NO. 69453-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINAY BHARADWAJ,

Appellant.

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

The Honorable Richard D. Eadie, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant his constitutional right to representation when it refused to appoint conflict-free counsel to handle a motion for new trial, effectively leaving appellant without the assistance of counsel.

2. The trial court erred when it considered and denied appellant's motion for new trial on the merits where appellant was without conflict-free counsel to prepare and argue the motion.

3. The trial court erred when it denied appellant's motion to reconsider based on the failure to appoint new counsel.

4. The trial court erred when it denied appellant's motion to vacate judgment under CrR 7.8 based on ineffective assistance of trial counsel.

5. The trial court erred when it found, during its oral decision denying the CrR 7.8 motion, that it was not clear appellant would have accepted an offer to plead guilty to Assault 3 without an assurance it would avoid deportation and the State would not have been willing to "sanitize" an assault conviction to the degree necessary to avoid deportation.

Issues Pertaining to Assignments of Error

1. Every criminal defendant has the right to legal representation on a motion for new trial. Where the defendant claims ineffective assistance of trial counsel, the trial court must appoint conflict-free counsel to handle the motion. Did the Superior Court deny appellant this right when it denied his counsel's motion to withdraw and refused to appoint conflict-free counsel?

2. The trial judge was informed of the conflict, and appellant's desire to add additional claims to the motion for new trial (including ineffective assistance claims), prior to a ruling on the motion. Did the trial court err when it nonetheless considered and denied the motion for new trial on its merits?

3. Did the trial court err when it denied a motion to reconsider its refusal to appoint new counsel to handle the motion for new trial?

4. Following sentencing, appellant filed a CrR 7.8 motion for relief from judgment, arguing that his trial attorneys were ineffective in their handling of plea negotiations and by giving unreasonable and misleading advice concerning appellant's chances at trial. Did the trial court err when it denied this motion on untenable grounds and for untenable reasons?

5. The record disproves key findings the trial judge made in denying the CrR 7.8 motion. Are these findings erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged appellant Vinay Bharadwaj with three counts of Child Molestation in the Second Degree and one count of Communication with a Minor for Immoral Purposes. CP 484-486. Bharadwaj, who has degrees in engineering and formerly worked as a Microsoft software designer, hired attorney John Henry Browne to defend him. 3RP 1; 9RP 98-100.

The parties negotiated a plea deal. CP 1211-1216, 1232-1242. A deal was never consummated, however, and – on Browne's advice – Bharadwaj proceeded to trial, waived his right to a jury, and agreed the Honorable Richard Eadie could decide the case. CP 487; 4RP[1] 2-13; CP 1215-1216. Judge Eadie found Bharadwaj guilty as charged. 12RP 10-11; CP 1174-1178.

Browne filed a motion for new trial on Bharadwaj's behalf

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[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 1/6/11; 2RP – 2/7/11; 3RP – 9/1/11; 4RP – 7/30/12; 5RP – 7/31/12; 6RP – 8/1/12; 7RP – 8/6/12; 8RP – 8/7/12; 9RP – 8/8/12; 10RP -- 8/9/12; 11RP – 8/13/12; 12RP – 8/14/12; 13RP – 9/21/12; 14RP – 1/28/13.

supported by multiple declarations and documentary evidence supporting Bharadwaj's trial defenses. CP 488-991. By the time the motion was set for consideration at sentencing, however, Bharadwaj had been in touch with attorney David Zuckerman and was alleging Browne had been deficient in his representation. Consequently, Browne moved to withdraw, and Bharadwaj requested the appointment of new counsel and a continuance so that new counsel could supplement the motion for new trial with additional claims, including claims against Browne. 13RP 3-6, 8-11, 14-15.

Judge Eadie believed he could solve the conflict by simply dispensing with oral argument on the motion for new trial (thereby avoiding Browne acting as an advocate for Bharadwaj at the hearing). 13RP 15. He denied the motion for new trial based solely on the written materials Browne had prepared. 13RP 15-19. He then sentenced Bharadwaj to 57 months and, only then, permitted Browne to withdraw. 13RP 31, 34-35.

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

1189.

Zuckerman subsequently filed a motion for relief from judgment under CrR 7.8, arguing Browne had been ineffective in his handling of plea negotiations. As discussed in far greater detail below, the motion alleged Browne had given Bharadwaj incomplete and inaccurate advice and information regarding the immigration consequences of certain convictions discussed during plea negotiations and Browne had given unreasonable and misleading advice regarding Bharadwaj's chances of success at trial. CP 1190-1331. The motion was denied. CP 1342.

Bharadwaj timely appealed. CP 1186-1187, 1343-1349.

2. Substantive Facts

Vinay Bharadwaj was born and raised in India. 9RP 97-98. After obtaining a Bachelor's degree in electrical engineering, he moved to the United States and obtained a Master's degree in electrical and computer engineering from Rice University. 9RP 98-99. In 2002, Microsoft hired Bharadwaj as a software designer, prompting his move to the Seattle area. 9RP 100.

In March 2005, Bharadwaj had a life altering experience. He attended a talk, at the University of Washington, by a young and

dynamic Swami named Nithyananda (hereinafter "Swami").[2] 9RP 101, 105-106. Headquartered in India, the Swami conducts meditation and yoga programs in the United States sponsored by his Life Bliss Foundation. 6RP 63-66, 165-168; 9RP 112-113. The foundation also makes money from the sale of books and CDs. 9RP 18-19. The Swami seeks and obtains the devotion of his followers, who often wear a necklace containing his image. Followers sometimes leave professional jobs to serve without compensation and follow the Swami's dictates on where they may live and who they may date. 5RP 84-85; 6RP 90-93, 166; 9RP 46-49, 84, 105-106, 123, 133.

Bharadwaj began attending other programs presented by the Swami in Washington and California. 9RP 107-108. In May 2005, during a program in Northern California, the Swami invited Bharadwaj to a private room and asked him to press his feet. Any physical contact with a Swami is seen as a blessing, and Bharadwaj complied. 9RP 108-111. The Swami began discussing sexual energy and eventually kissed Bharadwaj on his neck and face. 9RP

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[2] "Swami" means "master or lord" and is "used as a form of respectful address to a Hindu religious teacher or monk." Webster's Third New Int'l Dictionary 2306 (1993).

111-112.

Later this same month, Bharadwaj traveled to India and visited the Ashram, the center of the Swami's organization. 9RP 112-113. In another private meeting, the Swami told Bharadwaj that he was looking out for his best interests and was incapable of doing wrong even if Bharadwaj did not like what was happening. He began to kiss Bharadwaj again and fondled his genitals. Although Bharadwaj is heterosexual, at the Swami's direction, Bharadwaj performed oral sex on the Swami. 9RP 114-115.

In the several years that followed, Bharadwaj continued to have sexual contact with the Swami at meetings throughout the United States and India based on the Swami's assurances these encounters would lead to Bharadwaj's enlightenment. 9RP 118-121, 124-126, 128-133. Eventually, the Swami required abstinence from Bharadwaj with the exception of sex with the Swami himself. 9RP 128. The Swami also directed Bharadwaj to end his relationship with a woman whom he had hoped to marry. He obeyed. 9RP 105-106, 123.

