

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

IN RE PERSONAL RESTRAINT PETITION OF:

DARNELL KEENO CRAWFORD,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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DIVISION II
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STATE OF WASHINGTON
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A. INTRODUCTION

In his PRP, Darnell Crawford made several claims directed, not to his trial and the jury's finding of guilt, but instead to the trial court's persistent offender finding and Crawford's subsequent life sentence.

Crawford first argued that he was not a persistent offender because his Kentucky conviction for "sex abuse" is not a strike and that trial counsel was ineffective for failing to challenge the comparability of this conviction to a "strike" offense. In response, the State acknowledges that a comparability determination required the trial court to find "new" facts not admitted by Crawford at the time of his Kentucky conviction; acknowledges that such fact-finding by a court to increase the maximum sentence is prohibited by the United State's Supreme Court's 2000 *Apprendi* decision (as well as subsequent state and federal court precedent); but then makes the contradictory argument that Crawford seeks the application of a new rule to his post-*Apprendi* sentence. The State is incorrect, as even its own pleading unwittingly admits. Thus, this Court should vacate Crawford's persistent offender sentence and remand for re-sentencing.

Next, Crawford claimed in his PRP that trial counsel provided ineffective assistance when she failed to recognize and warn Crawford of the risk of a persistent offender finding and either: (1) advise him to accept a plea offer that treated the Kentucky offense as a non-strike, especially

where, if Crawford had accepted the offer he could rely on the doctrine of specific performance; or (2) failed to engage in plea bargaining for a non-strike sentence. In response to the former argument, the State argues that it never extended an offer that treated the Kentucky offense as a non-strike. Because the State failed to meet Crawford's extra-record evidence with its own contesting evidence, this Court should grant this claim. Alternatively, this Court should remand this issue to the trial court for a reference hearing.

In response to the Crawford's last argument, the State agrees that trial counsel's performance was deficient; presents additional information in support of Crawford's contention that the overwhelming majority of potential three strike cases are plea bargained; does not argue that Crawford's case differs in any material way from the cases reaching non-strike plea agreements (and, in fact, concedes there is a "possibility" that an plea agreement would have been reached but for counsel's deficient performance); does not dispute any of Crawford's extra-record evidence; but then argues that a fair trial serves to cure or eliminate any plea bargaining ineffectiveness. The State's argument is entirely premised on the unsupportable contention that, in order to prevail, Crawford must point to clearly established United States Supreme Court precedent—that this Court cannot consider its own authority or that of other courts. Once again, the State's treatment of the law is erroneous. Once again, if Crawford is

not granted relief on his first or second claims, this issue should be remanded to the trial court for an evidentiary hearing.

B. ARGUMENT

1. CRAWFORD’S SENTENCING COURT WAS PROHIBITED FROM FINDING “NEW” FACTS NOT ADMITTED AT THE TIME OF KENTUCKY “SEX ABUSE” CONVICTION IN ORDER TO MAKE THE COMPARABILITY DETERMINATION.

The State’s *Response* makes several significant concessions, both factual and legal. Factually, the State concedes, in order to conclude that Crawford’s Kentucky sex abuse conviction was comparable to child molestation, the current sentencing court (or a reviewing court) necessarily relied on facts neither admitted, nor proved at the time of conviction. *Response*, p. 16 (citing to “a court document [the Kentucky prosecutor’s plea offer form] setting forth the facts of the case” and relying on Crawford’s testimony *in this case* in support of the comparability conclusion).

Legally speaking, the State further concedes that recent state comparability law “reflect[s] the impact of *Apprendi v. New Jersey*, [530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]. *Response*, p. 14. The State also appears to concede, according to *State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004), that any facts relating to a foreign conviction that could have been used by the trial court to compare the foreign crime with

its Washington equivalent must have been previously admitted or found by the foreign court beyond a reasonable doubt. *Id.*

In light of these concessions, the State nevertheless argues that, although Crawford's Kentucky conviction is not comparable under current law, Crawford cannot benefit from that law, apparently according to some unstated retroactivity analysis—an analysis at odds with existing law. Thus, the State stakes its entire claim on the argument that *State v. Morely*, 134 Wn.2d 588, 952 P.2d 167 (1998) controls. The State is incorrect for several reasons, as Crawford demonstrates below.

The Facts Admitted at the Time of the Kentucky Conviction

Crawford pled guilty to sex abuse in Kentucky. Because the State did not present a plea form, the only facts that the State proved that Crawford admitted at the time of his plea are those found in the indictment, which alleged that Crawford “subjected [L.K.], a person less than twelve years of age, to sexual contact.” Obviously, those bare facts fall short of the elements of the most comparable Washington crime: child molestation.

