

FILED
Court of Appeals
Division II
State of Washington
11/13/2019 4:39 PM
No. 52872-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FORREST EUGENE AMOS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was Amos's trial counsel's performance deficient by failing to file a CrR 8.3 motion, and therefore did Amos receive ineffective assistance of counsel?
- B. Was there a violation of Amos's attorney-client privilege, and if so, did the State sufficiently prove it was harmless beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. **Forrest Amos Files A Personal Restraint Petition Alleging The State Interfered With His Attorney-Client Relationship.**

Forrest Amos agreed to plead guilty on July 31, 2014, and as part of his plea deal, the State agreed to amend the charges removing Leading Organized Crime, what would have been Amos's third strike. RP 277-80; CP 94-129. Amos pleaded guilty to 16 other charges as part of this plea deal, and Amos agreed to waive his right to appeal and collateral attack. CP 94-129; Supp. CP 99.¹ Amos was sentenced for a total of 12 years in prison, including two misdemeanor counts that ran consecutively to the felony counts. CP 117-23. There was an issue regarding an amendment to Amos's sentence that was vacated in 2016. CP 130-32.

Amos filed a timely personal restraint petition (PRP) in January 2016, raising numerous issues, including that his attorney-client privilege

¹ State will be filing a supplemental Clerk's papers to include Amos' written waiver of collateral attack and appeal.

was violated when Detective Haggerty, Chad Withrow, and a number of jail staff, executed a search warrant on his cell at the Lewis County Jail. *In re Pers. Restraint of Amos*, 1 Wn. App. 2d 578, 583, 406 P.3d 707 (2017). Amos alleged Detective Haggerty and Withrow read all of the documents while in his cell, including case narratives and vital strategies that took Amos months to prepare. *Id.* Amos asserted the trial court improperly sentenced his misdemeanor counts consecutively to be served in the Department of Corrections (DOC). *In re Amos*, 1 Wn. App. 2d at 582. Finally, Amos argued he received ineffective assistance of counsel, which thereby would make his waiver of collateral attack invalid. *Id.* at 594.

This Court, rather than determining the PRP, sent the PRP back to the trial court for a RAP 16.12 hearing on its merits. *Id.* at 600-01. This Court gave the trial court a list of five specific questions to determine, and a sixth catch all “any other factual questions the trial court deemed necessary to make a determination.” *Id.* This Court determined the misdemeanor counts were improperly sentenced to be served in DOC, but left it to the trial court as to how to deal with the sentence at the conclusion of the PRP. *In re Amos*, 1 Wn. App. 2d 578.

B. The Hearing On the Merits Of Amos’s Personal Restraint Petition.

The State and Amos called witnesses during the multiple day evidentiary hearing. *See* RP. The State and Amos also provided the trial

court with multiple rounds of briefing prior, during, and after the conclusion of the evidentiary hearing. CP 180-239. Ultimately, at the conclusion of the hearing, the trial court explained given the volume of the exhibits entered, the claims made, and the testimony, he would be taking the matters under advisement and issuing a written ruling later. RP 552-53; CP 240-50. The State prevailed and the trial court dismissed the petition. CP 240-50.

a. Amos's 2013 case that led to Amos being investigated for Witness Tampering and Witness Intimidation.

Amos, after being released from prison in 2010, established a prolific and lucrative business selling oxycodone in Lewis County. CP 11-14. Amos engaged in the business with several other individuals, including Jennifer Lantau, who he directed to take on various tasks. CP 13-15. Amos became the main supplier of oxycodone in Lewis County, selling thousands of pills a month. CP 14.

In late 2011, Amos delivered oxycodone to a confidential informant, and after this delivery agreed to work as an informant for the Centralia Police Department. CP 15. In exchange for lesser charges, Amos worked as an informant for federal authorities. *Id.* Unfortunately, Amos decided to maintain his large scale drug operation, while working as a confidential informant. *Id.* The police were also informed by another confidential source that Amos planned to keep his operation going while he was incarcerated at DOC. CP 15-16.

Prior to going to prison at the end of 2012, Amos gave a number of people instructions that Ms. Lantau was taking over the business while Amos was incarcerated, the money was for Ms. Lantau and Amos, and the business would be in operation when he was released from prison. CP 17. Amos gave explicit instructions to many different players on how they were supposed to continue on and how they were to assist Ms. Lantau. CP 17-18. Ms. Lantau was ill equipped to take over Amos's operation and relied heavily upon Amos's advice while he was in prison. CP 18. Amos orchestrated several specific crimes while incarcerated. CP 18-19.

Ms. Lantau was arrested and Amos became suspicious of her. CP 19. While he was still incarcerated in prison he also had his brother monitor Ms. Lantau's Facebook account, and told his brother to intimidate Ms. Lantau. CP 20.

The State charged Amos with 16 different crimes, including Leading Organized Crime and Tampering with a Witness on December 3, 2013. CP 1-10.

b. Information presented at the hearing on the merits.

Numerous witnesses testified at the hearing on the merits. The State called Forrest Amos, Detective Haggerty, Detective Withrow, Rose Kent, Judge Hunt, Deputy Prosecutor Halstead, Correction Deputy Felker, Janelle

Kambich, and Don Blair. The defense called Amos and Deputy Prosecutor Eisenberg. *See* RP.

i. Detective Haggerty investigates Amos for witness tampering and witness intimidation while Amos is housed in the Lewis County Jail.

While Amos was in the Lewis County Jail awaiting trial on his charges, Centralia Police Detective Haggerty received information through other informants that Amos was using the legal mail system to send and receive letters from people other than his defense counsel. RP 102, 104-05. Detective Haggerty was also listening to Amos's phone calls. RP 105. On the phone calls Amos was relaying "information he had obtained about some possible state witnesses, and he was asking for help to, in our opinion, intimidate them." *Id.*

Amos was asking certain non-defense attorney individuals, or legal aides, to send correspondence to Amos via the legal mail to avoid detection at the jail. *Id.* Detective Haggerty received a letter from a confidential informant on April 22, 2014, the letter lists specific people who were part of the case against Amos, for intimidation. RP 108-09; Supp. Ex. 36.² Two of Amos's associates were arrested on June 17th during the investigation of the witness tampering and intimidation. RP 111, 115.

² The State will be submitting a supplemental designation to include exhibit 36.

ii. Detective Haggerty executed a lawful search of Amos's cell at the Lewis County Jail.

Detective Haggerty wrote up an affidavit requesting a search warrant for Amos's cell based upon his investigation and the letter obtained outside the Lewis County Jail, the detectives believed he had probable cause Amos would continue to intimidate witnesses. RP 116; Ex. 4. The search warrant was granted. Ex. 5. Detective Haggerty did not run his warrant by a deputy prosecutor. RP 118.