Bharadwaj was promoted within the organization. He was directed to coordinate and teach programs in Vancouver, B.C. 9RP 117. He was ordained an "Ashram member" at the foundation's U.S.

headquarters in Los Angeles and later ascended to "level two training monk." 9RP 119-120, 130. Eventually, he was given a leading role in the establishment and operation of a Redmond temple, which opened in February 2008. 5RP 30-32; 6RP 17, 146; 7RP 65-66; 9RP 23-24, 131-132, 165. Later that year, the Swami directed Bharadwaj to leave his job at Microsoft and work for the foundation without compensation. Again, Bharadwaj complied. 9RP 133.

Eventually, Bharadwaj's fondness for, and devotion to, the Swami waned. The Swami last attempted sexual contact with Bharadwaj during a March 2009 meeting in Toronto, but Bharadwaj was able to avoid it. 9RP 143-144; 10RP 5. At this same meeting, Bharadwaj confronted the Swami regarding administrative concerns and issues other members had raised about the foundation. 9RP 144.

In April 2009, the Swami removed Bharadwaj from his post in Redmond and ordered him to Los Angeles. 9RP 146-147. In May 2009, the Swami and his second in command, Gopal Reddy – who coordinates the foundation's U.S. activities – presented Bharadwaj with a non-disclosure agreement concerning sexual activities with the Swami, but Bharadwaj refused to sign. 9RP 122, 148-149.

From late May 2009 to late July 2009, Bharadwaj was in India, where he had additional unpleasant interactions with the Swami. 9RP 150. Moreover, the foundation made a second attempt to convince Bharadwaj to sign a non-disclosure agreement. This time, Prasad Malladi, a priest at the Redmond temple, presented the agreement. 7RP 66; 9RP 151.

Bharadwaj knew the Malladi family well. Prasad's wife – Sarita Malladi – helped establish the Redmond temple and was a frequent volunteer. 5RP 27-30. The Malladi's thirteen-year-old daughter, S.M., also was active at the temple and, at the Malladi's request, Bharadwaj had served as her tutor and helped her with homework. 5RP 29-30, 33-34; 8RP 49-50. The Malladi family also has an older son, named after the Swami, who spent considerable time living at the Ashram. 5RP 26, 86; 8RP 29-33. Despite Prasad Malladi's urging, however, Bharadwaj again refused to sign a non-disclosure agreement. 9RP 151.

By July 2009, Bharadwaj had shared his concerns about the Swami with other foundation members, concluded the foundation was a cult, and decided to flee. 9RP 151, 154. He made no secret about the sexual abuse he had endured, even discussing the matter with the Swami's personal secretary. 9RP 163.

On August 2, 2009, Bharadwaj received an e-mail from S.M. letting him know that Gopal Reddy (the Swami's second in command) was threatening her and saying terrible things about Bharadwaj to her and the Malladi family. She indicated she was confused. 9RP 157.

On November 9, 2009, Reddy sent a threatening e-mail to Bharadwaj informing him that a minor had signed a letter regarding him. Reddy did not, however, provide details of the letter at that time. 9RP 159-160. In the letter, written by S.M. on November 8 and notarized at a foundation event in Los Angeles, S.M. claimed that she and Bharadwaj had been secretly communicating with one another and that Bharadwaj had encouraged her not to tell her parents. 6RP 55-56, 77-79; 7RP 81-84. S.M. did not yet allege any sexual improprieties. 6RP 56.

In March 2010, a sex video featuring the Swami and an Indian actress went public. 6RP 163. Moreover, the Swami was jailed on criminal charges filed by Indian authorities. 9RP 163-164. Bharadwaj was contacted by the Indian equivalent of the FBI and agreed to testify against the Swami. 9RP 164. Bharadwaj's life was about to change forever.

On June 2, 2010, the Malladi family obtained a temporary

restraining order prohibiting Bharadwaj from having contact with their daughter, S.M. 5RP 65; 7RP 92-93; 9RP 164-165. Bharadwaj was served with the order several days later. 5RP 109-110; 9RP 165. At a June 15 hearing to consider a permanent restraining order, the judge heard from the Malladi family and denied their request. 5RP 74-75; 7RP 93; 9RP 165.

Later that day, S.M. made her first allegations of sexual misconduct against Bharadwaj, accusing him of improprieties in an 8-page letter to her parents. 5RP 77; 6RP 77-81; 7RP 95-96. The family eventually contacted Redmond Police, who contacted the King County Prosecutor's Office. 5RP 79-80; 6RP 107-108. Charges were filed in November 2010. CP 1-6. Bharadwaj had no prior criminal history and was permitted to remain out of custody. 1RP 2; CP 3.

King County Senior Deputy Prosecuting Attorney Sean O'Donnell was assigned to the case and interviewed S.M. on February 10, 2011. 7RP 32-35. S.M.'s loyalty to the Swami was apparent; it was clear to O'Donnell that the Swami was a major influence in S.M.'s life. 7RP 41. She arrived at the interview wearing a necklace containing the Swami's photograph. 7RP 36-37. She related how Bharadwaj had told her the Swami was using his power

to do bad things, which made her doubt Bharadwaj. 7RP 37-39. S.M. said the Swami was "like a mother" to her, the Swami would do whatever was good for her, and, notably, that she would even lie for the Swami, although she added that he had never asked her to lie and she was not lying for him. 7RP 41-42, 49-50. At one point, however, S.M. also told O'Donnell she would do anything to stop Bharadwaj from saying bad things about the Swami. 7RP 44.

Subsequently, at trial, S.M. accused Bharadwaj of repeatedly molesting her from late November 2008 to March 2009. 6RP 17-48. According to S.M., in the summer of 2008, Bharadwaj had begun showing her special attention, which included prolonged hugs and handholding. 6RP 16-17. In mid-November 2008, while attending a temple function in Los Angeles, Bharadwaj met with her in private, questioned her about her relationship with a boy, and hugged and kissed her. 6RP 17-20. Thereafter, Bharadwaj began coming by her home when her parents were not there, calling her late at night, and encouraging her to call him. 6RP 20, 23-30. It was during one of these visits that Bharadwaj kissed her on the lips for the first time. 6RP 30.

According to S.M., the relationship became sexual at the end of November 2008. S.M.'s grandmother was ill and being treated at

Overlake Hospital. 6RP 30-32. Bharadwaj visited the hospital to conduct a healing meditation. 6RP 32. Thereafter, S.M. did not want to stay at the hospital, so her father permitted her to go with Bharadwaj to the temple. 6RP 32-33. They left around 7:00 p.m., but Bharadwaj took her to his apartment instead, where they kissed and Bharadwaj touched her breasts. 6RP 33-36. S.M. testified that after one to two hours, they drove to the temple. When asked where they had been, S.M. said they had gone to Jamba Juice. 5RP 50-51; 6RP 36-37, 145.

According to S.M., in the months that followed, Bharadwaj would take her to his apartment or the two would go to Bharadwaj's car, where they would kiss, he would touch her breasts, and/or he would get on top of her while thrusting his penis against her through clothing. 6RP 40-48. S.M. claimed that between the first sexual contact in late November 2008 and the last sexual contact in March 2009, there were seven incidents at Bharadwaj's apartment and seven or eight more in his car. 6RP 47-48.

In an attempt to bolster S.M.'s version of events, the prosecution called Sarita Malladi, Prasad Mallädi, and Kavita Gaddam to testify.

