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SUPREME COURT NO. 93143-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KEVIN ESTES,

Respondent.

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

The Honorable Phillip Sorensen, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE

Was defense counsel ineffective where he failed to understand that the defendant faced a third strike under the Persistent Offender Accountability Act (POAA)¹ due to a deadly weapon enhancement and consequently he failed to vigorously pursue a viable line of defense challenging the State's evidence?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On February 19, 2014, Kevin Estes was drinking with his friend James Randle at Randle's apartment. RP 278-79. Randle's roommate, Anthony Prusek, was also in the apartment that evening as was Prusek's girlfriend, Ashley Stoltenberg. RP 72, 74, 101. 277.

A conflict erupted between Estes and Stoltenberg that caused Prusek to restrain Estes. RP 281. At some point, a knife became involved.² RP 132, 281-82. As Prusek adjusted his grip to a chokehold, Estes suddenly began flailing with a knife and cut Prusek on the foot and pinky finger. RP 134, 143-44, 151, 153, 156. Prusek subdued Estes, and Randle grabbed the knife. RP 282-83. Randle told Estes to leave. RP 282-83. Estes went out to his car without any further problems. RP 194.

¹ RCW 9.94A.570

² Randle, Prusek, and Stoltenberg had significantly different accounts as to the details of what actually transpired. See, Brief of Appellant (BOA) at 4-6 (laying out these different accounts).

When an officer arrived in response to a 911 call, he found Estes inside his car in the driveway. RP 194, 210. Estes admitted that he was in the apartment and knew about the incident. RP 195-97. The officer detained Estes, searched him, and discovered a knife in his pocket. RP 197. Estes stated, "it was not the knife that was used." RP 207. The officer confiscated that knife and kept it outside the apartment until it was taken into to evidence. RP 208.

Meanwhile, Officer Steve Pigman went into the apartment and interviewed Stoltenberg in the kitchen. RP 254, 256. While there, he noticed a knife on the refrigerator. RP 256. Stoltenberg claimed that was the knife Estes had used, but officers never collected it. RP 106, 256.

Estes was arrested and eventually charged with two counts of second degree assault and one count of felony harassment, each with a deadly weapon enhancement. CP 1-2, 206-08. At trial, the jury was presented evidence regarding two possible weapons. RP 197, 162. The State introduced the knife found in Estes' pocket as physical evidence. Ex. 6; RP 197. It also introduced a photograph in which the knife blade was allegedly measured longer than three inches. Ex. 2; RP 217-218.

As to the second knife (the knife that was on top of the refrigerator), the State was unable to offer the knife as physical evidence or have the blade measured. RP 162. Instead, it relied only on testimonial

evidence. RP 162, 187, 256, 284. Prusek testified that Randle took the knife away from Estes. RP 162. Randle said he placed the knife on the refrigerator. RP 284. Pigman testified that he saw a knife on the refrigerator and Stoltenberg said that was the knife Estes used. RP 256. At trial, none of these people could reliably estimate the length of the blade length and offered considerably different accounts as to how it was used.³ RP 87, 101, 132, 134, 270, 284, 287, 303.

The jury was instructed that if it found Estes was armed with either knife during the incident, and if it found the knife constituted a deadly weapon either because of the blade length or the manner in which it was used, it could answer “yes” to the special verdicts.⁴ CP 329-330.

The State argued that both knives were deadly weapons as defined by law either because of the blade length or their capacity to cause death. RP 444-46; 453-54. The defense’s theory of the case was that the State could not meet its burden of proving Estes assaulted anyone with a knife due to the conflicting statements of Stoltenberg, Prusek, and Randle. RP

³ Prusek testified that while he and Estes were wrestling, he saw the knife blade and determined the blade length was between 3.5 and 4 inches long. RP 134. However, he later admitted he did not get a good look the knife. RP 186. In fact, his view of the knife was so fleeting, Prusek could not say whether the knife the State offered as physical evidence (Ex. 6) was in fact the knife that was used in the incident or whether another knife was used. RP 186, 190.

⁴ In other words, as instructed, the jury did not have to unanimously agree on: (1) which knife Estes was armed with; or (2) whether the knife was a per se deadly weapon or a deadly weapon via its capacity to inflict death. Id.

456-66. Defense counsel also contended that the knife found on Estes upon arrest could not have been the knife used in the incident. RP 466-67. Defense counsel then argued that, since no one could remember any specifics about the knife on the refrigerator, the jury could only speculate about the knife. RP 468-69.

The jury acquitted Estes of both second degree assault charges. However, it found him guilty of one count of third degree assault (a lesser included offense), the felony harassment charge, and deadly weapon enhancements for both offenses. CP 331-35.

After the jury returned its verdicts, the parties and the court discussed scheduling a sentencing hearing. RP 504. The following exchange took place:

[Prosecutor]: Yes. In fact, I am available whenever the Court can accommodate it. As the Court is aware, this is a third strike case. There's no issue as to — as to—

[Defense Counsel]: He wasn't convicted of a strike offense.

[Prosecutor]: Apparently, the Defendant is a third strike case because of the deadly weapon enhancements, so there's no issue as to the sentencing ..."

RP 504.