Detective Haggerty executed the search warrant on Amos's cell first thing in the morning on June 18, 2014. RP 117-19. Detective Haggerty and Detective Withrow, who was present merely as a witness, were escorted back to Amos's cell by two Lewis County Corrections deputies. RP 118-19, 196-97, 240. Amos was upset about the search warrant. RP 120, 198, 241. Detective Haggerty was in Amos's cell for approximately 10 minutes collecting the material. RP 122, 198. Amos was concerned about a civil DOC lawsuit he did not want to lose the documentation for. RP 120-22. Detective Haggerty attempted to leave behind documentation that clearly had a DOC letterhead or header for Amos. *Id.*

The collected documents were placed into a clear plastic bag Detective Haggerty took from the jail. RP 122. Detective Haggerty tied a knot in the bag and carried it out to his patrol vehicle and secured it there. *Id.* Detective Haggerty then drove directly back to his office within the

Centralia city limits. RP 122-23. While Detective Haggerty was taking the evidence collected from Amos's cell back to the Centralia Police Department he called Don Blair, Amos's defense attorney. RP 123. Detective Haggerty advised Mr. Blair they had executed a search warrant on Amos's cell. *Id.* Mr. Blair, in order to protect his client, suggested Detective Haggerty, prior to going through the documents, have the documents reviewed *in camera*. RP 123, 273. Detective Haggerty did not go through the documents. The documents were placed inside a paper box and sealed. RP 124. The box was secured pending an *in camera* review interview with Judge Hunt. RP 125.

iii. *In Camera* review of the documents collected from Amos's jail cell.

It took until July 21, 2014, for an *in camera* review to be set up with Judge Hunt. RP 154-57. It is unclear as to why it took three weeks. Detective Haggerty relied upon his sergeant to set up the appointment and Judge Hunt was asked to do the *in camera* review by the superior court judge preassigned to Amos's case. RP 156-57, 179-81.

Judge Hunt conducted the *in camera* review in his chambers. RP 180. Judge Hunt did not make notes regarding the *in camera* review. RP 183. Judge Hunt recalled being alone in chambers when the review occurred. RP 181-83. Detective Haggerty recalls being present. RP 161-62. Regardless, Judge Hunt went through hundreds of items, separated out

documents he considered privileged, placed those items on his desk, and gave the remaining items back to the Centralia Police Department. RP 131-32, 161-62, 182-83.

iv. The State did not review the materials collected from Amos's cell, with one possible exception.

All of the evidence obtained from the cell search was kept at the Centralia Police Department evidence facility and not viewed by any deputy prosecutor prior to Amos pleading guilty – with one possible exception. RP 56-60, 217, 227, 229-30, 250-54, 257-58, 478-81; Ex 1, 2, 41. After the *in camera* review, Detective Haggerty began sifting through the voluminous documents and uploading documents into the Spillman system to be work flowed to the Prosecutor's Office. 478-80.

On July 23rd, the State received documents which would become discovery package 11, documents Detective Haggerty then uploaded into Spillman, and uploaded into the prosecutor's office system on July 24th. RP 252-53, 479; Ex 41. The discovery package may have been reviewed by Mr. Halstead, but he does not recall it. RP 257-58. The discovery package does not contain confidential, privileged information recovered from the cell search. Ex. 41.

v. Amos elects to plead guilty to reduced charges.

While the Centralia Police Department was attempting to have the materials it collected as part of the new 2014 witness tampering and witness

intimidation case looked at *in camera*, the prosecutor's office and Amos's defense team were continuing to work on Amos's case. RP 218, 275. Mr. Blair spent over 180 hours preparing Amos's case, including 40 of those hours meeting with Amos. RP 264, 268. Mr. Blair filed numerous motions on Amos's behalf, and after speaking with Amos about his frustration regarding the cell search, Mr. Blair began working on a CrR 8.3 motion to dismiss on July 11th. RP 264-65, 274.

During the month of July, Mr. Blair made multiple requests and attempts to have Amos's materials confiscated from the cell search returned. Ex. 25 at 9-11, Ex. 26 at 30-32. Amos seemed most upset and angry about his missing DOC documents. RP 298. An order was signed on July 30th for return of the documentation separated out during the *in camera* review. Ex. 8.

After the order was signed, but prior to receiving the documents back, Amos elected to take the State's latest plea offer. RP 305, 326. As part of his plea deal, the State agreed to amend the charges removing the Leading Organized Crime, what would have been Amos's third strike, and Amos agreed to plead guilty to a number of other charges and waive his right to appeal and collateral attack. RP 277-80; CP 94-129; Supp. CP 99.³ Amos

³ State will be filing a supplemental Clerk's papers.

was sentenced for a total of 12 years in prison, including two misdemeanor counts that ran consecutively to the felony counts. CP 117-23.

vi. Amos disputes the State's evidence.

Amos disputed much of the State's evidence and witnesses. *See* RP. Amos asserted there were numerous corrections officers present during the execution of the search warrant and the detectives spent 30 to 40 minutes in Amos's cell carefully reading through Amos's documents prior to collecting the material. RP 68-69, 73-74, 353-54. Amos went through the documentation taken from his cell, and set aside the documents he asserted were privileged. RP 362- 75; Ex. 34, 35.

Amos asserted Mr. Blair originally agreed to file a CrR 8.3 motion on Amos's behalf, then told Amos they would not prevail because they could not show prejudice. RP 379-80. According to Amos, Mr. Blair stated, "It's a losing motion. I am not going to do a losing motion for you." RP 381.

Amos stated Mr. Blair would not allow him to waive speedy trial, and they were going to deal with the case now. RP 410. Amos did not want to take the plea deal, but believed he was being forced to do so because he had no choice. RP 411-14, 423.

c. Trial courts determination of the personal restraint petition.

The trial court entered the requisite Findings of Fact, Conclusions of Law and Order Denying Personal Restraint Petition. CP 240-50. The trial court entered 69 separate findings of fact and nine conclusions of law. *Id.* The trial court denied Amos's personal restraint petition. The trial court found Amos's testimony not credible, that Amos had a strong motive to lie throughout the proceedings, and his testimony was evaluated in light of his lack of credibility. CP 240-41.⁴ The trial court ultimately held there was no violation of the attorney-client relationship, any possible violation of the attorney-client privilege was harmless beyond a reasonable doubt, Mr. Blair's performance was not deficient, nor if there was any deficiency was their prejudice, and finally Amos's waiver of collateral attack was knowingly, voluntarily, and intelligently made. CP 249.

C. Appeal

As the personal restraint petition was determined in the trial court, Amos is afforded the right to appeal and has timely filed his notice of appeal. CP 258-91.

The State will supplement the facts as necessary throughout its argument below.

⁴ These findings have not been assigned error.

III. ARGUMENT

A. AMOS DID NOT RECEIVE INEFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO FILE A CrR 8.3 MOTION TO DISMISS THE CHARGES ALLEGING THE STATE HAD VIOLATED AMOS'S ATTORNEY-CLIENT PRIVILEGE.

Contrary to Amos's assertion, his trial counsel was not deficient for failing to file a CrR 8.3 motion alleging the State had violated Amos's attorney-client privilege. Mr. Blair was investigating and drafting a CrR 8.3 motion when Amos elected to plead guilty. Amos's trial counsel was not deficient for presenting his client to with the State's plea offer, and Amos's regret over his decision to plead guilty does not render his trial counsel's performance deficient. Therefore, Amos's counsel's performance was effective and his waiver of his right to collaterally attack his sentence is valid.

1. The Findings of Fact, Unless Explicitly Conceded, Are Supported By Substantial Evidence, And Therefore Binding On Appeal.

Amos assigns error to 25 of the trial court's findings of fact. Brief of Appellant at 1-6. These findings of fact are found in six sections of the Findings of Fact, Conclusions of Law and Order Denying. CP 240-50.

