NO. 69453-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

RESPONDENT'S ANSWER TO AMICUS CURIAE WASHINGTON DEFENDER ASSOCIATION

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TABLE OF CONTENTS

Page

A. ISSUE RAISED BY AMICUS CURIAE 1

B. ANSWER TO AMICUS CURIAE 1

C. CONCLUSION 7

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Descamps v. United States, ___ U.S. ___,
133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) 7

Hill v. Lockhart, 474 U.S. 52,
106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) 3

Lafler v. Cooper, ___ U.S. ___,
132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) 2, 3, 4

Padilla v. Kentucky, 559 U.S. 356,
130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) 3, 6, 7

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2042, 80 L. Ed. 2d 674 (1984) 2, 3, 4, 5

Washington State:

State v. Sandoval, 171 Wn.2d 163,
249 P.3d 1015 (2011) 6

Rules and Regulations

Washington State:

CrR 7.8 .... 4, 5, 7

A. ISSUE RAISED BY AMICUS CURIAE

Did trial counsel provide deficient representation by not availing himself of local informational resources regarding immigration law, and can Bharadwaj demonstrate actual prejudice as a result?

B. ANSWER TO AMICUS CURIAE

The Washington Defender Association (WDA) argues that trial counsel was ineffective for not consulting local resources to attempt to ascertain the potential immigration consequences of various crimes, including assault in the third degree with sexual motivation. Accordingly, WDA argues that Bharadwaj's convictions should be reversed and the State should be forced to "reoffer" a plea to assault in the third degree because trial counsel did not "accurately advise his client and effectively conduct plea negotiations to facilitate a plea to Assault third." Amicus Brief at 13. WDA further contends that, contrary to what was expressly represented to the trial court, sanitizing the record to omit references to the victim's age was not required to avoid deportation, and thus, trial counsel's "failure to communicate an

offer that avoids deportation" was both deficient and prejudicial. Amicus Brief at 17.

These arguments are unavailing, primarily for one inescapable reason: the State did not offer a plea agreement for assault in the third degree with sexual motivation in the first instance. Therefore, WDA's arguments are based on a faulty factual premise. In the absence of an offer from the State, Bharadwaj cannot meet his burden of showing actual prejudice as required under Strickland.[1] Secondarily, as WDA's brief itself demonstrates, the relevant law was unsettled at the time this case was litigated. Accordingly, in the absence of "truly clear" law regarding immigration consequences, WDA's contention that trial counsel was ineffective is also without merit.

As was already discussed in the Brief of Respondent, a criminal defendant is entitled to effective representation during plea negotiations. Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012). And, as discussed at length in WDA's brief, effective plea negotiations may include providing specific advice regarding the immigration consequences of a conviction if those

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[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2042, 80 L. Ed. 2d 674 (1984).

consequences are clear. Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). But as Lafler holds, in order to establish prejudice under the Strickland test for ineffective assistance of counsel in the plea bargaining context, a defendant must show: 1) that a plea offer was made in the first instance; 2) that the offer was rejected based on defense counsel's deficient advice; and 3) that but for the deficient advice, the offer would have been accepted by the defendant and ratified by the court:

> In contrast to Hill,[2] here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 132 S. Ct. at 1384.

In other words, regardless of whether counsel's advice was deficient on a question of law, a condition precedent for showing

[2] Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (holding that in order to establish prejudice under Strickland, a defendant must establish that a plea agreement would have been rejected and the defendant would have gone to trial but for counsel's deficient advice).

ineffective assistance of counsel in plea bargaining is that *a plea offer was actually made*. That condition precedent is absent in this case.

The record establishes that the State never tendered an offer for Bharadwaj to plead guilty to assault in the third degree with sexual motivation. Instead, the record shows that the trial prosecutor was willing to "float a possibility" of such a plea, but the victim was not receptive to the notion that Bharadwaj could plead guilty to a charge that did not acknowledge their age difference and that would allow Bharadwaj to avoid sex offender registration. CP 1365. Moreover, under questioning by the trial court, Bharadwaj's attorney during the CrR 7.8 motion agreed that "[n]o formal offer" of a plea to third-degree assault was ever made by the State. RP (1/28/13) 18-19. Accordingly, the trial court correctly found based on the record that Bharadwaj "didn't have a firm offer for assault in the third degree and there was nothing for Mr. Bharadwaj to accept." RP (1/28/13) 32.