After realizing that the deadly weapon enhancements elevated the third degree assault and felony harassment convictions to third strikes, defense counsel filed a CrR7.4 motion, moving to dismiss the enhancements due to insufficient evidence, conflicting verdicts, and a disproportionate sentence. RP 339-49. Defense counsel contended that the evidence was insufficient to show the knife found on Estes was a per se deadly weapon. CP 342-43. He explained that the dictionary defines "blade" as "the flat sharp part of a weapon or tool that is used for cutting." CP 343. Defense counsel stated that when he measured the actual "blade" with a ruler, it did not measure more than three inches and, therefore, did not meet the definition of a per se deadly weapon. CP 343; RP 510, 520.

Defense counsel went on to explain that, given the instructions, some of the jurors could have concluded the State had proved only that Estes was armed with the knife found in his pocket and that -- based on the State's inaccurate photo measurement -- it was a per se deadly weapon. However, because that knife was in fact not a per se deadly weapon, he argued, there was insufficient evidence to support such a conclusion. RP 519-23.

The State responded by first noting defense counsel had failed to move to dismiss the charges at trial for insufficient evidence and had not sought instructions defining the term "blade." RP 516. It also argued

there was sufficient evidence to conclude Estes was armed with a per se deadly weapon during the incident based solely on Prusek's testimony that the blade was over three inches long.⁵ RP 516.

The trial court denied the motion to dismiss, ruling there was sufficient evidence from which the jury could find "that the knife was used in a way to make [Estes] armed, and given the testimony that came out, that it was of sufficient length to make it a deadly weapon." RP 524. In reaching its decision, the trial court specifically pointed to Pigman's testimony that the knife was capable of causing death⁶ and Prusek's testimony the blade was longer than three inches. RP 521-22.

Due to the deadly weapons enhancements, Estes was convicted of a third strike and sentenced to life in prison without parole.⁷ CP 363. The Court of Appeals reversed, finding Estes was denied effective assistance of counsel. Appendix A.

⁵ At this point, defense counsel objected, stating: "I don't believe that was the testimony at all." RP 516. However, defense counsel was wrong about this. RP 134.

⁶ Officer Pigman testified that the knife on the refrigerator was a "deadly weapon." RP 270. Defense counsel failed to object to this improper opinion testimony. RP 270.

⁷ A sentencing court must impose a sentence of total confinement for life without the possibility of release on a "persistent offender." RCW 9.94A.570. A persistent offender is one who stands convicted of a felony defined as a "most serious offense" and has previously "been convicted as an offender on at least two separate occasions... of felonies that under the laws of this state would be considered most serious offenses." RCW 9.94A.030(37)(a)(ii).

C. SUPPLEMENTAL ARGUMENT

ESTES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO INFORM HIMSELF OF RELEVANT LAW AND THUS WAS NOT IN A POSITION TO MAKE REASONED DECISIONS IN DEFENDING AGAINST THE DEADLY WEAPON ENHANCMENTS.

A defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. He is denied this right when his attorney's conduct: (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As discussed below, both prongs are met here due to counsel's failure to inform himself of relevant law regarding strike offenses as it pertained to the circumstances in this case.

1. Defense Counsel's Failure to Be Informed Regarding Relevant Law Constituted Deficient Performance.

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). "Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. As this Court has recognized, the presumption of counsel's competence may be overcome by a showing that

counsel failed to conduct appropriate investigations. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816, 820 (1987).

“An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” Hinton v. Alabama, 571 U.S. ___, 134 S. Ct. 1081 (2014); see also, Kimmelman v. Morrison, 477 U.S. 365, 386, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (holding defendant received ineffective assistance due to inadequate pretrial investigation resulting from a failure to understand relevant discovery rules). Only after adequate research is conducted and the risks accounted for, is defense counsel in a proper position to intelligently advise his client regarding a plea or competently make tactical decisions when formulating a defense.

Indeed, this Court has consistently held that reasonable conduct for an attorney includes carrying out the duty to research and apply relevant law. In re Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 101-102351 P.3d 138 (2015); State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).⁸ Specific to third strike cases, this Court has found that it is

⁸ See also, A.B.A. Defense Function Standard 4- 4.1(a) (setting forth: “Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction...”) and A.B.A. Defense Function Standard 4-5.1(a) (setting forth: “After informing himself or herself fully on the facts and the law, defense counsel should advise

objectively unreasonable for defense counsel to fail to ascertain that his client is at risk of a third strike. State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006).

While not binding, the Wisconsin Supreme Court's decision in State v. Felton, 110 Wis.2d 485, 500-07, 329 N.W.2d 161(1983), is particularly germane to this case because it analyzes under Strickland a case in which a line of defense was not pursued due to defense counsel's ignorance of relevant law. Rita Felton was charged with first degree murder for shooting her husband. Id. at 487. Defense counsel presented only a battered-spouse defense. Id. at 488. Counsel was unfamiliar with the law as it pertained to a heat-of-passion defense and, thus, he did not consider such a defense when formulating trial strategies. Id. at 496. A jury found Felton guilty of second degree murder. Id. at 488. Felton appealed, contending she was provided ineffective assistance of counsel. Id. The Wisconsin Supreme Court agreed, holding defense counsel was ineffective because he had failed to familiarize himself with relevant law when formulating Felton's defense. Id. at 505.

Looking at the question of whether defense counsel's performance was objectively unreasonable, the Felton Court noted, "he was never in a

the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.") -- Retrieved on October 25, 2016 from: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#1.2

position even to consider whether, in light of the facts, heat of passion was an appropriate defense; and he never explored the circumstances to determine what evidence existed that would support [such a defense].” Id. The Court concluded defense counsel’s failure to familiarize himself with the law was “a glaring deficiency” that made it “impossible for him to weigh alternatives and to make a reasoned decision.” Id. at 506.