Mrs. Malladi testified she and others had been concerned

about her daughter's frequent phone communications with Bharadwaj. 5RP 36-47. According to Mrs. Malladi, she told Bharadwaj to stop calling S.M. after 10:00 p.m., but he continued to do so. 5RP 47-49. She testified about the evening in which Bharadwaj left Overlake with S.M. and did not show up at the temple until hours later; an occasion at the temple where Bharadwaj said he was measuring S.M.'s height on the wall, but she felt Bharadwaj was inappropriately physically close to her daughter; and another time when she saw Bharadwaj being playful with S.M.'s feet. 5RP 49-55. Mrs. Malladi claimed that she once complained to Gopal Reddy about Bharadwaj, but the contact with her daughter continued. 5RP 56-59, 103.

Both Mr. and Mrs. Malladi testified that, in January 2010, the family began getting frequent anonymous telephone calls. Although Bharadwaj had left Seattle for California in early 2009, they attributed the calls to him. 5RP 63; 7RP 84-85, 91-92. In June 2010, based primarily on the anonymous calls, the family obtained the temporary restraining order against Bharadwaj. 5RP 65, 71, 120; 8RP 67-68. She and her husband heard nothing about sexual abuse, however, until S.M. made her claims after denial of the permanent restraining order. 5RP 74-78; 7RP 93-97.

Kavita Gaddam, a temple priest who lived with the Malladi family for more than two years and took over Bharadwaj's role at the Redmond Temple upon his departure, testified she often saw Bharadwaj behave inappropriately with S.M. 6RP 148-162, 174. In addition to repeating some of Mrs. Malladi's claims about inappropriate contact and phone calls, she testified that Bharadwaj and S.M. were often alone together at the temple, and S.M. would blush and giggle around him. 6RP 148-162. Like the other prosecution witnesses, Gaddam's continued support for the Swami was apparent. She also wore jewelry containing his picture, she had helped edit a book about him, and she claimed the sex video showing him with an actress was a digitally altered fraud. 6RP 166-171.

The prosecution also presented phone records for Bharadwaj's and S.M.'s cell phones. 6RP 110-111. These records showed frequent contacts between the two from November 2008 to May 2009, sometimes late at night, with a majority of the calls placed by S.M. 6RP 117-120, 136.

The defense called several witnesses in support of its claim that S.M.'s false allegations were merely the product of the foundation's attempts to silence Bharadwaj and prevent his

testimony against the Swami in India.

Keshan Reddy, an Indian real estate developer formerly involved with the foundation, testified to a conversation he observed in December 2009 involving the Swami, Mrs. Malladi, and S.M. 8RP 86-87. Gopal Reddy also was present. 8RP 89. Keshan Reddy heard the Swami say to S.M., "no, do not think that you're filing a false complaint against Vinay. The cosmic rule is you are fighting negativity by supporting an enlightened master." 8RP 88. The Swami continued, "you are the chosen one. You will be blessed for eternity . . . be blissful, and coordinate back that will coordinate with you." 8RP 89.

Rhonda Rose, also a former foundation member, testified that while at the Los Angeles conference in November 2009 (where S.M. wrote her first letter alleging inappropriate contact with Bharadwaj), she observed Mr. Malladi and Gopal Reddy enter the Swami's chambers for a meeting that lasted a couple of hours. 9RP 45-53, 56-57. During this meeting, another member who served as the temple notary was frantically looking for his notary stamp before walking back to where the meeting was occurring. 9RP 53-54, 57.

Regarding late night phone calls between members, Rose testified that such calls and meetings were routine when conducting

foundation business and included teens, who were highly active in foundation activities. 9RP 54. Another former member, Madeline Oliver, testified conference calls were commonly made late at night because everyone was busy during the day with other obligations. 9RP 28-30. Moreover, because everyone went to bed so late, it was not uncommon to call other temple members late at night. 9RP 32. Foundation member Varaprasad Ballingham agreed. He testified that foundation business typically was conducted in the evenings, sometimes as late as 2:00 a.m., partly because it involved calls to India. 9RP 82-83. According to Ballingham, S.M. was active in temple activities in 2008 and 2009, but he never saw any inappropriate behavior between Bharadwaj and S.M. 9RP 83, 89-90.

Bharadwaj took the stand in his own defense. 9RP 96. He detailed his history with the Swami – his initial exposure to the foundation, the Swami's sexual abuse, his ascendancy in the organization, and his ultimate decision to flee and become a witness for the Indian government in its prosecution of the Swami. 9RP 101-164.

Bharadwaj denied any improprieties with S.M. He agreed to tutor and mentor S.M. because both her parents asked him to help

her with schoolwork and provide career advice. 9RP 140-141. Nothing untoward happened during the two events Mrs. Malladi focused on. The evening he drove S.M. from Overlake to the temple, he did so at Mr. Malladi's request. They left the hospital around 7:15 p.m., stopped at Jamba Juice, and went straight to the temple, arriving around 8:00 p.m. 9RP 134-140. And regarding the time Bharadwaj measured S.M.'s height, children in the temple were having a competition and Bharadwaj simply added S.M.'s height to other measurements on the wall. The room was neither private nor locked, and no one complained at the time. 9RP 141-143.

Bharadwaj also addressed the phone calls with S.M. Consistent with the other former foundation members, he testified that late night and early morning phone calls were the norm. 9RP 169-170. In 2008 and 2009, S.M. had many duties at the temple and worked on several projects with Bharadwaj's assistance. 9RP 170-171. Although there were a significant number of calls made to the Malladi family (including S.M.), they accounted for a relatively small percentage of the total calls Bharadwaj made during the relevant period and the total did not differ significantly from the number of calls made to some other temple members. 9RP 178-182. Moreover, phone records revealed that many of the calls

identified by the prosecution as between Bharadwaj and S.M. were for "0" minutes and, according to the defense, many additional calls were improperly identified as between Bharadwaj and S.M., thereby artificially inflating the prosecution's numbers. 9RP 182-187.

The detective assigned to investigate S.M.'s allegations did not speak with Bharadwaj prior to charges being filed against him. 9RP 168-169. Bharadwaj did not learn the details of S.M.'s allegations until after he was taken into custody in Los Angeles in November 2010. 9RP 168.

C. ARGUMENT

1. THE COURT ERRED WHEN IT DENIED BHARADWAJ'S REQUEST FOR APPOINTMENT OF CONFLICT-FREE COUNSEL TO REPRESENT HIM ON THE MOTION FOR NEW TRIAL.

The Sixth Amendment and article 1, § 22 of the Washington Constitution guarantee criminal defendants the right to representation at all critical stages of a criminal prosecution. State ex rel. Juckett v. Evergreen Dist. Ct., 100 Wn.2d 824, 828, 675 P.2d 599 (1984). A criminal defendant is merely considered an "accused person" – and therefore entitled to this right – until formal judgment and sentence have been entered. McClintock v. Rhay, 52 Wn.2d 615, 616, 328 P.2d 369 (1958). Thus, there is a right to counsel

through sentencing. State v. Robinson, 153 Wn.2d 689, 698 n.7, 107 P.3d 90 (2005); State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

The constitutional right to counsel "includes the right to the assistance of an attorney who is free from any conflict of interest in the case." State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003) (citing Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000)). To demonstrate a violation of this right, a defendant need merely show his attorney had a conflict of interest that adversely affected his performance; the defendant "need not demonstrate an effect on the outcome or that the verdict itself is unreliable." Dhaliwal, 150 Wn.2d at 570 and n.7 (citing Mickens v. Taylor, 535 U.S. 162, 166, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)).

Whether new counsel should have been appointed to represent the defendant on a motion for new trial involving allegations of ineffective assistance of counsel is reviewed for an abuse of discretion. State v. Young, 62 Wn. App. 895, 908, 802 P.2d 829 (1991). The necessity of appointing new counsel is more

likely, however, where the defendant's allegations are based on actions not already in the record. Id.