The State will not address all of the findings of fact or conclusions of law assigned error separately in this section, as it would be unnecessarily duplicative. Rather, the State will address the bulk of the assignment of

errors in the substantive argument below. The State does not concede any assignment of error unless directly stated. In this section the State specifically addresses the following assigned findings of fact: 1.13, 1.39, and 1.40.

Findings of fact entered by a trial court after an evidentiary hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The facts are binding on appeal “[w]here there is substantial evidence in the record supporting the challenged facts.” *Hill*, 123 Wn.2d at 647. Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. Findings not assigned error become verities on appeal. *Id.* at 418.

Amos also assigns error to several conclusions of law, 2.4, 2.7, 2.8, and 2.9. Brief of Appellant 7. A trial court’s conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *Sate v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

Finding of fact 1.13, 1.39, and 1.40, are assigned error, in a string of findings, under assignment number six (6), then it states, “which find that the documents in Exhibits 34 and 35, are not privileged attorney-client communications.” Finding of fact 1.13 merely states the documents seized, the bulk of which were contained within the exhibits 34 and 35, were readily identifiable, and gave a list of what those items were identifiable as: police reports, post cards, grievance reports, etc.. CP 242 (FF 1.13). A review of exhibits 34 and 35 support this finding of fact. Finding of fact 1.39 describes the items seized by Detective Haggerty, which is supported by exhibits 34 and 35. CP 244-45. Finding of fact 1.40 describes the documents seized that Amos claimed were privileged. CP 245; RP 362-78.

2. The Trial Court Followed The Instructions Of The Court Of Appeals, Mandated In The Opinion, When It Conducted The Hearing On The Merits.

The trial court was tasked with making the ultimate determination regarding the substantive, dispositive issues of Amos’s personal restraint petition with the exception of the misdemeanor sentencing issue. *In re Amos*, 1 Wn. App. 2d. This Court determined the State had not shown that *State v. Besio*, 80 Wn. App. 426, 901 P.2d 1220 (1995), was incorrect and harmful, therefore Amos’s gross misdemeanor sentences were improperly imposed and, dependent upon the trial court’s ruling on the merits of the

substantive issues, the trial court would have to determine how best to resentence the gross misdemeanor counts. *In re Amos*, 1 Wn. App. 2d 578.⁵

This Court specifically instructed the trial court:

The trial court will conduct a factual hearing to determine (1) the nature of the cell search, (2) whether officers or other state officials seized or reviewed documents, (3) what were the nature and contents of those documents, (4) if a violation of the attorney-client relationship did occur, whether the State can show beyond a reasonable doubt that Amos was not prejudiced, (5) whether Amos would not have pled guilty but for his attorney's deficient actions or advice, and (6) any other factual questions the trial court deems necessary to make a determination.

Id. at 600-601.⁶ This Court made it clear it was to be a hearing on the merits not a reference hearing. *Id.*; RAP 16.11(a); RAP 16.12.

The trial court followed the Court of Appeals opinion, using the roadmap provided by this Court and the trial court's independent judgement and discretion, when the trial court entered the Findings of Fact, Conclusion of Law and Order Denying Personal Restraint Petition. RP 551-53; CP 240-250. An appeal of an issue presented from a personal restraint petition

⁵ 2017 Wash. App. LEXIS 2818, 28-35 (This portion of the opinion is in the unpublished portion and is not cited for authority other than how it relates to Amos's appeal in this matter.)

⁶ This Court, in its remand for the hearing on the merits, required the trial court to answer if the defendant would have not pleaded guilty but for his attorney's deficient advice. This type of subjective test is not the appropriate standard for the determination of prejudice in a personal restraint petition. *State v. Buckman*, 190 Wn.2d 51, 66-67, 409 P.3d 193 (2018). The State's position is due to the de novo review of the ineffective assistance of counsel issue, the objective versus subjective test is not an issue, and the result would be the same.

transferred to the trial court for determination on its merits, is reviewed by this Court in the same manner this Court determines direct appeals of any other trial court decision. RAP 16.14(b).

Amos asserts his trial counsel's failure to file a CrR 8.3 motion was deficient performance, and in accordance to this Court's opinion in *In re Amos* he need not have shown anything more to the trial court to have prevailed on his ineffective assistance of counsel claim. Brief of Appellant. 23-31. Amos argues the decision to not file a CrR 8.3 was not strategic, it was deficient, and such a deficiency requires dismissal. *Id.* To support his position, Amos cites to this Court's strong language in its opinion regarding if Amos showed a reasonable investigation would have shown a violation of Amos's attorney-client relationship, then failing to file the CrR 8.3 motion could then show ineffective assistance of counsel. Brief of Appellant 21-22, *citing In re Amos*, 1 Wn. App. 2d at 598.

While this Court outlined the structure the trial court was to use in determining the merits of Amos's personal restraint petition, it decided to vest the discretion in the trial court to determine the merits of Amos's petition. *See, In re Amos*, 1 Wn. App. at 600-01. Amos fails to recognize this Court, while stating its interpretation of how the case law would relate to the facts of Amos's case; 1) did not know how the facts would fully develop during the evidentiary hearing, 2) decided to rest the power and

discretion with the trial court to determine the outcome of Amos's personal restraint petition, and 3) by giving the trial court this power of discretion, it necessarily vested in the trial court the right to determine the applicable law and its interpretation necessary for issuing a final ruling on the merits.

While this Court's analysis and discussion of the case law surrounding intrusion into a defendant's attorney client privilege and its application to Amos's case is a useful starting point, it is not the ultimate deciding factor in this case, as Amos appears to argue throughout his briefing. *See* Brief of Appellant. Therefore, this Court must apply the appropriate standards of review to the rulings and decisions of the trial court that Amos is assigning error and arguing to this court, just as this Court does on all direct appeals of any trial court decisions.

3. Amos's Attorney Was Not Deficient During His Representation Of Amos Throughout The Proceedings Leading To Amos's Guilty Plea.

Amos alleges his trial counsel was deficient for failing to investigate and file a CrR 8.3 motion to dismiss based upon the alleged violation of his attorney-client relationship stemming from the search of his jail cell at the Lewis County Jail. Amos further argues due to a heightened standard, he need not show prejudice, merely deficiency, to prevail in his ineffective assistance of counsel claim, which would then invalidate the waiver of collateral attack as Amos's entire guilty plea would no longer be knowingly,

intelligently, and voluntarily made. Brief of Appellant 21-24. Accordingly, Amos states dismissal is the only available remedy and the trial court erred by failing to dismiss his case.

The trial court properly considered the evidence presented at the evidentiary hearing on the merits of the personal restraint petition, including weighing the credibility of the witnesses, and determined Amos did not receive ineffective assistance of counsel rendering his guilty plea, and thereby his waiver of collateral attack, involuntary. CP 249. This Court should affirm the trial court.

a. Standard of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted). This Court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015). This Court defers to the trial court on determinations regarding the weight and credibility of witnesses who present testimony during a hearing on the merits. *In re Merritt*, 69 Wn. App. 419, 424, 848 P.2d 1332 (1993).

To prevail on an ineffective assistance of counsel claim Amos must show that (1) the attorney's performance was deficient and (2) the deficient

performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

When a defendant raises a failure to investigate claim the defendant must show "a reasonable likelihood that the investigation would have produced useful information not already known to the defendant's trial

counsel.” *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). A defendant who makes a showing that his or her trial counsel failed to investigate still must show the deficient performance prejudiced him or her. *In re Davis*, 152 Wn.2d at 739.