It is for this reason that State argues, then and now, that the sentencing court can rely on the facts stated in the Kentucky prosecutor's plea offer (“Δ digitally penetrated the vagina of his 7 year old niece”); can find for the first time that Crawford was more than 36 months older than the victim by taking the facts asserted in the plea offer and then calculating defendant's age based on independent, extra-record evidence of his date of

birth; and can find this State's non-marriage element satisfied by reference to Crawford's testimony at his new trial motion in this case where he testified that the victim was his seven-year old niece.

Thus, this claim turns entirely on resolution of whether Crawford is entitled to the benefit of the current rule that clearly prohibits reliance on new facts relating to a foreign conviction found during the comparability analysis.

The Applicable Rule at the Time of Crawford's Sentence

The State's concessions upend their legal argument.

The State correctly concedes that recent state comparability cases "reflect the impact of *Apprendi*." *Response*, p. 14. Of course, *Apprendi* was decided several years before Crawford was sentenced. Thus, he is obviously entitled to the benefit of that rule.

The State also correctly concedes that the *Ortega* court applied *Apprendi*. *Ortega*, 120 Wn. App. at 174 ("We conclude that *Apprendi* prohibits a sentencing court's consideration of the underlying facts of a prior conviction if those facts were not found by the trier of fact beyond a reasonable doubt.").

However, the State then incorrectly argues that Crawford is not entitled to the benefit of either case. The State is incorrect for two reasons. First, Crawford's conviction did not become "final" until his direct appeal was decided on December 6, 2006 (or when his mandate issued on January

7, 2007). See *In re Restraint of Markel*, 154 Wn.2d 262, 268, 111 P.3d 249 (2005) (“A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.”). Because Crawford’s conviction did not become final until after *Ortega* was decided, that rule must be applied retroactively to Crawford’s case. *In re Restraint of Lavery*, 154 Wn.2d 249, 11 P.3d 837 (2005), applies here for the same reason. According to those cases, “(a)ny attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.” *In re Restraint of Lavery*, 154 Wn.2d at 258. Nevertheless, the State persists in asking this Court to give its stamp of approval to that prohibited process.¹

However, Crawford is entitled to the benefit of the case he relies on in his PRP for an additional reason. As the State appropriately, but unwittingly, concedes, none of these case created a new rule—the cases simply applied *Apprendi*. “A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction

¹ The State also criticizes Crawford for failing to allege addition new facts about the conduct underlying his Kentucky conviction. Crawford does not seek to run afoul of the rule that he relies on. More importantly, the State’s suggestion shows why the rule posited by the State is unworkable and unconstitutional: it invites a trial today about conduct from years ago.

became final.” *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (“In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.”). Both parties agree that *Apprendi* created a new rule. However, both parties also agree that the subsequent cases discussed herein simply applied *Apprendi*. Thus, Crawford’s claim is not limited by the retroactivity doctrine. However, Crawford further notes that the United States Supreme Court recently held that states are not bound by the *Teague* retroactivity doctrine, but are free to develop their own tests. *Danforth v. Minnesota*, ___ U.S. ___, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (*Teague* does not constrain the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas). Obviously, this Court does not need to reach that issue, given the earlier discussion.

Remand or Reversal?

In his PRP, Crawford finally argued that because the Kentucky crime of sex abuse, like the federal bank robbery charge in *Lavery*, is a general intent crime certain defenses, applicable here in a child molestation case, are inapplicable in that state. The State fails to respond to this argument. Given the lack of contest on this issue, this Court should simply grant Crawford’s petition and remand for re-sentencing to a non-persistent offender sentence. In the alternative, Crawford requests remand for an

evidentiary hearing—with the instruction that the trial court cannot consider facts not admitted nor proved at the time of Crawford’s conviction in Kentucky.

2. THIS COURT SHOULD EITHER REVERSE AND REMAND OR ORDER AN EVIDENTIARY HEARING ON WHETHER THE STATE EXTENDED A PLEA OFFER TREATING CRAWFORD’S KENTUCKY CONVICTION AS A NON-STRIKE.

Prior to trial, the State offered Crawford an opportunity to plead guilty to a recommended 57 months in prison based on an offender score of “5.” This offer did not change even after the State provided defense counsel with a summary of Crawford’s criminal history which included his Kentucky sex abuse conviction, a conviction listed in the criminal history section of Crawford’s 1998 Pierce County robbery conviction.

The State does not contest that an agreement by the parties on the issue of comparability (or, lack of comparability) reflected in a guilty plea binds the sentencing court and can be enforced through the doctrine of specific performance. *See State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004).

Instead, the issue here is whether the State ever extended a plea offer treating the sex abuse conviction as a non-strike. Both this Court and the Supreme Court’s discussion of the facts developed at the new trial hearing conclude that the State’s plea offer which included a standard range of 57-75 months remained open after the discovery of the Kentucky conviction.