Next, the Felton Court rejected the notion that defense counsel’s inadequate performance could be justified as trial strategy. Although generally concerned with interfering with defense counsel’s professional judgment via “hindsight evaluation,” it nevertheless concluded that “requiring lawyers to inform themselves of relevant law prior to formulating a defense or determining a strategy or tactic will promote exercise of rational, informed, and considered judgment.” Id. at 507.

As in Felton, Estes’ counsel failed to familiarize himself with relevant law when formulating and executing his defense. He was unfamiliar with Washington’s POAA as it pertained to Estes’ case and, thus, never in a position to make reasoned choices when formulating a defense strategy that took into account the very serious risks the weapon enhancements posed and was unable to competently advise Estes as to plea options.

The record shows Estes did not understand that the weapon enhancements elevated non-strike felonies to strike offenses. Under the POAA, second degree assault – the original charge for two counts here – is a strike offense. RCW 9.94A.030(32)(b). However, felony harassment and third degree assault are not strike offenses unless a deadly weapon enhancement attaches. Former RCW 9.94A.030(32)(t). Counsel was aware of Estes' criminal history and the fact that he already had been convicted of two strike offenses under the POAA.⁹ CP 381. However, when the prosecutor informed the trial court after the verdicts that this was a third-strike case, defense counsel immediately stated he believed Estes was not convicted of a strike offense. RP 504. In other words, defense counsel was unaware that under former RCW 9.94A.030(32)(t), Estes' convictions converted into strike offenses.

The dissent below and the State speculate that perhaps defense counsel was confused or misspoke, suggesting there needs to be a

⁹ The State issued a "Persistent Offender Case Notice" indicating Estes was facing a third strike offense, but the notice failed to specify under what statutory authority the State would be seeking to qualify each of the offenses as third strikes. CP 381. While it correctly identified the second degree assault charges as strike offenses, it incorrectly stated that felony harassment was a strike offense. CP 381; RCW 9.94A.030. Additionally, it failed to give notice that any felony in which the deadly weapon enhancement attached constituted a strike offense. CP 381. As such, the State's notice was misleading. However, reasonably prudent counsel – knowing about the potential for a third strike – would not have relied on the State's notice and would have independently consulted the statutes to determine all possible third-strike scenarios given Estes' criminal history.

reference hearing to determine whether counsel's comment was some sort of mistake. Appendix A at 16; Petition for Review (PFR) at 9-10. However, neither the State nor the dissent point to anything in the record that remotely suggests defense counsel did not mean what he said.

Moreover, other factors in this record strongly support the conclusion that defense counsel did in fact mean what he said.¹⁰ Counsel's direct statement expressing his lack of knowledge on this point of law combined with counsel's trial performance regarding that issue and his post-trial motion adequately establish the fact defense counsel was unaware that Estes faced strike offenses under former RCW 9.94A.030(32)(t). See, Thomas, 109 Wn.2d at 230 (inferring from counsel's trial performance that he had failed in his duty to adequately investigate before trial despite the fact he never directly said so on the record). Hence, there is no need for a reference hearing.

In sum, counsel's failure to familiarize himself with the POAA and discover before trial that any felony with a deadly weapon enhancement constituted a strike offense was objectively unreasonable. There is no question counsel's performance fell below the A.B.A. Defense Standards and the standards set forth by this Court in the cases listed above. This

¹⁰ These factors include the State's inaccurate statement of the law in its "Persistent Offender Case Notice," defense counsel's failure to vigorously defend against the deadly weapon evidence at trial, and most importantly his inexplicable withholding of the blade-length defense he offered in his post-trial motion.

was a significant deficiency in a threshold matter that made it impossible for defense counsel to effectively make reasoned decisions as to how to properly defend the charges or competently offer advice regarding plea deals. Without a basic knowledge of the law, counsel's execution of Estes' defense against the weapon enhancements simply was not the product of rational, informed, and considered judgment. As such, this Court should find his performance deficient.

2. There is a Reasonably Probability that the Outcome Would have been Different had Defense Counsel Been Informed of the Law.

The existing appellate record establishes that counsel's failure to familiarize himself with relevant law was prejudicial to the outcome of the case.¹¹ Under Strickland, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. Instead, prejudice is established if there is a reasonable probability that the outcome would have been different but for the attorney's conduct. Id. A reasonable probability is one that undermines confidence in the outcome. Strickland, 466 U.S. at 694.

The U.S. Supreme Court has cautioned that reviewing courts "should keep in mind that counsel's function, as elaborated in prevailing

¹¹ It is Estes' position that, while the Court of Appeals may have erred when it relied on facts only alleged in Estes' State of Additional Grounds (SAG), matters within the existing appellate record establish prejudice and, thus, this Court should affirm on alternative grounds.

professional norms, is to make the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690. Counsel’s knowledge of the law is crucial in this regard. Indeed, the adversarial testing process will not function properly unless defense counsel has undertaken an adequate investigation before developing a defense. Kimmelman, 477 U.S. at 384.