In the context of a guilty plea, to prevail on an ineffective assistance of counsel claim, a defendant is required to show their attorney failed to substantially assist them in deciding whether to plead guilty, and but for their attorney’s failure to adequately advise them, they would have not pleaded guilty. *State v. McCollum*, 88 Wn. App. 977, 982 947 P.2d 1235 (1997).

In contrast, on a post-conviction motion, the test is not a subjective test to determine if the specific defendant raising the claim would have not pleaded guilty. *Buckman*, 190 Wn.2d at 66-67. The courts, in evaluating whether a defendant has suffered prejudice employ an objective test, using a rational person inquiry. *Id.* at 66. “Rationality is an objective inquiry informed by the circumstances of the defendant.” *Id.* at 66-67. The Supreme Court did acknowledge the credibility of the defendant was relevant in the inquiry, but not sufficient to determine if the defendant has suffered actual and substantial prejudice. *Id.* at 67

b. Amos's attorney had been working on a CrR 8.3 motion when Amos decided to plead guilty to a plea offer extended by the prosecutor's office.

Amos's assertion his trial counsel's performance was deficient for failing to investigate, and later file a motion to dismiss based upon, his claim the State violated Amos's attorney-client privilege is without merit. Amos argues this deficiency, failing to file a CrR 8.3 claim, automatically renders his trial counsel ineffective. Amos's argument regarding Mr. Blair's alleged deficient conduct surrounding Amos's claimed violation of his attorney-client privilege is contrary to the evidence adduced at the hearing on the merits of his personal restraint petition. Amos received effective assistance from Mr. Blair, throughout his representation of Amos, including the investigation and drafting of motions for Amos's case. There was no deficiency, and therefore no ineffective assistance of counsel.

To determine if Mr. Blair was deficient in his representation of Amos, the Court must view Mr. Blair's conduct to see if it is within the wide range of competent assistance. *Strickland*, 466 U.S. at 690. Mr. Blair represented Amos for a number of months prior to the guilty plea. RP 264-67. Mr. Blair knows he billed for 184 hours of his time, not including some court hearings, and met with Amos in excess of 40 hours while preparing Amos's case. RP 264, 268. Mr. Blair prepared a number of motions,

including two bills of particulars, two supplementary discovery requests, possibly a *Knapstad* motion, and there may have been others. RP 264-65.

Mr. Blair provided discovery for Amos to review, believing the documents were kept in the booking area of the jail and Amos would be allowed to go through them in the evenings as necessary. RP 267-69, 297; CP 248 (FF 1.65). Mr. Blair had always instructed his clients to go ahead and make notes on the discovery he left at the jail. RP 269. Mr. Blair had notes in his file from Amos in preparation for the case going to trial that Mr. Blair had received prior to June 2014. RP 267; CP 248 (FF 1.65). Mr. Blair had received numerous pages of notes and suggestions in early March. RP 269; CP 248 (FF 1.65). Mr. Blair received a six-page document from Amos that went through, in detail, all of the discovery Mr. Blair had provided Amos and Amos had written out questions and discrepancies. *Id.* According to Mr. Blair, he knew he had not sent Amos any legal information through the mail, and it was Mr. Blair's understanding all the discovery materials were kept up in the booking area, therefore Mr. Blair did not believe Amos's jail cell would contain any secrets in regard to their case. RP 297; CP 245, 248 (FF 1.41, 1.63).⁷

⁷ The State acknowledges this testimony could be considered contradicted by statements made during the July 10th and 18th, 2014, court hearings. *See* Ex. 25 at 9-10, Ex. 26 at 31-32.

Detective Haggerty executed the search warrant on Amos's cell on June 18, 2014. RP 117. The items were quickly gathered, placed into a plastic garbage bag, and Amos was given a return of service form. RP 120-22; Ex. 40. Mr. Blair received a phone call from Detective Haggerty, informing Mr. Blair there had been a search warrant executed on Amos's jail cell. RP 123, 272-73.

On July 10, 2014, Mr. Blair informed the trial court he could not file a CrR 3.6 motion due to lack of discovery and not having a copy of the warrant. Ex. 25 at 9-10. Mr. Blair further indicates he has been told the items seized are sitting in a box, untouched, awaiting an *in camera* review. *Id.* at 10. Finally, Mr. Blair informs the trial court that Amos has told Mr. Blair the missing documents contain a lot of case preparation for the 2013 case and are hindering Amos's preparation for trial. *Id.* Mr. Halstead explained they needed an *in camera* review of the materials, Mr. Blair requested return of all the materials, and Judge Hunt stated there needed to be a motion. *Id.* at 11.

On July 11, 2014, Mr. Blair began drafting a CrR 8.3 motion. RP 274, 311; CP 248 (1.67). Mr. Blair explained, at the time he was drafting the CrR 8.3 motion he did not know if the cell search would be an adequate reason for Amos to prevail because Mr. Blair did not yet know what had been taken from Amos's cell. RP 276, 324-26; CP 248 (FF 1.64). Mr. Blair

was not going to merely rely upon Amos's statements of what was contained in the material taken from his cell, Mr. Blair wanted to see more evidence prior to advancing the argument. RP 276, 313, 324-26; CP 248 (FF 1.64).

Mr. Blair explained it was his intention of filing one CrR 8.3 motion, containing both the discovery violation issue and the attorney-client privilege violation (if there was in fact one) on the eve of trial. RP 305, 312, 326-27; CP 248 (FF 1.67, 1.68). Mr. Blair needed something beyond Amos stating the violation had occurred to prevail in a CrR 8.3 motion and was waiting to see what documents and items were recovered. RP 326-27.

On July 18, 2014, Mr. Blair made it known to the trial court that Centralia Police Department had informed Mr. Blair he could not look at the items retrieved from Amos's cell without the prosecutor's office's permission. Ex. 26 at 30. Mr. Blair told the trial court that everything he had asked Amos to do in the last two months was in the hands of Centralia Police. *Id.* at 31-32 (FF 1.63).⁸

⁸ This statement during the July 18, 2014, hearing conflicts with FF 1.63 (3). The State concedes there is conflicting testimony regarding this FF, as there were portions of Mr. Blair's testimony during the evidentiary hearing that he stated he did not believe there would have been anything in Amos' cell regarding their case, absent legal research Amos continually did, which was of minimal value at best. *See* RP 270-71, 294-95, 297.

The *in camera* review was conducted on July 21, 2014. RP 130, 156-57. Judge Hunt went through the documents and items seized from Amos's cell, several hundred, setting aside items he deemed potentially privileged and giving the remaining material back to the Centralia Police detectives. RP 130-31, 161-62, 179-82. The documents retained by Judge Hunt were not given to the officers, but placed on Judge Hunt's desk. RP 131.

Next, at the July 24, 2014, hearing it was clear the parties were unaware whether the *in camera* proceedings had occurred. Ex. 27. Since, Judge Hunt testified he did not inform Mr. Blair, nor would he had allowed Mr. Blair to be present, this fact is not necessarily surprising. RP 186; CP 244 (1.46).