See State v. Crawford, 128 Wn. App. 378-9, 389, 115 P.3d 387 (2005)

(“Before trial, both the prosecutor and defense counsel knew about Crawford's previous Washington conviction for second degree robbery, as well as his previous Kentucky conviction for first degree sex abuse...

Before trial, the prosecutor offered to recommend a sentence at the low end of the standard range, in exchange for Crawford's pleading guilty as charged. Thinking that his standard range was 57-75 months, Crawford decided to reject the offer, not to initiate an offer himself, and to proceed to trial. His counsel concurred with those decisions, reasoning that Crawford would probably receive a standard range sentence, and that the difference between the low and high ends of the standard ranges ‘was not much inducement to plea[d] rather than take a chance at prevailing at trial.’”).

This Court’s summary of the facts is completely consistent with the testimony of Ms. Stenberg that, after she was notified of the Kentucky offense, “(w)e were still in agreement that he had five felony points with the standard range of 57 to 75.” RP 301. *See also* RP 306 (“I think the offer from the State remained the same, which led me to believe that we were still probably all on the same page, that maybe even the State had interpreted those Kentucky convictions as misdemeanors, because the offer remained throughout.”); *Declaration of Stenberg attached to PRP*.

However, while the State disputes these facts in its *Response*, the State utterly fails to present any “competent” contesting facts. As the State

notes, the purpose of an evidentiary hearing is “to resolve genuine factual disputes.” *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Thus, the obligation of supporting claims with evidence applies with equal force to the State. The State's response must not only answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must also meet the petitioner's evidence with its own competent evidence. *Rice*, 118 Wn.2d at 886.

Crawford submitted sworn declarations and the relevant sworn testimony from the new trial hearing. In response, the State makes arguments, but presents no new evidence. This Court should hold the State to the requirements of *Rice*. This is especially true where the State failed to produce the most logical piece of potentially contesting evidence: a declaration from the deputy prosecutor who made the plea offer in this case.

Instead, the State relies on her earlier declaration which merely states she sent a revised criminal history to defense counsel, after learning of the Kentucky conviction—a criminal history which admittedly did not treat the Kentucky offense as comparable to a most serious offense. Thus, the State's argument in its *Response* that, assuming Crawford pled guilty to the State's offer, he still would have ended up a persistent offender based on the “discovery of additional convictions after conviction” provision is completely contradicted by its own evidence.

This Court should grant Crawford's petition and remand for specific performance as outline in his opening brief. In the alternative, this Court should remand for an evidentiary hearing pursuant to RAP 16.11 on the issue of what plea offer existed after the State's discovery of Crawford's Kentucky sex abuse conviction.

3. THE STATE CONCEDES CRAWFORD'S COUNSEL WAS DEFICIENT BY FAILING TO INFORM CRAWFORD OF THE RISK OF A PERSISTENT OFFENDER FINDING. THE STATE'S ARGUMENT THAT A TRIAL CURES THE PREJUDICE OF ANY AND ALL PLEA BARGAINING DEFICIENCIES IS UNSUPPORTED BY THE LAW.

Introduction

The issue here is prejudice. The State does not contest that trial counsel performed deficiently in the plea bargaining process. *Response*, p. 25, 39. Likewise, the State does not argue that it would not have extended a non-strike plea offer to Crawford if, like in other potential persistent offender cases, counsel (on both sides) perceived the possibility of a persistent offender finding. To the contrary, the State presents evidence that over 75% of all possible persistent offender cases result in plea bargains to lesser, non-strike offenses. The State does not attempt to marshal an argument that Crawford's case falls into the much smaller category of cases where no plea offer was offered.² To the contrary, the

² The State does not present any evidence what percentage of cases (where a persistent offender finding was made) involved the rejection of a plea offer by a defendant or whether there are additional unfortunate cases like Crawford's where trial counsel failed to appreciate the risk and inform her client prior to his decision to proceed to trial.

State admits that it is possible that Crawford could have avoided the prospect of a life sentence, if aided by competent counsel. *Response*, p. 27.

Instead, the State argues that Crawford's ineffectiveness claim is not cognizable for two reasons: (1) he cannot cite to any clearly controlling United States Supreme Court caselaw addressing this precise issue; and (2) his fair trial puts any plea bargaining ineffectiveness beyond reach.

There has never been a rule that PRPs can only be granted where the defendant can show clearly controlling caselaw from the United States Supreme Court. For that reason, the State's decision to limit its discussion of the law to Supreme Court caselaw is puzzling. Certainly, this Court's review is not so narrowly constrained.

