim without a formal offer that includes every material term of a plea agreement. Specifically, the Court focused on Lafler's statements that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it" and "[i]f no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise." Slip Op., at 1, 6-7 (citing Lafler, 132 S. Ct. at 1387).

---

[4] The Lafler Court described the test for prejudice as follows:

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would been less severe than under the judgment and sentence that if fact were imposed.

Lafler, 132 S. Ct. at 1385.

Neither these, nor any other statements in Lafler, suggest the rule adopted for Bharadwaj. Rather, the Court of Appeals confused the narrow question before the Lafler Court – whether rejection of a plea offer that is apparently complete in its terms can result in prejudice under Strickland – with a bright-line rule that *only* a plea offer that is complete in its terms can result in such prejudice. The Lafler Court did not adopt this restrictive approach; such an issue was not even before it.

A similar attempt to convert the specific facts of a recent United States Supreme Court decision into a restrictive, minimum, bright-line requirement was rejected in Lechuga v. United States, 15 F.Supp.3d 788, 791-792 (N.D. Ill. 2014). In Lechuga, the petitioner claimed his attorney was ineffective for misadvising him regarding the sentence he faced if convicted at trial, causing him to reject a possible plea agreement that would have resulted in a shorter sentence than he received following conviction at his trial. Citing Missouri v. Frye, the government argued petitioner could not prevail in the absence of a claim that there had been "a formal, approved plea offer." Id. at 793; see also id. at 795 ("although a potential plea agreement was discussed with defense counsel, the trial team did not obtain the approval of the United States Attorney . . . to actually enter into any plea agreement").

The Federal District Court rejected the argument:

> This is a misreading of *Missouri v. Frye*, which stated that "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." 132 S.Ct. at 1407. The Supreme Court went on to acknowledge the difficulty in determining whether a defense counsel's performance in the plea negotiation process is sufficient before stating that the case before it presented "neither the necessity nor the occasion to define the duties of defense counsel in those respects." *Id.* at 1408. On the narrow question that was before the Court, it held that counsel's failure to inform the defendant about a formal plea offer was clearly deficient. *Id.* This holding does not translate into a requirement that a petitioner must receive a formal offer in order to establish ineffective assistance during plea negotiations. Defendants are entitled to effective assistance at all stages of the plea negotiation, and ineffective assistance at an early stage could prevent a formal offer from being made. *See id.* at 1407-08 ("[C]riminal defendants require effective assistance during plea negotiations. Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.") (quoting *Massiah v. United States*, 377 U.S. 201, 204, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)). . . .

Lechuga, 15 F.Supp.3d at 793.

Other courts also have refused to limit Sixth Amendment protections to the precise circumstances in Frye or Lafler. In Commonwealth v. Marinho, 464 Mass. 115, 127, 129-132, 981 N.E.2d 648 (Mass. 2012), although the prosecution "never put a formal plea offer

on the table," where the prosecutor had expressed interest in resolving the case through a guilty plea, the Supreme Court of Massachusetts held that Lafler and Frye require a defendant to "demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it." (emphasis added); see also Kovacs v. United States, 744 F.3d 44, 52 (2d Cir. 2014) (rather than fixate on the specific circumstances in Frye, "each case is a context-specific application of *Strickland* directed at a particular instance of unreasonable attorney performance.").

In Bharadwaj's case, the Court of Appeals also apparently found support for its new, more restrictive rule in Merzbacher v. Shearin, 706 F.3d 356 (4th Cir.), cert. denied, 134 S. Ct. 71, 187 L. Ed. 2d 56 (2013), describing Merzbacher as holding that an offer was not sufficiently well-defined to demonstrate prejudice because "several of the offer's terms lacked definition" and "the undefined terms were of the sort that require substantial negotiation and compromise." Slip Op. at 7-8 n.28. Actually, however, the petitioner in Merzbacher lost under the deferential standards of AEDPA[5] applicable to federal review of state court factual findings. The Fourth Circuit Court of Appeals was bound by findings that the

[5] The Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. § 2254 (2006).

parties would never have negotiated a mutually agreeable plea deal based in part on the presence of several unsettled aspects of a deal. Merzbacher, 706 F.3d at 365-369.