On July 30, 2014, the order was entered to return the materials seized from Amos's cell reviewed by Judge Hunt. Ex. 8. Mr. Halstead and Mr. Blair continuously worked on Amos's case for months. RP 275. After Amos's many court hearings in July which culminated in the hearing on July 30th, a plea offer was extended. RP 305. Even though Amos understood Mr. Blair had not yet received or reviewed the materials seized from Amos's cell, Amos accepted the plea offer. RP 277, 305; CP 247 (1.58). Amos understood he was giving up the ability to challenge the search of his cell by pleading guilty. RP 280; CP 247 (FF 1.59). Mr. Blair explained, if Amos

had decided to go forward and proceed to trial, Mr. Blair would have raised the attorney-client violation issue in the CrR 8.3 motion. *Id.*

Mr. Blair discussed the matter of the cell search at three hearings after the search warrant was executed. Mr. Blair, prior to July 18, 2014, contacted the Centralia Police Department in an attempt to look at the items seized during the cell search and was told he could not do so without permission from the prosecutor. Mr. Blair was not going to be able to have access to the documents until after the *in camera* review was complete, that much is clear, and it was not for Mr. Blair's lack of trying. Yet, according to Amos, Mr. Blair was deficient in his investigation of the matter.

Even though he did not have the documentation to support the motion, Mr. Blair started drafting a CrR 8.3 motion for Amos's case on July 11, 2014. Contrary to Amos's assertion here, and in the trial court evidentiary hearing, the seizure of the documents by the police does not guarantee there was a Sixth Amendment of Amos's right to counsel for violating his attorney-client privilege. Mr. Blair was diligently performing his duties in an attempt to forward to the trial court a motion that would be successful and warrant a dismissal for Amos. To prevail, the motion needed evidentiary support beyond Amos's word, as Mr. Blair understood the trial court was not merely going to take what could be considered self-serving

statements of a criminal defendant. This is a tactical and strategic decision, made by a competent attorney. RP 306, 313, 326; CP 248 (FF 1.68).

The only reason Mr. Blair discontinued the CrR 8.3 motion was because Amos pleaded guilty. RP 305. Mr. Blair candidly testified he did not know if a violation of attorney-client privilege could have been remedied, but also stated he knew that if there was a violation the standard was implied prejudice. RP 312, 324-26; CP 248 (FF 1.64). Mr. Blair had not finished preparing the motion because Amos chose to plead guilty and did not even allow Mr. Blair to review the documentation which would support the CrR 8.3 motion. RP 305, 326-27, 332.

Amos argues Mr. Blair was deficient for failing to investigate the nature of the materials taken, for being skeptical of Amos's statements, and Mr. Blair's deficiency is further proven by Mr. Blair's lack of awareness of the witness tampering case (2014 case) "filed at the same juncture as the cell search." Brief of Appellant 25-29. Amos mischaracterizes Mr. Blair's actions, the information available, and disregards his own choice to plead guilty.

Mr. Blair stated during the evidentiary hearing he did not believe the witness tampering case had anything to do with the cell search. RP 328. Mr. Blair explained that typically the information received in a probable cause statement, the basis for a charge, is received by the prosecutor's office the

previous day. RP 329. Mr. Blair further explained, in the 2014 witness tampering case, the information that formed the basis of the probable cause statement was an interview with Ms. Lantau and her attorney on June 17th, the day before the cell search. RP 329; Ex. 7; CP 246 (FF 1.49). This case occurred more than four years prior to the evidentiary hearing, therefore, many of the witnesses had to have their recollections refreshed and recalled the events to the best of their abilities. The correct characterization of the facts is that the cell search occurred **the day after** the State obtained the necessary information to charge Amos with the 2014 witness tampering charges. RP 88-89, 115, 215; Ex. 7. The search warrant was to obtain additional evidence to support the witness tampering charges. Ex. 4, 5.

An attorney is not deficient by utilizing a tactic, to have the documentation available for the trial court to review, when presenting a motion to the trial court arguing his client's attorney-client privilege had been violated. This is particularly important in a case such as Amos's where Amos has issues with his credibility in the courts. CP 240-41. There were still several weeks until trial, which was set to begin August 25, 2014. RP 438. Mr. Blair drafting a CrR 8.3 motion that contained two distinct allegations of governmental misconduct demanding dismissal of the

charges against his client is not deficient performance.⁹ Amos was not prejudiced by Mr. Blair not filing the attorney-client violation allegation immediately, that claim does not become stale. It was only because Amos chose to plead guilty the CrR 8.3 motion was not brought.

Amos demands reversal, comparing his case to *State v. Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010). Amos's case is distinguishable. In *Perrow*, the detective executed a valid search warrant on the defendant's home for a sex crime. *Perrow*, 156 Wn. App. at 326. The detective seized materials that had been prepared by the defendant at the request of the defendant's attorney in a civil matter related to the criminal investigation. *Id.* at 325-26. The detective was notified when he seized the materials that they were protected by attorney-client privilege. *Id.* at 326. The detective went through all the materials, read them, wrote a report in regard to all the seized documents and forwarded the report to the prosecutor's office. *Id.* The Court of Appeals found the detective's behavior an egregious violation of the attorney-client privilege and dismissal the only adequate remedy. *Id.* at 331.

Amos's case is distinguishable from *Perrow*, in a number of ways. First, Detective Haggerty seized the material without reading the potentially

⁹ Mr. Blair did state he believed he would have a higher likelihood at prevailing at his CrR 8.3 motion closer to the trial date, and the fact that he did not have the discovery was "the biggest thing for me." RP 276-77; CRP 248 (FF 1.66).

privileged communications that were seized. The search warrant explicitly allowed for the seizure of items notated as “legal mail” and there was adequate justification for the seizure of such items, as Amos was using this designation to get mail past monitoring systems and threaten and tamper with witnesses. RP 104-06; Ex. 4, 5. The officer had probable cause, got a search warrant, without speaking to the DPA assigned to the case, executed the search warrant, bagged up the evidence, sealed it in a box without reading the contents, and then had a judge do an *in camera* review of each item before reading the information contained within the writings collected from Amos’s cell. RP 118, 122, 124-27; Ex. 4, 5. Mr. Blair did not have the same cause of action that the attorney in *Perrow* had, a clear case of violation of Perrow’s attorney-client privilege. The facts of Amos’s case are distinct from *Perrow*, and this Court should distinguish the result as well.

Mr. Blair’s actions were not deficient, he was not ineffective, and therefore Amos’s plea and waiver of collateral attack was knowing, voluntary, and intelligently made upon the advice of counsel. Whether Amos decided wisely is not the question, as Amos clearly had other options for litigation, he simply chose to not avail himself to those options, perhaps out of fear of a third strike and spending the rest of his life in prison. Whatever the reason, Mr. Blair’s failure to file a CrR 8.3 motion was not out of deficiency, it was due to Amos pleading guilty prior to the motion

being finished. This Court should find Mr. Blair provided Amos with effective representation and affirm Amos's plea, waiver of collateral attack, and sentence.

B. ANY PREJUDICE INCURRED BY THE STATE'S INTRUSION INTO AMOS'S ATTORNEY-CLIENT PRIVILEGED COMMUNICATION WAS PROVEN BY THE STATE TO BE HARMLESS BEYOND A REASONABLE DOUBT.