The proposition that defense counsel can provide ineffective assistance where, based on deficient advice, a defendant rejects a plea offer and chooses to proceed to trial is not novel or controversial in the law. The Court of Appeals did not question this legal premise in *State v. Cloud*, 95 Wn. App. 606, 976 P.2d 649 (1999), instead remanding the case with instructions that former counsel could not intervene in a hearing to determine whether the facts supported that exact issue. *Cloud*, who was convicted after a trial, brought an ineffective assistance of counsel claim against former counsel for his allegedly incompetent advice during the plea bargaining process. *Cloud* said that former counsel told him that he had a 95 percent chance of being acquitted on insanity grounds and that, even if

he were convicted of first degree murder, he would not have to serve the full 20-year sentence. Obviously, if Cloud's claim was brought on an untenable premise, the entire opinion could have been avoided.

Other courts are in accord. *See United States v. Day*, 969 F.2d 39, 43 (3d Cir.1992); *Turner v. Tennessee*, 858 F.2d 1201, 1205-07 (6th Cir.1988), *vacated on other grounds*, 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989), *reinstated*, 726 F.Supp. 1113 (M.D.Tenn.1989), *aff'd*, 940 F.2d 1000 (1991), *cert. denied*, 502 U.S. 1050, 112 S.Ct. 915, 116 L.Ed.2d 815 (1992); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir.1991), *cert. denied*, 505 U.S. 1223, 112 S.Ct. 3038, 120 L.Ed.2d 907 (1992); *United States v. Blaylock*, 20 F.3d 1458, 1465-67 (9th Cir.1994); *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir.1992).³ In *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001), the Court held:

The Supreme Court has long held that *Strickland* applies to ineffective assistance claims arising out of the plea bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The prejudice inquiry in such cases "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*." *Id.* at 59, 106 S.Ct. 366 (emphasis added). Moreover, a large body of federal case law holds that a defendant who rejects a plea offer due to improper advice from counsel may show prejudice under *Strickland* even though he ultimately received a fair trial. *See Engelen v. United States*, 68 F.3d 238, 241 (8th Cir.1995) (collecting cases). To establish prejudice under such circumstances, the petitioner must show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence. *Id.*

³ Petitioner regrets his reliance on the withdrawn opinion in *Riggs v. Fairman*, 399 F.3d 1179 (9th Cir. 2005).

However, this Court does not need to look beyond the Washington Supreme Court's direct appeal decision *in this case* for rejection of the State's legal argument regarding the formulation of prejudice. The Supreme Court did not conclude that Crawford's trial rendered any plea bargaining deficiencies automatically harmless. Instead, the Court found that Crawford had not made a sufficient showing that the prosecutor would have offered a non-strike plea deal. 159 Wn.2d at 100.

For example, the Supreme Court's opinion that Crawford failed to show prejudice at his new trial hearing was premised on the assumption that the nature of the POAA "virtually precludes the prosecutor from plea bargaining." *Id.* Crawford has now affirmatively disproved that assumption. Crawford nevertheless acknowledges, if both of his previous arguments are rejected, that it is difficult to determine with precision what offer, if any, would have been made if counsel had performed competently.

However, the law only requires Crawford to show a *reasonable probability* that the State would have offered and he would have accepted a non-strike offer. Such a determination can be made based on an examination of how other similar cases were resolved—the evidence missing on direct appeal, but supplied here. This Court should remand this claim for an evidentiary hearing.

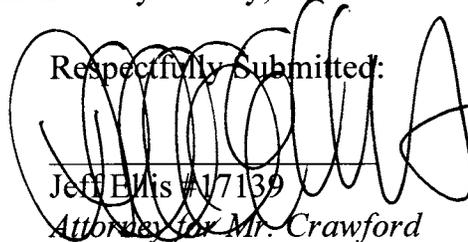
D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should:

1. Find that Crawford is not a persistent offender; vacate his persistent offender finding and remand this case to the Pierce County Superior Court for imposition of a standard range sentence; or
2. Find that Crawford's rejection of the State's pretrial offer (treating his Kentucky sex abuse offense as a non-strike) was the result of ineffective assistance of counsel; vacate his conviction and sentence and remand this case with instructions that the State reinstate the offer—either based on the existing record or after an evidentiary hearing; or,
2. Remand his final claim for an evidentiary hearing.

Crawford's direct appeal record fell short—the test for ineffectiveness requires more than the existence of events that *might* have changed the outcome. It requires the defendant to *affirmatively prove* a reasonable likelihood of a different outcome. Crawford has now shouldered that burden.

DATED this 27th day of May, 2008

Respectfully Submitted:

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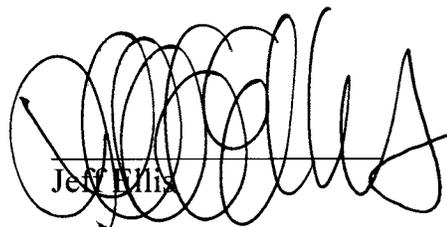
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CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on May 27, 2008, I served the party listed below with a copy of the attached *Reply in Support of PRP* by placing a copy in the mail, postage pre-paid, addressed to:

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Date and Place



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