Notably, in Merzbacher, the Fourth Circuit indicated that, "Certainly, there may be cases in which a petitioner can show *Strickland* prejudice despite the incipience of the plea offer he did not accept due to his counsel's lack of communication or inadequate advice." Id. at 369-370. The Merzbacher Court also noted that the United States Supreme Court had not considered the issue of a "nascent plea offer" in Frye, which merely dealt with "an indisputably formal plea." See id. at 370 n.4.

Recently, in Ramirez v. United States, 751 F.3d 604 (8th Cir. 2014), the Eighth Circuit Court of Appeals cited Merzbacher for the notion that the absence of defined terms in a plea offer, while possibly making it more difficult to conclude the parties would consummate a deal, did not preclude such a finding. Ramirez, 751 F.3d at 608 n.3. Ramirez was only offered an opportunity to cooperate and, if his information proved valuable to law enforcement, the *possibility* a plea agreement would be discussed or considered. The absence of any actual plea offer, combined with the fact Ramirez never expressed a willingness to

cooperate, led a majority of the court to conclude he had not established reasonable probability of a plea deal.[6] Id. at 606-608.

In summary, prior precedent – state and federal – does not support the Court of Appeals new rule that every material term of a plea agreement must be settled before a defendant can succeed on a Sixth Amendment claim of deficient performance in plea negotiations. The new rule also is illogical. Whether an individual declines a "formal offer" to plead guilty based on an attorney's deficient representation (actionable under the new rule) or the record shows an individual was denied an opportunity to receive and accept a formal offer based on an attorney's deficient representation (not actionable), the consequence of the violation is precisely the same: denial of the best possible outcome for the defendant.

Moreover, the Court of Appeals new rule is inflexibly harsh. Citing contracts cases and a treatise, the Court concluded that all material terms must be addressed in the offer, although it failed to provide an exhaustive list of these terms. It appears, however, that even if every other term were included in the State's plea offer, just a failure to negotiate the prosecutor's sentencing recommendation (identified specifically as missing in Bharadwaj's case; see Slip op., at 7) insulates counsel's

[6] One judge dissented, concluding an evidentiary hearing was warranted to determine the merit of Ramirez's claim. See id. at 609-610 (Bye, J., dissenting).

deficient performance from any remedy. Rather than seek to determine a reasonable likelihood the parties would have reached a final agreement acceptable to all, the Court of Appeals simply denies any claim. While undoubtedly efficient, this unprecedented approach significantly weakens the Sixth Amendment. Review is appropriate under RAP 13.4(b)(1)-(3).

2. THIS COURT SHOULD ALSO DECIDE WHETHER BHARADWAJ WAS DENIED HIS RIGHT TO CONFLICT FREE COUNSEL ON HIS MOTION FOR NEW TRIAL.

The Sixth Amendment and article 1, § 22 of the Washington Constitution guarantee criminal defendants the right to representation at all critical stages of a criminal prosecution, which includes proceedings until formal judgment and sentence have been entered. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984); McClintock v. Rhay, 52 Wn.2d 615, 616, 328 P.2d 369 (1958).

The constitutional right to counsel "includes the right to the assistance of an attorney who is free from any conflict of interest in the case." State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). To demonstrate a violation, a defendant need merely show his attorney had a conflict of interest that adversely affected his performance; the defendant "need not demonstrate an effect on the outcome or that the verdict itself is unreliable." Dhaliwal, 150 Wn.2d at 570 and n.7 (citing Mickens v. Taylor,

535 U.S. 162, 166, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). Even where counsel is present in the physical sense, the total failure or inability to assist the defendant during a critical stage warrants a presumption of prejudice and reversal. United States v. Cronic, 466 U.S. 648, 659-660, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

The Court of Appeals erred when it concluded that Browne did not have a conflict of interest by the time of sentencing that prevented him from representing Bharadwaj on the Motion for New Trial. There is a conflict where counsel is required to make a choice to advance his own interests to the detriment of his client's interests. Daniels v. United States, 54 F.3d 290, 294 (7th Cir. 1995); Mannhalt v. Reed, 847 F.2d 576, 579-580 (9th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 260, 102 L. Ed. 2d 249 (1988). Browne made such a choice when he refused to advocate for Bharadwaj, including arguing his own ineffectiveness. See Brief of Appellant, at 21-24; Reply Brief of Appellant, at 1-5.