Amos argues his attorney-client privilege was violated, the privileged material seized (and alleged by Amos, reviewed) by the State was voluminous, and the State failed to meet its burden to prove beyond a reasonable doubt that the prejudice Amos suffered was harmless. While not conceding Amos may raise the issue on collateral attack or that the State has violated Amos's Sixth Amendment rights, *arguendo*, the State has proven any intrusion and prejudice suffered was proven to be harmless beyond a reasonable doubt and Amos's convictions and sentence should be affirmed.

1. Standard Of Review.

This Court reviews mixed questions of law and fact *de novo*. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Alleged constitutional errors are also reviewed *de novo*. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482, (2013). This court reviews a trial court's determination of a

motion to dismiss pursuant to CrR 8.3 for an abuse of discretion. *State v. Garza*, 90 Wn. App. 291, 295, 994 P.2d 868 (2000).

2. A Defendant Has A Right To Communicate With Their Attorney Without Interference From The State, Including The Content Of Privileged Documentation.

A criminal defendant's right to counsel in a criminal prosecution is a constitutionally protected right. U.S. Const. amend VI; *State v. Cory*, 62 Wn.2d 371, 373, 382 P.2d 1019 (1963). A critical, and statutorily protected, portion of the right is that communication between a defendant and his attorney is privileged. RCW 5.60.060(2)(a). The necessity for a defendant to have confidence their communications with their attorney are confidential has been recognized by the Washington State Supreme Court since the 1960s. An attorney is not able to make a complete investigation of the law and facts unless they have their client's full and complete confidence. *Cory*, 62 Wn.2d 374 (internal quotations omitted). Without assurances the disclosures made are confidential, a client cannot have such confidence in their counsel. *Id.* It has been recognized the appropriate remedy for when the prosecution gains privileged information, thereby interfering with the defendant's right to private consultation with their attorney, is a dismissal. *Id.* at 377-78.

In *Cory*, the sheriff installed a microphone in the conference room where in custody defendants met with their attorneys. *Id.* at 372. The sheriff

not only listened to the conversations but also recorded them. *Id.* The Supreme Court determined this conduct denied Cory of his right to counsel as protected by the constitution and RCW 5.60.060(2). *Id.* at 377. The Court stated: “the shocking and unpardonable conduct of the sheriff’s officers, in eavesdropping upon the private consultations between the defendant and his attorney, thus depriving him of his right to effective counsel, vitiates the whole proceeding. “ *Id.* at 378. The Court then set aside the judgment and sentence and required the case to be dismissed. *Id.*

The conduct of a detective in *Fuentes* was similarly appalling and shocking, but the Supreme Court was tasked with determining if the State’s intrusion upon attorney-client conversations was per se prejudicial. *State v. Pena Fuentes*, 179 Wn.2d 808, 818-20, 318 P.3d 257 (2014). After trial had concluded, the detective in *Fuentes* listened to Pena Fuentes’ phone calls from the jail to investigate possible witness tampering. *Id.* at 816. The detective informed the prosecutor that in the process of listening to all of Pena Fuentes’ phone calls, the detective listened to six phone calls between Pena Fuentes and his attorney. *Id.* The prosecutor told the detective to not listen to any more calls, to not disclose the content of the phone calls to anyone, and requested the detective be immediately removed from the case. *Id.* at 817. The prosecutor submitted a declaration stating the detective did not disclose the content of the phone calls with the prosecutor. *Id.*

The Supreme Court noted that the “United States Supreme Court has expressly rejected a per se prejudice rule for eavesdropping.” *Id.* at 819, citing *Weatherford v. Bursey*, 429 U.S. 545, 557-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). It was reasoned that when the eavesdropper did not communicate the content of the conversation “and thereby create at least a realistic possibility of injury to the defendant or benefit to the State, there can be no Sixth Amendment violation.” *Id.* (internal quotations, brackets, and italics omitted). The Supreme Court, while condemning the egregious act of eavesdropping on attorney-client communications, held such violations are presumed prejudicial, but the presumption is rebuttable. *Fuentes*, 179 Wn.2d at 819. This allows for the State to prove the intrusion was harmless beyond a reasonable doubt. *Id.* at 820.

3. The State Proved Any Prejudice Suffered By The State’s Alleged Intrusion Into Amos’s Attorney-Client Privilege Was Harmless Beyond A Reasonable Doubt.

Amos asserts many of the documents taken from his cell were privileged, the State allowed the documents separated *in camera* by Judge Hunt to be lost, the State retained the remaining documents in its possession and refused to release them for a lengthy period of time, and the State did not prove the infringement was harmless beyond a reasonable doubt. Brief of Appellant 32-39. Amos further asserts what appears to be akin to a structural error analysis that infringement such as alleged here, a few pieces

of paper with notes regarding witnesses and some highlighted discovery materials, could never be subject to a harmless error analysis. Brief of Appellant 34-35. Amos's argument is nonsensical and contrary to the case law.

To determine if there has been a deprivation of Amos's Sixth Amendment right, and if a remedy should issue, the court employs the following inquiry: (1) Did a state actor participate in the alleged infringing conduct? (2) If so, did the state actor infringe on the defendant's Sixth Amendment right? (3) If so, did the State fail to overcome the presumption of prejudice by not proving the infringement harmless beyond a reasonable doubt? (4) If so, what is the appropriate remedy considering the totality of the circumstances, including the degree of nefariousness of the conduct by the state actors and the degree of prejudice to the defendant's right to a fair trial? *State v. Irby*, 3 Wn. App. 2d 247, 252-53, 415 P.3d 611 (2018). Employment of this test shows the State proved beyond a reasonable doubt that the inadvertent infringement upon Amos's attorney-client privileged communication was harmless beyond a reasonable doubt.

a. Not all of the material seized, pursuant to the lawful search warrant, from Amos's cell was privileged material.

The State has never denied that Detective Haggerty, a state actor in this case and a member of the prosecution team, seized material from

Amos's jail cell at the Lewis County Jail. Detective Haggerty seized the material, including legal mail and documents, pursuant to a lawfully executed search warrant. Ex. 4, 5. The search warrant specifically allowed for Detective Haggerty to seize "Any and all mail addressed as 'legal mail', including but not limited [to] letters sent by Amos or received by Amos. These letters are to be inspected to confirm the authenticity of whether or not Defense Attorney Don Blair was the actual sender/recipient." Ex. 5. The search warrant also authorized Detective Haggerty to seize all address books, letters drafted by Amos, stationary, witness names, addresses and phone numbers that may be listed on police reports or other documents. Ex. 5. All of the items bagged up in the garbage bag from Amos's cell could potentially fall into the items listed in the search warrant. Ex. 34, 35.

Amos claims many of the items contained in exhibits 34 and 35 constitute privileged information. Amos's application of privileged communication is overly broad and unworkable. Brief of Appellant 32-34. Amos would have this Court deem any police report in a defendant's possession a privileged document simply because they may use it in their defense at a later date. Amos even includes the confidential informant agreement between himself and the Lewis County Prosecutor as part of his privileged materials. *Id. citing* Ex. 35 at 36-43.

Attorney-client privilege is of statutory construction and it is not absolute. “An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” RCW 5.60.060(2). The privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997). It applies to communications and advice between an attorney and client and extends to documents that contain privileged communications. *Perrow*, 156 Wn. App. at 328.