Moreover, "Whether the circumstances demonstrate a conflict of interest under ethical rules is a question of law, which is reviewed de novo." State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783, review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008). While review for an abuse of discretion is generally deferential, review for misapplication of the law is not. State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998), review denied, 137 Wn.2d 1016, 978 P.2d 1099 (1999). Misapplication of the law is an abuse of discretion. Gildon v. Simon Property Group, Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

a. Browne Had A Conflict That Adversely Affected His Performance.

By the time Judge Eadie and the parties convened for argument on Bharadwaj's motion for new trial, it was apparent Browne had a conflict and could not ethically represent Bharadwaj's interests.

Bharadwaj had contacted attorney David Zuckerman, who was present for the hearing, and discovered that Browne had been ineffective in his handling of plea negotiations with the State. 13RP

2-3, 5-6. Browne informed Judge Eadie of the nature of the claim: he had failed to understand or inform Bharadwaj a plea deal could be reached with the State that would not have resulted in automatic deportation (an outcome Bharadwaj sought to avoid). 13RP 5-8.

Although no written claim of ineffective assistance had been made, this was simply because Zuckerman had not yet had time to do so. 13RP 10. Browne indicated that, in light of this claim, he could not continue to represent Bharadwaj under the Rules of Professional Conduct. 13RP 6, 8, 10. He moved to withdraw, asked for conflict-free counsel to be appointed, and requested a continuance so new counsel could pursue Bharadwaj's claims. 13RP 6, 10-11.

Bharadwaj himself addressed the court, asked for a continuance, and indicated that "he would like to add additional claims of ineffective assistance as well" and there would be more witnesses coming forward with credible and material evidence in support of a new trial. 13RP 14-15. Browne reiterated he had no choice but to withdraw. 13RP 15.

Browne was correct. Under the Rules of Professional Conduct, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." RPC 1.7(a). "A concurrent

conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." RPC 1.7(a)(2). There is a conflict where counsel is required to make a choice to advance his own interests to the detriment of his client's interests. Daniels v. United States, 54 F.3d 290, 294 (7th Cir. 1995); Mannhalt v. Reed, 847 F.2d 576, 579-580 (9th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 260, 102 L. Ed. 2d 249 (1988).

Browne had a strong personal interest in preserving his professional reputation. In addition, he would have sought to avoid a malpractice lawsuit and avoid bar discipline. If Bharadwaj's claim that Browne had botched plea negotiations was true, Browne violated several ethical rules, including RPC 1.1,[3] 1.2(a),[4] and 1.4(b).[5] Arguing his own ineffectiveness would have been at odds with all these interests. Defense counsel is "in the best position to

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[3] RPC 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[4] RPC 1.2(a) provides, "In a criminal case, the lawyer shall abide by a client's decision, after consultation with the lawyer, as to a plea to be entered . . . ."

[5] RPC 1.4(b) provides, "A lawyer shall explain a matter to the extent reasonable necessary to permit the client to make informed decisions regarding the representation."

determine when a [disabling] conflict exists." State v. Chavez, 162 Wn. App. 431, 439, 257 P.3d 1114 (2011) (quoting Mickens, 535 U.S. at 167). Browne properly recognized he could not represent Bharadwaj on the motion for new trial.

When defense counsel has a conflict under RPC 1.7(a), and does not reasonably believe he can continue with the representation, withdrawal is required. State v. Rooks, 130 Wn. App. 787, 799-800, 125 P.3d 192 (2005), review denied, 158 Wn.2d 1007, 143 P.3d 830 (2006). And where, as here, a defendant alleges his conviction should be vacated because his attorney did not provide proper advice regarding a plea offer, counsel should be permitted to withdraw and new counsel appointed to file a motion for new trial. See In re Disciplinary Proceeding Against Longacre, 155 Wn.2d 723, 731, 122 P.3d 710 (2005).

Judge Eadie erred when he failed to recognize Browne's conflict of interest, refused to permit Browne to withdraw, and refused to appoint new counsel to supplement and argue the motion for new trial.

b. Judge Eadie Did Not Cure The Problem By Dispensing With Oral Argument.

Judge Eadie was under the impression that simply dispensing with oral argument on the motion for new trial would cure any problem with Browne representing Bharadwaj at the motion hearing. 13RP 15. After summarizing the written arguments Browne had made on Bharadwaj's behalf, Judge Eadie denied the motion. 13RP 15-20.

When Browne pointed out that he had intended to argue on Bharadwaj's behalf prior to learning of the allegations against him, Judge Eadie invited Browne to go ahead and argue despite the fact he had just denied the motion. Browne again indicated he could not ethically do so. 13RP 20.

Rather than curing the problem, Judge Eadie's decision not to hear argument on Bharadwaj's claims further underscores the fact Browne's conflict adversely affected his performance. Whereas Judge Eadie was clearly prepared to entertain argument on the motion, and Browne had prepared to present argument on the claims that had been made, Browne could not argue due to his conflict.

Argument was particularly critical in light of the bare bones briefing Browne had submitted as part of the motion for new trial. Despite submission of more than two dozen supporting attachments, the motion contains little discussion of the content and importance of these lengthy materials. In fact, the motion mentions fewer than half of the attachments. See CP 488-493. This, and the title of the motion – "Defendant's *Preliminary* Motion For A New Trial and Arrest of Judgment" – strongly suggest Browne intended to follow up with something more substantive prior to argument, but failed to do so. See CP 488 (emphasis added).

Judge Eadie chose to decide the motion anyway based solely on the incomplete submissions of a conflicted attorney even after he was informed that Bharadwaj would challenge Browne's handling of the plea negotiations, he wished "to add additional claims of ineffective assistance as well," and there would be more witnesses coming forward with credible and material evidence in support of a new trial. 13RP 14-15. Such an outright denial of counsel is presumed prejudicial and requires remand, the appointment of new counsel, and a rehearing on the defendant's claims. State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996).

c. Judge Eadie Should Not Be Permitted To Decide Bharadwaj's Claims On Remand.

It is apparent Judge Eadie has already improperly prejudged the motion for new trial. At sentencing, he denied the motion after dispensing with oral argument on the claims already before him and dispensing with conflict-free counsel to supplement those claims with additional grounds.

Judge Eadie even denied the motion for reconsideration, filed by Mr. Zuckerman, which clearly identified the violation of Bharadwaj's constitutional right to the appointment of conflict-free counsel to supplement and litigate his motion for new trial. See CP 1180-1185, 1188-1189.

Because Judge Eadie has already improperly prejudged Bharadwaj's motion, he should not again have an opportunity to hear and decide Bharadwaj's claims. This is consistent with State v. Cloud, 95 Wn. App. 606, 976 P.2d 649 (1999), a case that also involved attorney John Henry Browne. Following his conviction for first-degree murder, Cloud asked the trial court to vacate that conviction because Browne (as in Bharadwaj's case) had been incompetent during the plea bargaining process. Id. at 610. Browne

sought to intervene in the post-trial proceedings to protect his personal and professional reputation, and the trial court allowed him to do so. Id. at 611. After hearing evidence on the matter, the judge denied the motion, concluding Cloud had not demonstrated prejudice; i.e., that he would have taken the plea offer in the absence of Browne's advice. Id. at 610-611.