Moreover, dispensing with oral argument did not cure the problem. Because the written submissions were incomplete and Browne had intended to supplement them with oral argument, canceling argument on the motion was improper and prevented full consideration of Bharadwaj's claims. See Brief of Appellant, at 25-26; Reply Brief of Appellant, at 5-6.

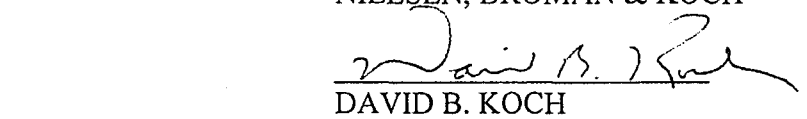
F. CONCLUSION

This Court should grant review and reverse the Court of Appeals.

DATED this 26th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Petitioner

# APPENDIX

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, Respondent, v. VINAY KESHAVAN BHARADWAJ, Appellant. | ) | No. 69453-7-I consolidated with No. 69854-1-I<br><br>UNPUBLISHED OPINION<br><br>FILED: October 27, 2014 |

VERELLEN, A.C.J. — To establish ineffective assistance of counsel during plea negotiations, a defendant must demonstrate that the State has made an offer of the material terms required for a plea agreement. "If no plea offer is made . . . the [ineffective assistance] issue . . . simply does not arise."[1]

Vinay Bharadwaj appeals from his convictions for three counts of child molestation in the second degree and one count of communication with a minor for immoral purposes. He argues that his attorney was ineffective during plea negotiations. Because the State did not make a sufficiently well-defined plea offer, Bharadwaj does not demonstrate that he suffered prejudice from his attorney's alleged deficient performance.

Bharadwaj also argues that the trial court erred in denying his request for substitute counsel to represent him on his motion for a new trial when his attorney

---

[1] Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012).

had a conflict of interest. Because the risk of a conflict of interest arising from Bharadwaj's intention to assert an ineffective assistance of counsel claim was too ambiguous to warrant substitute counsel for purposes of the new trial motion, the trial court did not err in declining to allow substitute counsel.

Accordingly, we affirm.

FACTS

Bharadwaj, a native of India, has been a lawful permanent resident of the United States since 2008. In 2012, he was charged with three counts of child molestation in the second degree and one count of communication with a minor for immoral purposes (CMIP). Bharadwaj sought a plea agreement to avoid deportation.[2] Defense counsel and the deputy prosecutor assigned to the case attempted to negotiate a plea bargain.

The parties initially discussed a preliminary proposal for Bharadwaj to plead guilty to one count of CMIP, but the defense rejected that initial overture. The prosecutor later suggested that if Bharadwaj pleaded guilty to assault in the third degree with sexual motivation, he might avoid deportation.[3] Then, in July 2012, the

---

[2] The Immigration and Nationality Act allows the government to deport various classes of noncitizens, such as those who are convicted of certain crimes while in the United States. See 8 U.S.C. § 1227(a)(2). When a noncitizen has been convicted of one of a narrower set of crimes classified as "aggravated felonies," 8 U.S.C. § 1101(a)(43), then he is not only deportable, 8 U.S.C. § 1227(a)(2)(A)(iii), but also ineligible for certain forms of discretionary relief from removal, such as asylum or cancellation of removal. See 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i), § 1229b(a)(3), (b)(1)(C).

[3] In one e-mail, the prosecutor told defense counsel that "if you can think of something that would require registration but would not result in deportation, we would be willing to consider it." Clerk's Papers at 1232. In a follow-up e-mail sent later the same day, the prosecutor stated, "Word on the street is Asst 3 SM is not deportable." Id.

prosecutor e-mailed defense counsel stating, "Last chance for CMIP or Asst 3 with SMI."[4] He followed up two days later stating, "[I]f we are going to do a plea, we will need to do it Friday. None of us needs to be spending any time this weekend on unnecessary last minute trial prep."[5] Bharadwaj sought advice from an immigration attorney regarding the deportation consequences of pleading guilty, but defense counsel failed to provide Bharadwaj information necessary for the immigration attorney to provide an opinion. Ultimately, the parties did not reach an agreement, and the case proceeded to a bench trial. The trial court found Bharadwaj guilty on all charges and subsequently sentenced him to a total term of 57 months of imprisonment and 36 months of community custody.