When counsel has failed to familiarize himself with relevant law or facts, prejudice is established by determining whether the record shows a credible line of defense that was not pursued due to counsel’s ignorance of the law and there is a reasonable probability a reasonable juror could have been swayed by this line of defense. Hinton, 134 S. Ct. at 1088; Thomas, 109 Wn.2d at 233; Felton, 110 Wis. at 507. For example, turning to Strickland’s prejudice prong, the Felton Court explained that prejudice exists if the facts support a reasonable line of defense that was foreclosed due to counsel’s ignorance of the law. Felton, 110 Wis. at 507. The Felton Court determined that the facts in that case would have supported a credible heat-of-passion defense. Id. at 513. Hence, it held Strickland’s prejudice prong was satisfied. Id.

Defense counsel’s post-trial motion to dismiss the weapons enhancements and his performance at trial show that his ignorance of relevant law resulted in his failure to vigorously pursue a credible line of defense at trial. The record definitely shows that after counsel was finally

made aware that the weapon enhancements elevated Estes' convictions into strike offenses, he brought forth a new line of defense that should have been pursued at trial. When arguing the motion to dismiss, defense counsel explained that after consulting the dictionary to determine the definition of a "blade" and then measuring the knife in evidence, he concluded the blade was not longer than three inches and, thus, was not a per se deadly weapon.

Defense counsel did not present this line of defense to the jury, however. He did not cross examine the forensic evidence technician about her measurements or confront her with dictionary definition of "blade." RP 219-20. He did not ask the trial court for an instruction defining "blade." He failed to make any targeted argument during his closing argument regarding the blade length. RP 460-72. This was a line of defense that defense counsel recognized (albeit after the trial) could have raised doubt as to whether Estes was armed with a deadly weapon. Yet, he never presented it to the jury, and only revealed it in a post-trial motion.

There is no legitimate explanation for why defense counsel did not present this line of defense to the jury. This argument did not conflict with his other argument (i.e. the knife in Estes' pocket was not used during the incident) and could have been easily argued in the alternative. Indeed, the only reasonable explanation for why counsel did

not present this defense was that he did not understand the importance of vigorously challenging the State's case regarding the weapons enhancements until after the jury had returned its verdict.¹²

The record also reveals defense counsel's failure to understand the risks posed by the weapon enhancements contributed to a further breakdown in the adversarial process. First, defense counsel failed to object to an officer's improper opinion that one of the knives in question was a "deadly weapon." RP 270; see also, BOA at 24-32 (providing greater details regarding this improper opinion evidence). Competent counsel would not have sat idly by while an officer gave his opinion regarding a critical fact to be independently determined by the jury.

Second, defense counsel also inexplicably failed to register the fact that Prusek testified that Estes' knife had a blade that was 3.5 to 4 inches long. RP 516. Certainly competent counsel, who understood the importance of the weapon enhancements under Former RCW 9.94A.030 (32)(t), would not have let Prusek's testimony slip by unnoticed.

¹² Below, the State claimed that defense counsel's failure to vigorously defend against the State's deadly weapon evidence during trial "can be categorized as legitimate trial strategy or tactics." BOR at 9-10. However, while Strickland protects "strategic choices made after thorough investigation of law and facts," 466 U.S. at 690, it does not protect choices made where counsel does not have a full understanding of the law prior to formulating a defense. Williams v. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Hence, this Court should reject the State's invitation to characterize defense counsel's decisions in defending against the weapon enhancements as a legitimate tactic or strategy.

Third, defense counsel dedicated very little attention to challenging the State's weapons evidence during closing, making only a tepid argument, despite the fact that there were fertile areas for challenge. RP 468. For example, defense counsel did nothing to mitigate the impact of Prusek's testimony regarding the blade length because that testimony never even registered with him. RP 460-7, 516. Indeed, reasonably competent counsel – who understood the risks that the weapon enhancements could elevate any convictions to a third strike – would have hammered on the fact that Prusek was not in a good position to see the knife or make any reasonable estimation about the blade length.

Additionally, there was no evidence establishing that the knife found on Estes at the time of arrest was in fact in his pocket during the incident. RP 460-472. Informed counsel who was effectively defending against the enhancements would have reminded the jury that, while it was possible the knife was in Estes' pocket at the time of the offense, there was at least an equal possibility Estes armed himself with that knife after he got in his car. Because counsel was unaware of the law and the penalty Estes faced if convicted of the deadly weapon enhancements, however, he failed to effectively mitigate the effect of the State's evidence during closing argument.

There is a reasonable probability that had defense counsel understood the need to offer a robust challenge to the State's weapons evidence the outcome of the case would have been different. Indeed, the State's case as to whether either knife was a deadly weapon was not particularly strong.

As for the knife that was in the kitchen, the State had to rely solely on witness recollection and could not offer the physical evidence or even a picture. Although officer Pigman saw the knife, he could not testify to the length of the blade or how it was used.¹³ Stoltenberg and Randle saw the knife after the incident, but neither could testify as to the blade length and they offered starkly different recollections of the knife's use. See, BOA at 4-5 (setting for the these differences in detail). Prusek testified as to a blade length of over three inches; however, he only saw this while wrestling with Estes. RP 134. In fact, Prusek later clarified he did not get a good look at the knife. RP 186, 190.

As for the knife that was found on Estes, the State's evidence was also weak. The State did not establish through any testimony that Estes in fact had the knife on him while he was in the apartment. While the jury

¹³ The State also offered Pigman's improper opinion that the knife was a deadly weapon. However, this evidence is tainted by defense counsel's ineffectiveness because he failed to even register the risks the deadly weapon testimony posed and thus did not object to this improper opinion as competent counsel would have. See, BOA at 13-24 (challenging Pigman's testimony as improper opinion).

could have inferred this from the fact that the knife was in Estes' pocket when the police arrived, it was at least equally possible the jury could have inferred that Estes was not armed with it while inside, and instead, grabbed that knife after he returned to his car.