On appeal, this Court found it was error to permit Browne's intervention and active participation in the post-trial proceedings. Id. at 615. In remanding and ordering a new hearing on Cloud's claims, this Court reasoned that "because it would be extremely difficult, if not impossible, for the trial judge who worked so hard on this case to discount everything that transpired in the first hearing, a different judge should preside over the next hearing." Id. at 616.

The same is true in Bharadwaj's case. Judge Eadie has already prejudged and rejected Bharadwaj's claims in violation of his right to representation. It would be difficult, if not impossible, for him

to put his decision aside at this point and fairly consider Bharadwaj's claims on remand.[6]

2. THE COURT ERRED WHEN IT DENIED BHARADWAJ'S MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8.

Following sentencing, Zuckerman filed a CrR 7.8 motion asking Judge Eadie to vacate Bharadwaj's convictions and permit him to plead guilty to one count of Assault in the Third Degree with Sexual Motivation. Zuckerman argued that Bharadwaj's decision to forgo a plea to this crime was the product of Browne's deficient representation – incomplete and inaccurate advice regarding the immigration consequences of pleading guilty versus going to trial and misrepresentations regarding the chance of success at trial. CP 1190.

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[6] Cloud is not unique. Remand to a different judge following appeal is often appropriate to ensure fair proceedings. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (without "cast[ing] aspersions on the trial court," Supreme Court provides for a new judge on remand "in light of the trial court's already-expressed views" on appropriate disposition); State v. Harrison, 148 Wn.2d 550, 559, 563, 61 P.3d 1104 (2003) (prosecutor's breach of plea agreement at sentencing requires de novo sentencing hearing on remand, preferably before a different judge); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge where disposition was clearly excessive); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to a different judge where initial sentencing hearing suffered from appearance of unfairness).

Judge Eadie's denial of the CrR 7.8 motion is reviewed for an abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); State v. Forest, 125 Wn. App. 702, 706, 105 P.3d 1045 (2005). Discretion may be abused in several different ways:

> A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.
>
> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citations omitted).

a. Facts Supporting The Motion

Supported by sworn declarations and documentary evidence, the CrR 7.8 motion sets forth in great detail the facts surrounding Bharadwaj's decision to reject a plea and instead risk conviction at trial on three counts of Child Molestation. See generally CP 1190-1331. These materials reveal the following.

When charged, Bharadwaj was living in Los Angeles, had no experience with the criminal justice system, and depended on his Seattle lawyers – John Henry Browne and associate Colleen Hartl –

for advice. CP 1210-1211. Bharadwaj was disposed to accept a plea offer because conviction following trial meant at least 57 months in prison. CP 1211. He was very concerned about the immigration consequences, however, and did not want to plead guilty if it would mean deportation. CP 1211.

Bharadwaj was an Indian citizen living lawfully in the United States since 1998. CP 1211. He had established a very successful career in this country as an engineer for Nokia, Texas Instruments, and Microsoft, and had recently been named Director of Engineering at a California startup company. CP 1211-1212. He had a very large group of friends and extended family in the United States. CP 1212. Moreover, in India he faced retribution, including the possibility of physical harm, from the Swami and his followers, who remain a powerful presence in that country. CP 1211.

The King County Prosecutor's Office was aware of Bharadwaj's concerns over deportation and was willing to negotiate a plea deal. On May 18, 2012, Browne forwarded to Bharadwaj an e-mail from Senior Deputy Prosecuting Attorney Hugh Barber in which Barber indicated deportation was not the goal and offered Bharadwaj the opportunity to plead guilty to Communicating with a Minor for Immoral Purposes ("CMIP"). Barber did not know whether

a CMIP conviction would result in deportation but indicated that if Browne knew of a crime that did not result in deportation, Barber was willing to consider it. CP 1232. Barber subsequently indicated, "Word on the street is Asst 3 SM is not deportable." CP 1232. Bharadwaj did not know that "Asst 3 SM" referred to Assault 3 with Sexual Motivation. He thought it meant Sexual Misconduct in the Third Degree, but was glad to see he might avoid deportation. CP 1212.

Browne told Bharadwaj he would contact an immigration lawyer for assistance, but neither he nor Hartl ever identified for Bharadwaj any lawyer they had contacted. Hartl apparently obtained some information on immigration matters through a website. CP 1212, 1229. Based on what she discovered there, she erroneously believed how long Bharadwaj had been in the United States had some bearing on whether he would be deported. CP 1212-1213, 1224-1225, 1229.

Bharadwaj had difficulty obtaining specific information from his lawyers about the State's plea offer. By July 2012, Bharadwaj was under the impression he could plead guilty to CMIP or "Sexual Misconduct in the Third Degree," a crime that, in fact, does not exist. CP 1195-1196, 1212. He resorted to his own Internet research of

these crimes, including their penalties and registration requirements, but was unsuccessful. CP 1212.

On July 17, 2012, Bharadwaj sent an e-mail to Hartl requesting details about the State's plea offer. The e-mail indicates Bharadwaj's belief that he could plead either to CMIP or "SM3" without jail time or deportation, but with registration as a sex offender. CP 1235. Hartl erroneously indicated that length of U.S. residency "will answer the possible deportation issue." CP 1235. Bharadwaj responded he had been a lawful resident since July 2008. CP 1235. Hartl did not follow up with further questions and never explained how that information affected immigration status. CP 1196, 1212-1213. The e-mail string ends on July 18 with Bharadwaj asking whether the State is offering "Sexual Misconduct 3" and asking for details regarding that offense. CP 1235.

One reason Bharadwaj was seeking specific details was that, earlier that day (July 18), he went to the office of California immigration attorney Leon Hazany. CP 1213, 1220. Bharadwaj sought Hazany's assistance because he was not getting clear immigration advice from Browne or Hartl. CP 1213. For the first time, Bharadwaj learned that the immigration consequences would not be imposed at sentencing, but in a separate federal action. CP

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

On July 23, 2012, Bharadwaj met with Browne and Hartl at their Seattle office. CP 1214. Trial was scheduled for Monday, July 30, and he asked his attorneys to obtain a continuance so that they could work out the details of a plea, including the immigration consequences. CP 1214. Bharadwaj continued to press Browne and Hartl for specific details regarding the proposed plea, including the precise elements of the offenses. But he continued to get only vague responses regarding immigration consequences and general descriptions of the crimes, such as "an assault is an offensive touching." He was never provided anything in writing describing the elements and penalties for CMIP or Assault 3. CP 1214. Browne believed Bharadwaj was demanding too much of their time, became angry, and threatened to call police if he did not leave. CP 1214, 1228.

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

On July 24, Hartl asked whether there was any offer that would avoid incarceration, to which Barber replied, "CMIP could." CP 1241. Hartl forwarded this e-mail string to Bharadwaj with the comment: "here's the answer – possibility of no jail!!!" CP 1241. She did not explain why CMIP was the "answer" when there were no assurances a conviction for CMIP would avoid immigration consequences. CP 1241. This left Bharadwaj confused regarding the consequences of a plea to one charge or the other. CP 1213.

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

Bharadwaj called Hartl on Thursday, July 26 and explained

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

Bharadwaj contacted Browne by e-mail. He asked whether there would be time for him to review any plea documents with the immigration lawyer and Ford Greene, a lawyer representing Bharadwaj in a civil lawsuit against the Swami. He also asked about the impact a registration requirement would have on travel. CP 1214. Bharadwaj had an appointment to meet again with immigration attorney Hazany the following morning. CP 1215. After receiving no response from Browne, Bharadwaj wrote, "I will really feel let down if I cannot get a response today even for this at this critical juncture." CP 1244.