Further, the discovery rule exempts from disclosure legal research, records, correspondence, reports, or memoranda, “to the extent that they contain the opinions, theories or conclusions of investigation or prosecuting agencies...” CrR 4.7(f)(1). The doctrine does extend to “material prepared by agents for the attorney as well as those prepared by the attorney himself.” *United States v. Nobles*, 422 U.S. 225, 238-39, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975), *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985).

Again, this doctrine is not absolute. Whether it applies depends on the type of material sought to be discovered and the adversary’s need for it. *State v. Pawlyk*, 115 Wn.2d 457, 476, 800 P.2d 338 (1990). Materials which

do not contain “opinions, theories, or conclusions” are not work product. *State v. Strandy*, 49 Wn. App. 537, 540, 745 P.2d 43 (1987), *review denied*, 109 Wn.2d 1027 (1988), *State v. Garcia*, 45 Wn. App. 132, 138, 724 P.2d 412 (1986).

Therefore, with the exception of the highlighted and handwritten material, the remaining documentation, well over a thousand pages, could not reasonably be considered privileged work product or privileged communication. Ex. 34, 35 (1.43). Even some of those papers are not work product, Amos testified he wrote the notes on the paper, then later, he would elaborate more and fashion something up that would assist his attorney. RP 368; CP 245 (FF 1.44).

The address book was not work product, it was valuable, lawfully obtained, evidence in a witness tampering case. Ex. 4, 5; CP 245 (FF 1.43). Amos’s not wishing the State to have access to his known associates does not make the address book work product. *Id.*

Similarly, the billing statement for a prior closed case is not privileged work product. CP 245 (FF 1.42). The fees charged by an attorney and the identity of an attorney’s client are not privileged information. *State v. Mendez*, 157 Wn. App. 565, 585, 238 P.3d 517 (2010). There is no privilege attached to an attorney’s billing records. *Mendez*, 157 Wn. App. at 585. The subject of the fees, such as the reason for the consultation are

subject to privilege. *Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 531, 688 P.2d 506 (1984). “There is, however, an important exception to this general rule which bars disclosure where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought.” *Seventh Elect Church in Israel*, 102 Wn.2d at 532 (internal quotations and citations omitted). In this matter, Amos had already completed the case where Mr. Lane had represented him, and the billing statement was of no consequence to the present case. Ex. 35 at 13-33, CP 245 (FF 1.42).

b. The State did not infringe upon Amos’s Sixth Amendment right, and therefore, did not violate his attorney-client privilege.

The inquiry now becomes did Detective Haggerty, or any state actor, infringe on Amos’s Sixth Amendment right? Detective Haggerty, the only state actor who had access to the items collected from Amos’s cell, apart from the evidence technician at the Centralia Police Department, did not independently review the items prior to the *in camera* review absent the collection of the items in the jail. “At Amos’s request Officer Haggerty looked at the header of the documents in an effort to determine whether they

clearly pertained to Amos's DOC lawsuit, or whether they contained an attorney's letterhead." CP 242.¹⁰

The items seized from Amos's cell were stored at the Centralia Police Department evidence division until the *in camera* review could be set up by Sergeant Shannon. RP 122-30, 155-57; Ex. 1, 2, (FF 1.48). Judge Hunt conducted an *in camera* review of the items seized from Amos's cell before anyone on the prosecution team reviewed the documents to protect Amos's attorney client privilege. RP 121, 124, 150, 169, 181-83, 214-17; CP 243-44 (FF 1.35, 1.37, 1.48). After an independent judicial officer, not a state actor, reviewed all of the material seized from Amos's cell, the judicial officer released approximately over 1,000 pages¹¹ of materials back to the police after removing material he deemed privileged or potentially privileged. RP 131, 182-83, 187-89; CP 243-44. These materials are contained within exhibits 34 and 35. RP 131.

Detective Haggerty, knowing he seized material that could be privileged and receiving advice to have the material viewed *in camera* prior to personally reviewing the documents, followed the advice and only viewed the materials returned to the police and deemed not privileged by a superior court judge. RP 123-25, 150, 153-54. While Detective Haggerty

¹⁰ FF 1.12 is verities on appeal, as it was not assigned error.

¹¹ Including both sides of documents.

uploaded some of the documents returned by Judge Hunt into the Spillman database system prior to Amos pleading guilty, none of the documents uploaded had any privileged communication. RP 479-80; Ex. 41; CP 244 (FF 1.35).¹² Detective Haggerty, who reviewed many of the documents did not see anything he understood to be privileged or work product. RP 132.

The State actors in this matter, i.e., the police officers at the Centralia Police Department, did everything they could to not infringe upon Amos's Sixth Amendment rights while investigating Amos for using the mail system at the jail to assist him in tampering and intimidating with witnesses for his upcoming trial. The state actors should not be held liable for failings of an independent judicial officer who returned arguably privileged documentation.

c. If the State infringed upon Amos's attorney-client relationship, any violation to that privilege was proven harmless beyond a reasonable doubt by the State.

If the State is held liable for the judge's faulty *in camera* review, the State proved any prejudice suffered from the infringement was harmless beyond a reasonable doubt. *Irby*, 3 Wn. App. 2d 253. Amos argues in accordance with *Cory* and *Granacki*, this Court must dismiss his case due

¹² Finding of Fact 1.35 has the incorrect date the documents were received by the prosecutor's office, they were in fact electronically received on 7/23/14 and uploaded into the system on 7/24/14.

to the State's conduct. Brief of Appellant 38-39, *citing Cory*, 62 Wn.2d 371; *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998). Amos appears to allege nefarious conduct on the part of Mr. Halstead, without evidence to support such an allegation. Brief of Appellant 36. Amos further claims misconduct on the part of the prosecutor's office that was not proven, and in fact, is contrary to the evidence elicited at the evidentiary hearing: claiming it is impossible to determine that certain materials were not reviewed by Centralia police, "nor their form or substance received and possessed by the prosecutor's office during the trial preparation phase, and then the plea negotiation stage when the State crafted its offers – indeed, the opposite appears to be true." Brief of Appellant 38-39; Ex. 41, 42; RP 252-53, 57-59, 477-82. Amos's claims are without merit, the State proved beyond a reasonable doubt that any prejudice suffered by the inadvertent continued possession of privileged documents was harmless beyond a reasonable doubt.

In determining the appropriate remedy, and in consideration of the possibility of harmless error, it is helpful to review the origin of the harsh remedy of dismissal of a case for the state violating the attorney client privilege. The Supreme Court in *Cory* relied upon the reasoning from other cases that used language such as, "the lawless activities of law enforcement officers," and "illegal schemes of the state itself." *Cory*, 62 Wn.2d at 378,

citing Roberts J., concurring in *Sorells v. United States*, 287 U.S. 435, 453 [sic],¹³ 153 S. Ct. 210, 77 L. Ed. 413 (1932), *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905 (1955). In contrast the United State Supreme Court discussed the lack of lawless, illegal conduct in *Weatherford* when it rejected the per se prejudice rule. *Weatherford*, 429 U.S 545.

Amos has never challenged the legitimacy or lawfulness of the search warrant or the cell search. Amos does not assign error to any of the findings of fact or conclusions of law regarding why Detective Haggerty obtained the search warrant or that it was a lawfully executed search warrant. CP 241, 249 (FF 1.6; CL 2.2, 2.3). Therefore, there has not been a challenge to legality of the breadth of the search warrant, which included the seizure of all Amos's legal mail, including letters to and from his attorney and all of the police reports. Ex. 5. The search was for a legitimate law enforcement purpose, to further investigate and collect more evidence of witness tampering.