As for the manner in which the knife was used, the State had to contend with vastly different witness accounts. See, BOA at 3-6. The jury's acquittal on the second degree assault charges is also a strong indication that it did not find the State's evidence as to the use of the knife particularly persuasive. Given the weakness of the State's case in regard to the knives, there is a reasonable probability the outcome would have been different had defense counsel been aware of the risks the deadly weapon enhancements posed and competently defended against the weapon enhancements.

In sum, defense counsel's failure to inform himself of relevant law as it pertained to the deadly weapon charges was objectively unreasonable. Moreover, this record shows counsel's deficient performance as to his threshold duty fundamentally prejudiced Estes' defense. Hence, this Court should find – based only on matters within the existing appellate record – that there is a reasonable probability that Estes would not have been convicted of the weapon enhancements had he received competent

representation. Thus, it should affirm the Court of Appeals on alternative grounds and reverse Estes' convictions.

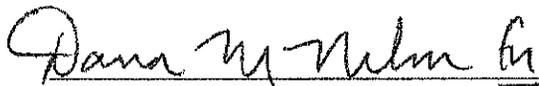
D. CONCLUSION

For the reasons stated above, this Court should affirm the Court of Appeals decision. Assuming arguendo that this Court reverses the Court of Appeals, however, then it should send the case back down to the appellate court for consideration of the other issues raised in Estes' appeal and SAG.

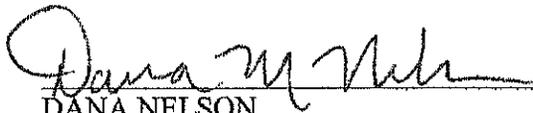
DATED this 31ST day of October, 2016.

Respectfully submitted,

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APPENDIX A

April 19, 2016

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE ESTES,

Appellant.

No. 46933-2-II

PUBLISHED OPINION

MELNICK, J. — Kevin Estes appeals from the trial court’s judgment and sentence after a jury found him guilty of assault in the third degree and felony harassment, each with a deadly weapon enhancement. The trial court sentenced Estes to total confinement for life without the possibility of release under the persistent offender statute.¹ Estes argues that he received ineffective assistance of counsel. He also asserts in his statement of additional grounds (SAG) that his attorney did not advise him that a felony with a deadly weapon enhancement constituted a strike under the persistent offender statute. Because defense counsel’s performance was deficient and there is a reasonable probability that counsel’s deficient performance prejudiced the outcome of the trial, we reverse and remand for a new trial.²

¹ RCW 9.94A.570

² Because of our resolution of this case on this ground, we do not address the other issues Estes raised in his appeal and his SAG.

FACTS

I. GENERAL OVERVIEW

On February 18, 2014, Estes visited an apartment shared by James Randle and Anthony Prusek. Prusek's girlfriend, Ashley Stoltenberg, was present and Estes flirted with her, making her uncomfortable.

Estes returned to the apartment the next day. He consumed alcohol and played video games with Randle and Prusek. Estes began talking about Stoltenberg and made statements about her breasts. Prusek told Estes that Stoltenberg did not like his comments. Shortly thereafter, an angry Stoltenberg came out of the bedroom and told Estes to stop or she would slap him. Stoltenberg testified that Estes stood up looking angry and said, "Time to die, bitch," while pulling a knife out of his pocket. 2 Report of Proceedings (RP) at 86. Stoltenberg knew that the blade was small enough to conceal in his pocket, but she could not say with certainty if the blade folded; she saw it for 10 seconds.

Prusek only caught the last word Estes spoke, which was "bitch." 2 RP at 132. Prusek stated that Estes stood up like he was going after Stoltenberg. Prusek grabbed Estes and pulled him down on the ground where they wrestled. Suddenly, Estes had a knife in his hand and flailed his arms. According to Prusek, Estes was still trying to get towards Stoltenberg. The knife cut Prusek's foot and then his pinky finger. Prusek described the blade as "three and a half, four inches" in length. 2 RP at 134. He stated that the blade could have done "grave harm" and "[w]as the type of a blade that could have cut through your skin and into muscle." 2 RP at 134. Stoltenberg called 911.

Randle took the knife away from Estes and went towards the kitchen. Stoltenberg saw Randle put the knife she believed Estes used on top of the refrigerator after Estes left. Randle also

remembered putting the knife on top of the refrigerator. Prusek went to the bathroom to get bandages and to clean himself up. Randle told Estes to leave because the police were coming and Estes left.

Officer Grég Massey was the first officer to respond. He found Estes sitting in his car in the driveway. Estes appeared angry and agitated, opened the car door, and when asked, told Massey he was in the apartment and had been in a fight. Massey was unsure but remembered Estes saying something like, “[H]e felt that he needed to rid the world of people like the two that were inside the apartment.” 2 RP at 207-08. Massey searched Estes’s person and seized a knife from him. That knife and a picture of it with a ruler beside it were admitted at trial. Massey described the knife as a fixed-bladed knife in a black sheath. The evidence technician who took the picture stated that the knife blade was about three inches long. Estes told Massey that the knife on his person was not the knife from the incident.