Browne sent a heated response later that evening:

> Vinay you are wearing us down, you must know that. It is unreasonable for you to expect immediate replies particularly when your conversations today were all about matters we have discussed many many many times. It has turned into a game you ARE your worst enemy.

> If you plea to the misdemeanor there are NO promises other than you won't go to prison, probably not go to jail, but could, and most likely will not be deported (not certain) you will have to register. That is as clear as we can be. Jhb

CP 1245. The misdemeanor Browne referenced was necessarily CMIP, the only misdemeanor under consideration by the parties.[7] See RCW 9A.68.090(1) (subject to certain exceptions, crime is a gross misdemeanor).

At 8:45 a.m. on Friday, July 27, Bharadwaj e-mailed his civil attorney Ford Greene and said he was "strongly considering" taking the plea offer. CP 1215, 1250. He also sent two more e-mails to Browne seeking the information he needed for his meeting later that morning with Hazany. He noted that his questions about the plea offer still were unanswered. CP 1215, 1245-1246. At about 10:00 a.m., Bharadwaj called Browne's office in one last attempt to get the information. He left a message with Browne's assistant, but had not heard back from Browne by his 11:00 a.m. appointment with Hazany. CP 1215.

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[7] It is impossible to reconcile Browne's assertion that CMIP most likely would *not* lead to Bharadwaj's deportation with Browne and Hartl's earlier e-mails to Barber in which they indicate their belief CMIP *would* lead to deportation. See CP 1242; Supp. CP ___ (sub no. 150, State's Response to Defendant's CrR 7.8 Motion, at appendices A and B).

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

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

CP 1221-1222. Nevertheless, Hazany offered to work over the weekend to prepare an analysis if Bharadwaj could promptly obtain the necessary information. CP 1215.

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

> You seem impossible to satisfy, but I will try again. Communication with a minor for immoral purposes means just that. You communicated with a minor (under 18) for immoral purposes (undefined) Assault 3 means you assaulted (improper touching) another in this case for sexual motivation (common definition).
> Yes you would not be able to travel to Canada and some other country's. No I do not think we can get any more time for anything and am not sure deal is on the table still. You must make up your mind now. Jhb

CP 1247.

As Bharadwaj left Hazany's office around noon, he received a

telephone call from Browne, who made a strong pitch for going to trial rather than pleading guilty. CP 1215. He emphasized that Bharadwaj was lucky to have Judge Eadie assigned to the case. Browne mentioned that he had attended a charitable dinner with the judge. He noted Judge Eadie had once acquitted one of Browne's clients despite a strong prosecution case. CP 1215, 1228. He also said Judge Eadie did not like to send well educated and successful people to jail and he would likely find Bharadwaj not guilty or, at worst, guilty only of CMIP. Therefore, Browne recommended a bench trial. CP 1215.

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

Bharadwaj felt he now had no choice but to go trial since he had not been told a plea could avoid deportation. He felt his prospects at trial were very good given Browne's unblemished record

and the fact Judge Eadie would be disinclined to convict him. Moreover, since Browne was saying the worst result was likely a conviction for CMIP, it appeared he had nothing to gain by pleading guilty to that charge. As far as he knew, deportation was no more certain if he were convicted as charged than it would be with a plea. CP 1216.

By 12:35 p.m. that afternoon, Browne notified Judge Eadie and opposing counsel that Bharadwaj would proceed by bench trial. CP 1252. Although the legal services agreement between Browne and Bharadwaj was for a flat fee that covered the possibility of trial, Browne asked for $10,000.00 more, which would ensure Hartl's participation at trial. Bharadwaj paid the additional money. CP 1210-1211, 1229, 1256.

In connection with the CrR 7.8 motion, attorney Hazany was finally provided the detailed information he requested regarding the charges Bharadwaj faced at trial and those to which he might plead guilty. CP 1202. According to Hazany, conviction for even a single count of Child Molestation subjected Bharadwaj to "the most severe immigration consequences possible." CP 1222. Specifically:

> Mr. Bharadwaj's conviction in this case for Child Molestation in the Second Degree is an Aggravated Felony for sexual abuse of a minor pursuant to 8

> U.S.C. section 1101(a)(43), a Crime of Child Abuse pursuant to 8 U.S.C. section 1227(a)(2)(E)(1) and a Crime of Moral Turpitude pursuant to Quintero Salazar v. Keisler, 506 F.3d 688 [9th Cir. 2007], regardless of the sentence imposed.

CP 1222. Bharadwaj's convictions subject him to mandatory federal detention, deportation, and permanent ineligibility for naturalization to United States citizenship. CP 1222-1223. Hazany continued:

> As a result of this conviction, once Mr. Bharadwaj completes his criminal sentence Immigration and Customs Enforcement ("ICE") will immediately arrest and detain him without the right to release. Once in ICE custody, removal proceedings will be initiated against him, an order of permanent removal will be issued and he will be physically barred from returning to the United States.

CP 1223.

Hazany pointed out that the result would have been largely the same had Bharadwaj pled guilty to CMIP:

> In Parilla v. Gonzalez, 414 F.3d 1038 (9th Cir. 2005), the Ninth Circuit Court of Appeals found that a conviction for RCW 9.68A.090, Communicating with a Minor for Immoral Purposes, was an Aggravated Felony conviction as an offense constituting sexual abuse of a minor. So a plea to violating this law would have many of the same immigration consequences as a conviction for Child Molestation in the second degree, including deportation, inadmissibility, permanent ineligibility for naturalization and mandatory detention, regardless of the sentence imposed.

CP 1224.

According to Hazany, a conviction for Assault in the Third Degree with Sexual Motivation, however, is treated differently under federal immigration law. Assuming a conviction based on RCW 9A.36.031(1)(d) or (1)(f) – both of which involve negligent assaults – all of these immigration consequences would likely have been avoided. CP 1224-1225.

Finally armed with full and correct information regarding his options, Bharadwaj made it clear he would not have risked conviction at trial had he known that, in truth, Browne had lost trials involving sex offenses. Nor would he have gone to trial had he known that conviction would mean certain deportation or that deportation could be avoided with a guilty plea to Assault 3 with Sexual Motivation. CP 1216.

b. State's Response, Bharadwaj's Reply, and the Court's Ruling.

The State argued that Browne properly advised Bharadwaj regarding the risks and possible outcomes at trial. Relying on a recent interview with Browne, Barber noted that Browne now denied telling Bharadwaj he had never lost a trial involving sexual allegations; he claimed that he told Bharadwaj he had never lost a jury trial involving sexual allegations. Browne also denied telling

Bharadwaj that Judge Eadie did not like sending educated people to jail and denied telling Bharadwaj he likely faced, at worst, convictions for CMIP if he proceeded by bench trial. Supp. CP ___ (sub no. 150, State's Response, at 3-4).

The State also argued that, even if it were assumed Browne performed deficiently in advising Bharadwaj concerning a guilty plea to Assault 3 with Sexual Motivation (an assumption it disputed), there was no showing of prejudice because there was no formal offer on that charge. Nor would there have been an offer based on the State's understanding that crafting such a plea to insulate it from immigration consequences would have required redaction of every reference to S.M.'s status as a minor, which the prosecutor's office was now claiming it would not have done. Supp. CP ___ (sub no. 150, State's Response, at 4-7); Supp. CP ___ (sub no. 156, Declaration of Hugh Barber).