Prior to sentencing, Bharadwaj's attorney filed a motion for a new trial under Criminal Rule (CrR) 7.5. Then, at the hearing on the motion, defense counsel stated his intent to withdraw due to a perceived conflict of interest. Counsel informed the court that he believed that an actual conflict existed because Bharadwaj intended to argue that counsel was ineffective during plea negotiations. Bharadwaj addressed the court directly, indicated his belief that counsel was ineffective, and requested additional time to allow substitute counsel to supplement the motion for a new trial. The trial court denied the request to withdraw and allow substitute counsel. The trial court also denied the motion for a new trial after it was presented without oral argument. After sentencing, defense counsel was allowed to withdraw. Bharadwaj's new attorney filed a motion for reconsideration, which the trial court denied.

---

[4] Clerk's Papers at 1238.

[5] Clerk's Papers at 1237.

Bharadwaj then filed a motion for relief from judgment pursuant to CrR 7.8(b)(5) alleging ineffective assistance of counsel during plea negotiations. Bharadwaj argued that in order to avoid deportation he would have pleaded guilty to assault in the third degree with sexual motivation with competent advice from counsel. Following a hearing, the trial court denied the motion for relief from judgment.

Bharadwaj appeals.[6]

DECISION

Bharadwaj contends that the trial court erred in denying his motion for relief from judgment based on the ineffective assistance of counsel during plea negotiations. We disagree.

Although we review a trial court's denial of a CrR 7.8 motion for an abuse of discretion,[7] we review de novo a claim of ineffective assistance of counsel raised under CrR 7.8(b)(5) because the claim presents mixed questions of law and fact.[8] A defendant possesses the right to the effective assistance of counsel in criminal proceedings, including during plea negotiations.[9] To prevail on an ineffective assistance of counsel claim, the defendant must show both that defense counsel's representation was deficient and that the deficient performance prejudiced the

---

[6] Bharadwaj appeals both from the judgment and sentence, filed as No. 69453-7-I, and from the order denying his motion for relief from judgment, filed as No. 69854-1-I. These appeals were consolidated under No. 69453-7-I.

[7] State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996).

[8] State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

[9] Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

defendant.[10] To establish prejudice in the plea bargaining context, "a defendant must show the outcome of the plea process would have been different with competent advice."[11] More specifically, "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel."[12] The defendant must also demonstrate a reasonable probability that the State would not have withdrawn the offer and that the trial court would have accepted the agreement.[13]

Bharadwaj cannot establish such prejudice because the State did not make an offer that he could accept.[14] We understand that "the plea-bargaining process is often in flux, with no clear standards or timelines"[15] and that "[b]argaining is, by its nature, defined to a substantial degree by personal style."[16] But plea agreements are interpreted as contracts,[17] so we apply basic rules of contract law to determine

---

[10] Strickland, 466 U.S. at 687.

[11] Lafler, 132 S. Ct. at 1384; see Strickland, 466 U.S. at 694.

[12] Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012).

[13] Id. at 1410; see Lafler, 132 S. Ct. at 1384-85.

[14] We need not decide whether counsel performed deficiently. If a defendant fails to establish either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

[15] Frye, 132 S. Ct. at 1407.

[16] Id. at 1408.

[17] State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997); State v. Wakefield, 130 Wn.2d 464, 480, 925 P.2d 183 (1996).

whether a plea offer was made during the parties' negotiations.[18] Under general contract principles, "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[19] Additionally, an agreement must have sufficiently definite terms to be enforceable.[20]

Bharadwaj conceded both before the trial court and before us on appeal that the State did not make a formal offer to allow Bharadwaj to plead guilty to assault in the third degree with sexual motivation.[21] Bharadwaj argues that he need demonstrate only that there is a reasonable probability that a formal offer would have been made. But the United States Supreme Court in Lafler v. Cooper made clear that the probability of an offer is not sufficient: "If no plea offer is made . . . the [ineffective assistance] issue raised here simply does not arise."[22] Instead,

---

[18] State v. Wheeler, 95 Wn.2d 799, 803, 631 P.2d 376 (1981).