In *Garza*, jail staff read inmates legal paperwork, including private communications with their attorneys, albeit due to searching for an attempted jailbreak. *State v. Garza*, at 293-94. The Court of Appeals sent the case back to the trial court because the trial court's findings and conclusions were not sufficient to support the trial court's decision to not

¹³ The correct page number is actually 455.

dismiss the case. *Id.* at 300-01. The Court of Appeals explained the trial court needed to answer with precision if the security concerns at the jail justified the intrusion into the attorney-client privileged communications of the defendants. *Id.* at 301. If the answer was no, then prejudice was presumed. *Id.*

Amos argues the documents seized in finding of fact 1.40 and concluded in finding of fact 1.45 to be privileged were sufficient alone, beyond his other arguments, to warrant dismissal, because the State has failed to prove beyond a reasonable doubt there was no possibility of prejudice to Amos. Brief of Appellant 34. As stated above, none of the material listed as claimed privilege in finding of fact 1.40 was transmitted to the prosecutor's office, as the only part of exhibits 34 and 35 transmitted or viewed by the prosecutor's office was contained in discovery package 11 (exhibit 41). The testimony of Mr. Halstead, Detective Haggerty, Ms. Kambich, and Ms. Kent all support that the prosecutor's office never received the material and Mr. Halstead never reviewed the material. RP 53-56, 250-54, 477-82, Ex. 1, 2 (FF 1.51).

The State cannot change that Judge Hunt improperly gave back to Detective Haggerty material that could be considered privileged. The State did not request the privileged material, and Detective Haggerty clearly did not understand he had privileged material. Detective Haggerty had no idea

some of the police reports seized from Amos's cell were privileged work product or somehow contained what could be considered trial strategy or trial tactics. RP 132.

Q. Did you review any documents pertaining to the 2013 case, the case that he was originally charged with organized crime and all the other - - there's numerous charges. In regards to that case, did you review any documents from his cell pertaining to, I guess, legal strategies?

A. No. My only recollection was that he had my police reports...

RP 132. Amos fails to explain how a detective, who thought he had done everything correctly by taking all of the material he had collected to a judge to have anything privileged removed, and then having no idea he currently possessed documents of such alleged importance to the defense, could be formulated a nefarious plot to convey this privileged information to the prosecution.

Detective Haggerty was not searching Amos's cell in an attempt to find privileged material or trial strategies, he was searching the cell to find evidence related to a witness tampering case. The only documents Detective Haggerty uploaded and work flowed to the prosecutor's office were contained in discovery package 11, exhibit 41, because Amos pleaded guilty, and therefore, Detective Haggerty stopped uploading the items from the cell search. RP 477-82; CP 247 (FF 1.52). Detective Haggerty did not communicate with the prosecutor's office about any of the information

contained in the exhibits, or documents, prior to uploading the information into the Spillman system. RP 250, 252-54; 477-82; CP 244 (FF 1.38). Mr. Halstead did not recall reviewing the documents from the cell search prior to Amos pleading guilty, and they had no impact on his negotiations with Mr. Blair on Amos's case. RP 226-27, 258 (FF 1.50).¹⁴

Amos's assertion the State somehow, "allowed the documents separated *in camera* by Judge Hunt to be lost," is without merit and has no basis in the record. Brief of Appellant 35. Judge Hunt did not notify Mr. Blair prior to the *in camera* review it was occurring and explained he would not have allowed Mr. Blair to be present during the review because the material was of an investigative nature at the time it was reviewed. RP 186. Judge Hunt also believed he personally handed to Mr. Blair the material Judge Hunt separated as privileged from the other documents. RP 183. While, Judge Hunt's recollection was clearly inaccurate as to the material being returned to Mr. Blair, it is indicative of how he treated the material, that it did not belong to the state and should not be in its possession. This is further evidenced by Detective Haggerty's testimony, who explained Judge Hunt placed the documents on his desk and never gave Detective Haggerty

¹⁴ The State asserts that the only documents received prior to the personal restraint petition from the cell search was exhibit 41, discovery package 11. The documents contained in exhibit 43 were documents created in July 2014. Therefore, this portion of finding of fact 1.50 and 1.36 are incorrect.

any instructions regarding getting the material back to Mr. Blair. RP 131, 164-65. Similarly, Mr. Halstead did not know what happened with the documents and did not know if Mr. Blair retrieved them. RP 218. This is because once Judge Hunt took the documents into his possession the State was no longer allowed access the them, the State did not “allow” the documents to become lost.

The State did not retain the documents for a lengthy period and refuse to release them. The documents were retained for approximately a little over a month while the State attempted to have the documents reviewed *in camera*. It is unclear why the *in camera* review took a month to set up, but Amos still had another month until his trial was to start after the *in camera* review occurred. There was still time for Amos and Mr. Blair to regain the materials and discuss any matters in regards to the documentation.

Finally, Amos has argued *Granacki* supports dismissal of his case. In *Granacki*, the detective stayed in the courtroom during a break in the trial, read the notepads on the defense table that included privileged communication between the defendant and his attorney, and then lied about his conduct to the trial court. *Granacki*, 90 Wn. App. 598, 600-01, 959 P.2d 667 (1998). The trial court dismissed Granacki’s case due to the detective’s misconduct. *Id.* at 601. The Court of Appeal, in its decision, noted that it

was within the trial court's discretion to dismiss Granacki's case or fashion some other lesser sanction, and had the court chosen a lesser sanction it would not have been an abuse of the trial court's discretion. *Granacki*, 90 Wn. App. at 604.

Amos's arguments urging this Court to dismiss this case due to the State's alleged invasive intrusion upon his privileged attorney client privilege are analogous to a CrR 8.3 motion. As are the trial court's findings and conclusions from the hearing on the merits of the personal restraint petition regarding these claims. CP 240-50. Therefore, this court reviews the trial court's rulings under an abuse of discretion standard. RAP 16.14(b); *Garza*, 90 Wn. App. at 295. The trial court did not abuse its discretion when it determined the inadvertent retention of privileged material was not a violation of Amos's attorney-client privilege. Further, the trial court did not abuse its discretion when it found, in the alternative, if there was a violation, that any violation was harmless beyond a reasonable doubt. CP 249. The trial court acted within its discretion to dismiss Amos's personal restraint petition. *Granacki*, 90 Wn. App. at 600-01. This Court should affirm the trial court's dismissal of Amos's personal restraint petition.

IV. CONCLUSION

Amos did not receive ineffective assistance from Mr. Blair. Mr. Blair investigated and began preparing a motion to dismiss, only to be halted

by Amos's decision to plead guilty. This is not deficient performance from an attorney. Therefore, Amos's waiver of collateral attack is valid. The State did not with disregard to the law, purposefully intrude upon Amos's privileged communications with his attorney. The trial court correctly decided the personal restraint petition, finding no violation, and finding if there was a violation it was harmless beyond a reasonable doubt. This Court should affirm the trial court and the dismissal of Amos's personal restraint petition.

RESPECTFULLY submitted this 13th day of November, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

November 13, 2019 - 4:38 PM

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