In a written reply, Zuckerman pointed out that the State's new position – they would not have been willing to offer Assault 3 as an "immigration-safe" plea – was inconsistent with e-mails demonstrating the State's willingness to permit a plea to Assault 3 with Sexual Motivation while acknowledging Bharadwaj's strong desire to avoid deportation. CP 1332-1333.

Moreover, the States' current understanding of what was required missed the mark. It was relatively easy to insulate the conviction from immigration consequences while preserving, for example, the victim's or others' rights to speak freely at sentencing about her minor status and the State's ability to obtain sentencing conditions corresponding to the age of the victim. In fact, recent Ninth Circuit precedent suggested the precautions concerning age of the victim would not have been necessary to avoid Bharadwaj's deportation. CP 1333-1334.

Regarding Browne's recent assertion that he merely told Bharadwaj he had never lost a jury trial involving sexual allegations, Zuckerman filed a declaration discussing what Browne had told him prior filing the CrR 7.8 motion. CP 1339-1341. According to Zuckerman, he specifically asked Browne if he told Bharadwaj that he had never lost a trial (not limited to jury trials), and Browne confirmed that he had indeed made that representation. In fact, Browne indicated he had made the same representation when speaking to attorneys at CLE presentations. At no time did Browne explicitly tell Zuckerman his claim to Bharadwaj had been limited to jury trials. CP 1339-1340. Zuckerman pointed out that this dispute (and others) concerning what Browne actually said could be resolved

at an evidentiary hearing. CP 1191, 1335.

The defense CrR 7.8 motion was heard on January 28, 2013. 14RP 1. Zuckerman once again suggested the necessity of an evidentiary hearing if Judge Eadie found critical facts in dispute. 14RP 5-6. Ultimately, however, Judge Eadie did not call for the presentation of any evidence. Instead, the parties summarized their positions in the written submissions. 14RP 6-33.

Judge Eadie denied the motion. 14RP 33. He found that Bharadwaj did not have a firm offer to accept, it was not clear he would have accepted such an offer without an assurance it would avoid deportation, and the State would not have been willing to "sanitize" the charge to the degree necessary to avoid deportation. 14RP 32-33. Judge Eadie then filed a written order merely incorporating his oral ruling. CP 1342.

c. Bharadwaj Was Denied His Sixth Amendment Right To The Effective Assistance of Counsel During The Plea Bargaining Process.

The Sixth Amendment guarantees the effective assistance of counsel during the plea bargaining process. Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012). Counsel must "actually and substantially" assist a client in deciding whether to plead guilty. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683

(1984); State v. S.M., 100 Wn. App. 401, 410-411, 996 1111 (2000)..

In Lafler, the Supreme Court held:

> If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

Id. at 1387. The applicable test is based on Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Id. at 1384-1385.

1. Browne and Hartl Performed Deficiently

To establish deficient performance, a defendant must show that counsel's representation concerning a plea fell below an objective standard of reasonableness. Lafler, 132 S. Ct. at 1384. Bharadwaj has made that showing based on Browne and Hartl's handling of plea negotiations and Browne's misstatements concerning Bharadwaj's chances of success at a bench trial before Judge Eadie.

As the United States Supreme Court has recognized, relatively recent changes to immigration laws make an increasing number of offenses subject to automatic deportation and have "dramatically raised the stakes of a noncitizen's criminal conviction."

Padilla v. Kentucky, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Therefore, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that . . . deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants . . . ." Id.

In several recent decisions, defense counsel have been found ineffective for failure, during the plea process, to adequately represent noncitizen clients facing potential deportation. Padilla, 559 U.S. at 366-369 (defense counsel performed deficiently where he misinformed client about immigration consequences of guilty plea); State v. Sandoval, 171 Wn.2d 163, 169-176, 249 P.3d 1015 (2011) (counsel ineffective for giving client overly optimistic immigration advice leading to guilty plea in rape case); In re Jagana, 170 Wn. App. 32, 57-60, 282 P.3d 1153 (2012) (finding counsel's representation deficient for failing to advise client of deportation consequences and remanding for hearing on prejudice); State v. Martinez, 161 Wn. App. 436, 440-443, 253 P.3d 445 (counsel ineffective for failing to notify defendant of deportation consequences of plea), review denied, 172 Wn.2d 1011, 259 P.3d 1109 (2011).

In Lafler, counsel performed deficiently by advising his client

to reject the prosecution's plea offer and stand trial for charges that resulted in a harsher penalty. Lafler, 132 S. Ct. at 1383. It follows from Lafler and Padilla that a conviction should be set aside where the defendant's decision to reject a plea offer and stand trial was based on deficient representation and resulted in a harsher penalty. Here, that harsher penalty included precisely the outcome Bharadwaj sought to avoid: deportation.

The American Bar Association standards serve as guides to determining whether counsel performed deficiently. Padilla, 559 U.S. at 366-367. Consistent with case law, these standards establish an attorney's obligation to provide competent and timely information and advice on plea matters:

> **Standard 4- 1.3 Delays; Punctuality; Workload**[8]
>
> (a) Defense counsel should act with reasonable diligence and promptness in representing a client.
>
> **Standard 4- 3.8 Duty to Keep Client Informed**
>
> (a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.
>
> (b) Defense counsel should explain the

[8] The ABA Standards are available online at www.americanbar.org.

developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Standard 4- 6.2 Plea Discussions

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

Standard 14- 3.2. Responsibilities of defense counsel

(a) Defense counsel should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney.

. . . .

(f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of the plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Together, these standards require defense counsel to promptly and understandably explain to the client any significant plea proposals, provide updated information on any developments, and act with diligence and promptness in responding to any requests for

information.

Browne and Hartl failed to satisfy these standards. Instead, they failed to associate with an immigration specialist or otherwise educate themselves on immigration law; provided confusing, conflicting, and sometimes incorrect advice on the possibility of deportation; encouraged a plea or trial on deportable offenses; and failed to alert Bharadwaj to the deadline for any plea deal. Browne and Hartl also failed – despite multiple requests – to provide the necessary information immigration expert Hazany needed to timely advise Bharadwaj whether he should take a plea deal.

Of course, the deficiencies in representation were not limited to the incorrect and insufficient information concerning the plea. Browne provided grossly misleading advice concerning Bharadwaj's chances of success at a bench trial. On this point, the ABA standards provide:

> **Standard 4- 5.1 Advising the Accused**
>
> (a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.
>
> (b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence

on the accused's decision as to his or her plea.

According to Bharadwaj, Browne indicated that he knew Judge Eadie well, telling Bharadwaj he was lucky to have Judge Eadie, he had attended a charitable dinner with the judge, and Judge Eadie had once acquitted one of Browne's clients despite a strong prosecution case. CP 1215, 1228. He also said Judge Eadie did not like to send well educated and successful people to jail and he would likely find Bharadwaj not guilty or, at worst, guilty only of CMIP. CP 1215. Moreover, Browne claimed he had never lost a trial involving a sex offense. CP 1215, 1229.

Browne later denied making most of these assertions, and Judge Eadie never heard evidence or made findings on whose version of events was correct. But if Browne did make these comments and claims, they serve as an additional ground for reinstatement of a plea agreement. Convincing Bharadwaj his worst fate at a bench trial was convictions for CMIP (to which he could also plead guilty) erroneously indicated he had nothing to lose by going to trial. See Paters v. United States, 159 F.3d 1043, 1044, 1048-1049 (7th Cir. 1998) (attorney erroneously advised defendant that result would be the same whether he pleaded guilty or went to trial and that he had "nothing to lose" by proceeding to trial; remanded for hearing

on prejudice).