Officer Steven Pigman responded to the scene later and entered the apartment. He noticed a knife on the refrigerator and asked Stoltenberg whether it was used in the assault. She told him “[Y]es.” 3 RP at 256. Randle believed the officers took the knife from on top of the refrigerator. When the State showed Randle the knife in evidence, he could not remember if it was the knife he took from Estes that day. To Pigman’s knowledge, the knife on the refrigerator was not taken into evidence. Pigman believed the knife he saw in the apartment was six inches in length total. He did not remember the length of the blade but believed it was exposed. He also stated, “I didn’t inspect it at all.” 3 RP at 269. The State asked Pigman if the knife he saw was the type that could do someone harm. Pigman answered that it could. Pigman also confirmed that the knife would do serious bodily injury.

II. PROCEDURAL HISTORY

The State charged Estes with two counts of assault in the second degree, against Prusek and Stoltenberg respectively, and one count of felony harassment against Stoltenberg. Each count carried a deadly weapon enhancement. In the charging language of the information, the State referenced Estes's "multiple current offenses," which because of an already high offender score, would result in some of his offenses going unpunished without an exceptional sentence. Clerk's Papers (CP) at 245, 246.

In February 2014, the State filed a persistent offender notice indicating that Estes potentially faced a third strike.³ The notice stated,

[T]he offense of assault in the second degree; assault in the second degree; felony harassment, with which you have been charged, is a "Most Serious Offense" as defined in RCW 9.94A.030. If you are convicted at trial or plead guilty to this charge or any other most serious offense, and you have been convicted on two previous occasions of other "most serious offenses," you will be classified at sentencing as a 'Persistent Offender,' as defined in RCW 9.94A.030 and your sentence will be life without the possibility of parole as provided in RCW 9.94A.570.

CP at 381 (emphasis omitted).

Prior to trial, the court heard motions. Estes's lawyer argued that the State should not be allowed to mention or introduce the knife found on Estes's person. The trial court determined that whether or not the knife was used or readily accessible was a question for the jury. The court found the knife taken from Estes's person was relevant and "would certainly be admissible, if for

³ Estes's previous convictions include two counts of promoting prostitution, manslaughter, assault in the third degree, unlawful possession of a firearm, unlawful possession of a controlled substance, domestic violence assault in the third degree, and two counts of assault in the second degree. The manslaughter and assault in the second degree counts were violent offenses. During trial, Estes stipulated to the manslaughter conviction.

no other reason than just the enhancement.” 1 RP at 49. Estes’s lawyer also filed a *Knapstad*⁴ motion in which he argued the assault in the second degree counts should be dismissed because there was no evidence to support them. Estes’s criminal history was attached to the *Knapstad* motion.⁵

During Estes’s jury trial, Estes’s lawyer again objected to the admission of the knife taken from Estes’s person. The trial court overruled the objection. Estes’s lawyer also objected to specific jury instructions, including all instructions on assault in the third degree. The trial court acknowledged the objection but instructed the jury on assault in the third degree and assault in the fourth degree, which are inferior degree crimes to assault in the second degree. Estes did not object to the court’s instructions on assault in the fourth degree or on the deadly weapon enhancements. During the discussion of the jury instructions, defense counsel questioned whether the language in the deadly weapon enhancement special verdict form for count II, assault in the second degree against Stoltenberg, should be changed because assault in the fourth degree did not have a deadly weapon enhancement. At the same time, defense counsel objected again to the assault in the third degree instruction but did not object to the deadly weapon enhancement special verdict form for the felony harassment charge.

During closing argument, Estes’s lawyer contended that the State failed to prove Estes assaulted anyone with a knife and that the State could not prove that the knife in evidence was the knife from the apartment. Defense counsel emphasized the inconsistencies in the witnesses’ and the police officers’ testimony. Defense counsel argued that Estes was facing away from

⁴ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

⁵ The court’s ruling on the *Knapstad* motion is not a part of the record on appeal. However, we assume that the trial court denied the motion because the trial went forward on the assault in the second degree charges.

Stoltenberg when he allegedly threatened her. Counsel also argued that Stoltenberg “saw an opportunity to get rid of a problem, by making this statement and this story.” 4 RP at 459. Regarding the knife, defense counsel presented the theory that the knife was not used to cause harm to Prusek; instead, any harm occurred as the result of an accident. He also argued that because the knife from on top of the refrigerator was not in evidence, the jury was left to speculate about what it looked like. He stated, “They remember it being long and big and whatever, but it’s not here.” 4 RP at 468-69.

The jury ultimately found Estes guilty of assault in the third degree against Prusek and felony harassment against Stoltenberg. The jury also found that Estes was armed with a deadly weapon at the time of the commission of both crimes.

When the court discussed scheduling Estes’s sentencing, the State announced, “As the Court is aware, this is a third strike case.” 4 RP at 504. Defense counsel responded, “He wasn’t convicted of a strike offense.” 4 RP at 504. The State explained, “[T]he Defendant is a third strike case because of the deadly weapon enhancements.” 4 RP at 504.

Post-trial, Estes’s lawyer filed a motion to dismiss the deadly weapon enhancements, under CrR 7.4. At the motion hearing, defense counsel argued that the jury could not find that the knife was “used in such a way that was likely to or may bring about death” because it found Estes not guilty of assault in the second degree and that the jury could not find that the weapon was a “per se” deadly weapon. 4 RP at 510. Defense counsel provided the definition of the word “blade” and argued that the “cutting implement” was less than three inches long. 4 RP at 510. When the

State pointed out that Prusek testified that the knife was three and a half to four inches long, defense counsel objected saying that that was not the testimony. The State then argued that defense counsel failed to make a motion to dismiss at the close of the State's case, or at the close the trial, and failed to object to the jury instructions on the knives. The trial court denied the motion to dismiss.