[19] RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981); see Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435 (1994) ("A promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" (quoting RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981))); Pac. Cascade Corp. v. Nimmer, 25 Wn. App. 552, 556, 608 P.2d 266 (1980) ("An offer consists of a promise to render a stated performance in exchange for a return promise being given.").

[20] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 178, 94 P.3d 945 (2004); see also RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) ("The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.").

[21] "[T]he fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations." Frye, 132 S. Ct. at 1409.

[22] Lafler, 132 S. Ct. at 1387. "*If a plea bargain has been offered*, a defendant has the right to effective assistance of counsel in considering whether to accept it." Id. (emphasis added).

Bharadwaj must demonstrate a reasonable probability "that [he] would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances."[23] This is a generous standard,[24] but without an actual offer that Bharadwaj could have accepted, his ineffective assistance claim cannot succeed.[25]

Here, based on the evidence in the record, the State did not offer a plea agreement to assault in the third degree with sexual motivation. Bharadwaj submitted e-mail messages that represent the negotiations between his defense attorneys and the prosecutor.[26] Over the course of several messages, the prosecutor suggested that if Bharadwaj pleaded guilty to assault in the third degree with sexual motivation, he might avoid deportation, specified the State's requirement that Bharadwaj register as sex offender,[27] and identified a deadline by which Bharadwaj must indicate his desire to plead guilty. These e-mail messages do not address all material terms necessary for a plea agreement, including the prosecutor's sentence recommendation.[28] Thus, the State's e-mail did not contain sufficiently

---

[23] Id. at 1385.

[24] The standard of proof to demonstrate a reasonable probability "is 'somewhat lower' than the common 'preponderance of the evidence' standard." State v. Sandoval, 171 Wn.2d 163, 175, 249 P.3d 1015 (2011) (quoting Strickland, 466 U.S. at 694).

[25] See Lafler, 132 S. Ct. at 1387.

[26] Bharadwaj does not allege that additional negotiations were conducted outside of the parties' e-mail exchanges.

[27] In one e-mail, the prosecutor stated, "What matters to us is that he be held accountable for the general nature of his actions and that he register." Clerk's Papers at 1232.

[28] Cf. Merzbacher v. Shearin, 706 F.3d 356, 369 (4th Cir.), cert. denied, 134 S. Ct. 71 (2013) (holding that the offer was not sufficiently well-defined because "several

well-defined terms that Bharadwaj had only to accept.[29] The e-mail messages clearly contemplated future negotiations, as the prosecutor expressly indicated that any proposed plea was conditional on acceptance by "the powers that be," namely, the prosecutor's supervisor.[30] Thus, the State's tentative proposal was merely part of the parties' preliminary plea discussion.

For these reasons, Bharadwaj has not demonstrated that the State made an offer that he could or would have accepted absent counsel's deficient performance. Thus, Bharadwaj's ineffective assistance of counsel claim fails. The trial court properly denied his motion for relief from judgment.

Bharadwaj next contends that the trial court erroneously denied his motion for a new trial without allowing substitute counsel because defense counsel was burdened by a conflict of interest after Bharadwaj alleged that he was ineffective.[31] We disagree.

---

of the offer's terms lacked definition" and "the undefined terms were of the sort that require substantial negotiation and compromise."). "The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound; minor items are more likely to be left to the option of one of the parties or to what is customary or reasonable." RESTATEMENT (SECOND) OF CONTRACTS § 33, cmt. (f).

[29] An offer is made when another person's "assent to that bargain is invited and *will conclude it*." RESTATEMENT (SECOND) OF CONTRACTS § 24 (emphasis added).

[30] Specifically, in response to defense counsel's inquiry about the proposed assault plea, the prosecutor wrote, "I would have to run it by the powers that be." Clerk's Papers at 1240.