The leading Washington case on this subject is State v. Cloud. As previously discussed, Cloud was charged with first-degree murder and involved the very attorney at the center of this case: John Henry Browne. According to Cloud, Browne claimed there was a 95 percent chance a jury would not convict him of that charge. In light of this advice, Cloud rejected the State's offer to allow a guilty plea to second-degree murder. After he was convicted of first-degree murder, Cloud moved to vacate his conviction due to ineffective assistance of counsel (Browne's overly optimistic assessment). The trial court initially denied the motion after finding Cloud would not have accepted the plea offer even with accurate advice. Cloud, 95 Wn. App. at 610-611.

On appeal, however, this Court ordered a new hearing before a different judge. Id. at 615-616. On remand, the new judge found Browne's assessment unreasonable, found a reasonable likelihood Cloud otherwise would have accepted the plea, and ordered a new trial. CP 1286-1287. Cloud ultimately pled guilty to second-degree murder. CP 1258-1272. As in Cloud, Browne gave an overly optimistic assessment of Bharadwaj's chances of success at trial.

Browne and Hartl performed deficiently while representing

Bharadwaj because they did not actually and substantially assist in him in determining whether to plead guilty. The only remaining question is whether Bharadwaj suffered prejudice .

2. Bharadwaj Suffered Prejudice

In denying Bharadwaj's CrR 7.8 motion, Judge Eadie essentially focused on the issue of prejudice, denying the motion based on his findings that Bharadwaj did not have a firm offer to accept, it was not clear he would have accepted such an offer without an assurance it would avoid deportation, and the State would not have been willing to "sanitize" the charge to the degree necessary to avoid deportation. 14RP 32-33.

To establish prejudice, the defendant must show a reasonable probability the outcome of the plea process would have been different. Lafler, 132 S. Ct. at 1385. Specifically, the defendant must show that but for the deficient representation, there is a reasonable probability the plea offer would have been presented to the court (i.e., both parties would have ultimately agreed to the plea), the court would have accepted it, and that the resulting conviction and/or sentence would have been less severe. Id. Bharadwaj made this showing.

While it is true no formal offer had been made regarding

Assault 3 with Sexual Motivation by the time Browne persuaded Bharadwaj to go to trial, there is a reasonable probability a formal offer would have been made. On July 23, 2012, prosecutor Barber sent an e-mail to Hartl indicating, "Last chance for CMIP or Assault 3 with SM." CP 1242. Moreover, Barber knew of Bharadwaj's goal to avoid deportation, was not seeking deportation, and even stated the "word on the street" was that Assault 3 was not a deportable offense. CP 1232. It appears the only thing that stood in the way of a formal offer was Barber having to "run it by the powers that be." CP 1241.

The record belies Judge Eadie's finding that the State would not have been willing to sanitize an assault conviction in the manner necessary to avoid deportation. As Zuckerman explained, nothing prevented Bharadwaj from admitting every element of Assault 3 with Sexual Motivation. 14RP 13. Nothing prevented the prosecutor, S.M., and her family members from discussing every detail of the crime at the sentencing hearing, including S.M.'s juvenile status. 14RP 14. And nothing prevented the sentencing court from imposing conditions of probation based on crimes against a minor. 14RP 14. The parties would merely agree that the amended information not include S.M.'s age in the charging language and there would be no requirement that Bharadwaj agree the certification

of determination of probable cause (which includes S.M.'s age) be considered as part of the factual basis for the plea. CP 1333-1334.

In fact, as Zuckerman pointed out, federal precedent indicates these precautions may not even be necessary to avoid deportation. The Ninth Circuit Court of Appeals has held that, when classifying a conviction under immigration law, only facts necessary to prove the elements of the crime can be considered. Sanchez-Avalos v. Holder, 693 F.3d 1011, 1015 (9th Cir. 2012). Sanchez-Avalos pled "no contest" to sexual battery. Id. at 1014. And while the information clearly revealed the victim was 13 years old, because that fact was not necessary for conviction, it had no impact on the defendant's immigration status. Id. at 1014, 1016-1017. Moreover, that the defendant's probation conditions clearly addressed a crime against a minor made no difference, either. Id. at 1019.

In short, Judge Eadie's finding that the State would not have been willing to sanitize an assault conviction to the degree necessary to avoid deportation is based on a misunderstanding of what this would have required. Therefore, his decision denying the CrR 7.8 motion was untenable.

Not only is there a reasonable likelihood a formal offer would have been made that was acceptable to the State, it is also apparent

Bharadwaj would have accepted it. According to Hazany, whom Bharadwaj specifically hired on the immigration issue:

> Had Mr. Bharadwaj or his defense attorney provided me with the information I had requested, I would have strongly urged Mr. Bharadwaj to accept the plea deal to plead guilty to RCW 9a.36.031 section (1)(d) or (1)(f), Assault in the third degree, a felony, with a special allegation for Sexual Motivation pursuant to RCW 9.94A.835, instead of going to trial. My advice would have been the same even if Mr. Bharadwaj or his defense attorney believed there would be a small chance of a conviction resulting from taking the matter to trial, because the immigration consequences that he would possible be exposed to were far too severe, permanent, and life altering.

CP 1225-1226.

For his part, Bharadwaj indicated at the time of the CrR 7.8 motion that he would not have taken the case to trial had he known deportation could be avoided with a guilty plea to Assault 3 and had Browne not overstated the chance of success at a bench trial before Judge Eadie. CP 1216. This is fully consistent with Bharadwaj's actions prior to trial. He persistently expressed interest to Browne and Hartl in obtaining information about a plea deal. CP 1235, 1244-1248. And he sought advice on a plea from Hazany. CP 1220-1222. Indeed, at 8:45 a.m. on Friday, July 27, 2012, Bharadwaj e-mailed his civil attorney, Ford Greene, to say he was "strongly considering" pleading guilty. CP 1215, 1250. Even Browne

conceded Bharadwaj was likely willing to enter a plea. CP 1335. There is more than a reasonable likelihood Bharadwaj would have agreed to plead guilty had he been fully and properly advised on Assault 3 with Sexual Motivation and had Browne not improperly pressured him to go to trial.

Bharadwaj has demonstrated a reasonable probability the plea offer would have been presented to the court (i.e., both parties would have ultimately agreed to the plea), the court would have accepted it, and that the resulting conviction and/or sentence would have been less severe. Lafler, 132 S. Ct. at 1385. Therefore, he is entitled to relief. The proper remedy is to order the State to make the plea offer. Id. at 1391. At the very least, however, Bharadwaj's convictions must be reversed.

D. CONCLUSION

Bharadwaj was denied his Sixth Amendment right to effective representation when his attorneys gave him incomplete and inaccurate advice concerning a plea deal and failed to provide him with information necessary to evaluate his options. Moreover, Browne misled Bharadwaj on his chances of success at a bench trial before Judge Eadie. Alone, and together, these mistakes led Bharadwaj to forgo a plea and take his chances at trial. Bharadwaj's convictions should be reversed and he should be offered a plea deal that will avoid deportation.

Alternatively, Bharadwaj's case should be remanded and conflict-free counsel appointed to handle, supplement, and argue his motion for new trial before a different judge.

DATED this 10th day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69453-7-I
	)	
VINAY BHARADWAJ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VINAY BHARADWAJ
DOC NO. 361033
STAFFORD CREEK CORRECTIONSCENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF OCTOBER 2013.

x Patrick Mayovsky