Because these convictions constituted Estes's third strike, the trial court sentenced him to total confinement for life without the possibility of release. At the close of sentencing, the State also put on the record,

[O]ur office has a policy on third strike cases where the defense, the defense has an opportunity to seek mitigation, and come to our office, asking for something other than a third strike resolution. *The Defendant, Mr. Estes, declined to enter into any negotiations whatsoever during the entire course of this case. Also he did not wish to avail himself of the mitigation process.*

4 RP at 534 (emphasis added). The court responded, "I will just say that, as I indicated, this is not the kind of strike that we typically would be looking for as a community to be a third strike, so if there were no other options available, I guess I see that as another reason why we are here." 4 RP at 534. Estes appeals.

ANALYSIS

INEFFECTIVE ASSISTANCE OF COUNSEL

Estes argues that his defense counsel provided ineffective assistance because he did not know that Estes would be sentenced as a persistent offender if the jury convicted him of any felony with a deadly weapon enhancement. In his SAG, Estes also asserts that his attorney "did not advise [him] that the weapon enhancement was a strike in itself [sic] or when attached to a[n]

Assault [in the third degree] or felony harassment.”⁶ SAG at 2. We agree that Estes received ineffective assistance of counsel.

A. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the appellant must show both (1) that defense counsel’s representation was deficient, and (2) that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) test). Representation is deficient if after considering all the circumstances, the performance falls “below an objective standard of reasonableness.” *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Prejudice exists if there is a reasonable probability that except for counsel’s errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

An appellant making an ineffective assistance of counsel claim faces a strong presumption that counsel’s representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Killo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). However, “[w]here an attorney unreasonably fails to

⁶ Estes cites as authority, article 1, section 14 of the Washington State Constitution, the Eighth amendment of the United States Constitution, and the Rules of Professional Conduct. It is unclear whether Estes intends to argue ineffective assistance of counsel or cruel and unusual punishment. Because we reverse this case on the former issue, we do not address the latter. See *State v. Weller*, 76 Wn. App. 165, 167, 884 P.2d 610 (1994) (“An appellate court will not decide a constitutional issue when the case can be decided on other grounds.”). In addition, in so far as this assertion implicates matters outside the record, we do not consider it. A personal restraint petition is the proper vehicle for such an issue. *State v. Burke*, 132 Wn. App. 415, 419, 132 P.3d 1095, 1097 (2006).

research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.⁷" *Yung-Cheng Tsai*, 183 Wn.2d at 102 (quoting *Hinton v. Alabama*, ___ U.S. ___, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014)). Failing to conduct research falls below an object standard of reasonableness where the matter is at the heart of the case. *See Kylo*, 166 Wn.2d at 868.

Under the "persistent offender" statute, "[A] persistent offender shall be sentenced to a term of total confinement for life without the possibility of release." RCW 9.94A.570. A "persistent offender" is a person who "[h]as been convicted in [Washington] of any felony considered a most serious offense" and who previously "[h]as . . . been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of [Washington] would be considered most serious offenses." Former RCW 9.94A.030(37)(a)(i)-(ii) (2012). The definition of "[m]ost serious offense" includes a list of specific felonies; however, it also encompasses "[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825." Former RCW 9.94A.030(32)(t). A "deadly weapon" is "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825. "[A]ny knife having a blade longer than three inches" is a deadly weapon. RCW 9.94A.825.

⁷ *Strickland*, 466 U.S. 668.

B. Third Strike

Estes argues that his counsel's representation was deficient because he failed to thoroughly investigate the legal impact of a felony conviction accompanied by a deadly weapon enhancement. He argues that as a result, his lawyer failed to vigorously defend Estes against the deadly weapon enhancements and could not weigh alternatives or make reasoned decisions. Because the undisputed evidence supports this argument, we agree.

1. Deficient Representation

Where an attorney is ignorant of a point of law that is fundamental to the case and fails to perform basic research on the point, his conduct is unreasonable. *Yung-Cheng Tsai*, 183 Wn.2d at 102. A defense lawyer must thoroughly research a case so as to be able to properly advise his or her client. *See State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (holding defense counsel's performance was deficient where she knew her client had an extensive prior history and failed to ascertain through investigation that her client was at risk of a third strike and to advise him that, if convicted at trial, he faced a life sentence).

Estes argues, "[Counsel] was unable to weigh alternatives and make informed decisions about tactics," because he did not understand the charges against Estes. Br. of Appellant at 20. The record shows that defense counsel did not realize Estes was at risk of a third strike from the assault in the third degree charge with the deadly weapon enhancement. Additionally, defense counsel seemed to be unaware of the third strike attached to the felony harassment crime with a deadly weapon enhancement, which was charged from the start.

Before trial, defense counsel received the State's persistent offender notice.⁸ The charging document language stated that Estes had multiple prior convictions. Additionally, Estes's lawyer attached Estes's criminal history to a motion filed with the trial court; therefore, the defense attorney would have been at least aware of the seriousness of Estes's criminal record. However, after the jury returned a verdict of guilty on assault in the third degree and felony harassment, both with deadly weapon enhancements, the State said, "As the Court is aware, this is a third strike case." 4 RP at 504. In response, defense counsel stated, "[Estes] wasn't convicted of a strike offense." 4 RP at 504. This comment demonstrates that only then, after the verdict, did Estes's lawyer realize Estes was convicted of two offenses that made him a persistent offender. Only after that did Estes's lawyer move to dismiss the deadly weapons enhancements. As the State pointed out during argument on the motion, defense counsel did not make a motion to dismiss the charges at the close of the State's case or at the close of trial, and did not object to the jury instructions on a deadly weapon.