[31] Specifically, Bharadwaj asserts that the trial court erred by denying his "request for appointment of conflict-free counsel to represent him on the motion for new trial." Appellant's Br. at 19. Although it appears from our limited appellate record that Bharadwaj likely was represented by retained, rather than appointed, counsel, he did not argue below and he does not argue on appeal that his constitutional right to counsel of choice was violated. See United States v. Gonzalez-Lopez, 548 U.S. 140, 144-48, 152, 126 S. Ct. 2557, 165 L. Ed. 2d. 409 (2006); State

A defendant's allegation of ineffective assistance does not create an inherent conflict of interest automatically requiring the court to allow defense counsel's withdrawal and to appoint substitute counsel.[32] "[I]f a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished, for whatever reason."[33] Instead, when a defense attorney notifies the trial court that he has a potential conflict of interest, the court must allow substitute counsel or take adequate steps to ascertain whether the risk of a conflict of interest is too remote to warrant substitute counsel.[34] The court should consider (1) the reasons given for the dissatisfaction; (2) the court's own evaluation of counsel; and (3) the effect of any substitution upon the scheduled proceedings.[35]

Here, defense counsel notified the trial court that he had a potential conflict of interest. But the only specific reason given for the alleged conflict was the possibility that Bharadwaj would file a motion alleging counsel's ineffectiveness during plea negotiations.[36] Notably, no written motion had been filed setting forth such an

---

v. Hampton, ___ Wn. App. ___, 332 P.3d 1020, 1027 (2014). Accordingly, we review the claim that has been presented to us. See RAP 10.3(a)(4).

[32] State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d 679 (1991).

[33] State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987).

[34] See Holloway v. Arkansas, 435 U.S. 475, 485-87, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); see also Rosborough, 62 Wn. App. at 347-48.

[35] State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997); Stark, 48 Wn. App. at 253.

[36] The alleged ineffective assistance claim stated by defense counsel when arguing below that substitute counsel should be appointed was different than the claim later raised by substitute counsel in the motion for relief from judgment and on appeal. But Bharadwaj, who directly addressed the trial court regarding his belief

ineffective assistance claim. And, even when given an opportunity to directly address the court, Bharadwaj failed to provide any detail regarding counsel's alleged ineffectiveness. Bharadwaj's proposed substitute counsel was available but could not effectively argue the post-trial motion without additional time to prepare, which would have caused further delay in the proceedings. Moreover, defense counsel's statements to the court suggested that the alleged conflict of interest did not arise until after the written motion for a new trial had been filed. And the trial court determined that disposition of the motion without argument was appropriate.

We have previously held that a trial court abused its discretion by not appointing substitute counsel when defense counsel refused to assist the defendant at a plea withdrawal hearing and even testified as a witness for the State regarding the alleged ineffective assistance of counsel.[37] Concluding that the conflict of interest clearly affected the disposition of the defendant's motion, we held that the defendant was denied his right to counsel and remanded for a new hearing with substitute counsel.[38] However, we noted that the conflict of interest was "evidenced by [counsel's] direct testimony against [the defendant]'s interest at the hearing."[39]

In Bharadwaj's case, the trial court was not presented with any such evidence of a conflict of interest. Defense counsel did not testify against Bharadwaj or otherwise take a position antagonistic to his client's interests. While Bharadwaj's attorney did not orally argue the motion for a new trial, this did not result in an outright

---

that counsel was ineffective, did not attempt to clarify the claimed conflict or the basis for the ineffective assistance claim.

[37] State v. Harell, 80 Wn. App. 802, 803, 911 P.2d 1034 (1996).

[38] Id. at 804.

[39] Id. at 805.

denial of counsel because the trial court determined that oral argument was unnecessary. When a post-trial motion is filed, the decision to hold "oral argument is a matter of discretion, so long as the movant is given the opportunity to argue in writing his or her version of the facts and law."[40] The trial court did not abuse its discretion by denying the request for the substitution of counsel, nor did it abuse its discretion by denying Bharadwaj's motion for a new trial without hearing oral argument.

We affirm.

WE CONCUR:

[40] State v. Bandura, 85 Wn. App. 87, 93, 931 P.2d 174 (1997).

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | SUPREME COURT NO. _____ |
| v. | ) | COA NO. 69453-7-I |
| | ) | |
| VINAY BHARADWAJ, | ) | |
| | ) | |
| Petitioner. | ) | |

**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 26TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VINAY BHARADWAJ
DOC NO. 361033
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 9900

**SIGNED** IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2014.

X Patrick Mayovsky