To sum up, in order to demonstrate prejudice in accordance with Strickland and Lafler, Bharadwaj must show that the State made an offer, that he rejected that offer based on defense counsel's deficient advice, and that he otherwise would have

accepted the offer and it would have been ratified by the court. In the absence of an offer, this Court cannot speculate about what might have occurred if an offer had been made. Speculation does not satisfy the Strickland test, and thus, WDA's argument is without merit.

Nonetheless, WDA further argues that the trial court was mistaken that references to the victim's age had to be redacted or omitted from the record in order for Bharadwaj to avoid deportation. *See* Amicus Brief at 12-16. This directly contradicts Bharadwaj's experienced defense counsel for the CrR 7.8 motion, who admitted that "every immigration lawyer I know would advise against" having references to the victim's age in the plea statement and in the judgment and sentence, and stated that "it would be inadvisable to agree to have the certification for determination of probable cause attached to the plea." RP (1/28/13) 10-11. It also contradicts the information that the trial prosecutor obtained from one of the authors of WDA's brief. *See* CP 1365 (trial prosecutor consulted Ms. Benson, and was told that "all references to the victim's age would have to be redacted from the record of plea and sentencing"). But even taking WDA's argument in this regard at

face value, it is self-defeating because WDA admits that the applicable law was not clear at the time this case was litigated.

Padilla stands for the proposition that when the immigration consequences of a conviction are clear, defense counsel's advice must be clear as well. Padilla, 559 U.S. at 369. But when the deportation consequences of a guilty plea are unclear or uncertain, a defense attorney need only advise the defendant that criminal charges may carry adverse immigration consequences. Id. Put another way, "[i]f the applicable immigration law is 'truly clear' that an offense is deportable," counsel must correctly advise the defendant of those consequences, but "[i]f 'the law is not succinct and straightforward,' counsel must provide only a general warning[.]" State v. Sandoval, 171 Wn.2d 163, 170, 249 P.3d 1015 (2011). The law was not clear in this case, and WDA's argument fails for this reason as well.

Although WDA argues that a plea to third-degree assault with sexual motivation need not have been "sanitized" to avoid deportation, WDA concedes that "*the best practice*" would have been to eliminate "reference to the victim's minor status in the charging document, plea or judgment & sentence." Amicus Brief at 12 (emphasis supplied). WDA also states that when this case was

pending, there was ongoing appellate litigation regarding "the legal framework for analyzing whether a state conviction triggers a deportation ground," and that the correct framework was not clearly established until the United States Supreme Court decided Descamps v. United States, ___ U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). Amicus Brief at 13-14. Descamps was decided on June 20, 2013 – 11 months after Bharadwaj's trial began, and six months after the CrR 7.8 motion was litigated. In other words, WDA concedes that the law was not "truly clear" when this case was litigated, and thus, this argument fails under Padilla.

In sum, this Court should not reverse Bharadwaj's convictions and order the State to offer a plea bargain that was not offered in the first place based on trial counsel's failure to obtain information about immigration law that was unclear. WDA's arguments should be rejected.

C. CONCLUSION

For the reasons stated above, and for the reasons stated in the Brief of Respondent, this Court should affirm Bharadwaj's convictions for two counts of child molestation in the second degree

and one count of communicating with a minor for immoral purposes.

DATED this 8th day of July, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: ______________________
ANDREA R. VITALICH, WSBA #25535
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Answer to Amicus Curiae Brief, in STATE V. VINAY BHARADWAJ, Cause No. 69453-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

07-08-14

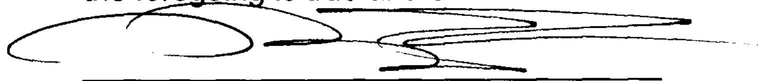
Name
Done in Seattle, Washington

Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Enoka Heart, Ann Benson and Travis Stearns, attorneys for amicus curiae Washington Defender Association, at Washington Defender Association, 110 Prefontaine Place S., Suite 610, Seattle, WA 98104, containing a copy of the Answer to Amicus Curiae Brief, in STATE V. VINAY BHARADWAJ, Cause No. 69453-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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