Estes also argues that defense counsel's failure to object to Pigman's testimony about the knife being a deadly weapon, his failure to remember that Prusek stated the knife was three and a half to four inches long, and his failure to emphasize a lack of evidence that the knife found was actually on Estes during the altercation, demonstrate that he was unaware of the importance of the enhancements. On their own, these actions do not equate to ineffective assistance of counsel. For

⁸ The notice the State provided did not accurately state the law. It read: "assault in the second degree; assault in the second degree, felony harassment, with which you have been charged, is a 'Most Serious Offense' as defined in RCW 9.94A.030." CP at 381 (emphasis omitted). Felony harassment, RCW 9A.46.020, is not a third strike crime in and of itself. It only becomes a strike when a deadly weapon enhancement attaches to it. The same is true for the crime of assault in the third degree. Former RCW 9.94A.030(32)(t). Because the notice is deficient, it is even more evident that defense counsel did not do additional research to familiarize himself with the persistent offender law.

instance, as the State points out, defense counsel's failure to object may well have been trial strategy to avoid drawing attention to the comment. However, as in *Yung-Cheng Tsai*, trial counsel's conduct here indicated that he did not understand the importance of one of the key matters in this case and did not adequately prepare. 183 Wn.2d at 101-02. We conclude that defense counsel's conduct clearly demonstrates he failed to fully research the charges and appreciate their significance to Estes's case.

The dissent asserts that there is a lack of evidence on the issue of what Estes's lawyer knew about Estes being convicted of a third strike. But the undisputed direct evidence clearly shows that the lawyer had no knowledge that convictions for assault in the third degree and felony harassment with deadly weapon enhancements were most serious offenses. At the hearing to schedule sentencing, Estes's counsel stated, "He wasn't convicted of a strike offense." 4 RP at 504. The State clarified, "[T]he Defendant is a third strike case because of the deadly weapon enhancements." 4 RP at 504. This direct evidence, accompanied by the circumstantial evidence presented throughout this case, clearly refutes the dissent's argument that this language is susceptible to more than one meaning and is not meaningful.

Estes compares his case to *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983).⁹ In *Felton*, defense counsel, who represented a woman charged with murder in the first degree for shooting her husband while he slept, only put on a battered spouse defense, not a heat-of-passion defense. 329 N.W.2d at 170. The woman was convicted of murder in the second degree and appealed, arguing ineffective assistance of trial counsel. *Felton*, 329 N.W.2d at 162. Defense counsel admitted he was unaware the heat-of-passion defense could be used in the case. *Felton*,

⁹ Estes and this court acknowledge that this case is persuasive authority only and does not carry the weight of precedential authority.

329 N.W.2d at 170. The Wisconsin Supreme Court ultimately held defense counsel was ineffective because he failed to familiarize himself with the relevant law when formulating his client's defense. *Felton*, 329 N.W.2d at 169-70. The *Felton* court acknowledged its hesitance to second guess trial counsel's decisions with an evaluation in hindsight, but stated that "prejudice does exist if the facts presented at trial or in the postconviction hearing would justify the submission of a defense . . . to the jury." 329 N.W.2d at 171.

Estes argues that his counsel's performance, as in *Felton*, was deficient because he failed to familiarize himself with the relevant law and thus, was ill-equipped to provide his client with a full defense. While Washington courts are also hesitant to second guess decisions of trial counsel in hindsight, we conclude that here, defense counsel's performance fell below a reasonable standard and thus, was deficient.

2. Prejudice

Estes must in turn show that counsel's deficient performance was prejudicial or undercut confidence in the result of the proceeding. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). Estes argues that a line of defense was foreclosed because of counsel's ignorance of the law. He contends that defense counsel would have put on a more robust defense during trial, specific to the enhancements, had he understood. We disagree.

Estes's attorney made several motions to keep the knife found on Estes out of evidence, both before and during trial. He also moved to exclude pictures of that knife. The trial court denied both motions. Further, defense counsel attacked Prusek's, Stoltenberg's, and Pigman's memory regarding the knife that was in the apartment. And, during closing argument, defense counsel presented the theory that the State failed to prove Estes assaulted anyone with a knife and

that the State could not prove that the knife in evidence was the knife in the apartment. Estes has not shown prejudice on this point.

However, Estes also raises the issue of prejudice in his SAG. He states, “[My defense attorney] did not advise me that the weapon enhancement was a strike in itself [sic] or when attached to a[n] Assault [in the third degree] or felony harassment.” SAG at 2. Effective assistance of counsel in a plea bargaining context requires that counsel “actually and substantially [assist] his client in deciding whether to plead guilty.” *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987) (alteration in original) (quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). Representation must include not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and weaknesses of a defendant’s case so that the defendant knows what to expect and can make an informed judgment whether or not to plead guilty. *State v. Edwards*, 171 Wn. App. 379, 394, 294 P.3d 708 (2012). Counsel must “reasonably evaluate the evidence” against the defendant. *Edwards*, 171 Wn. App. at 394 (quoting *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010)). Uncertainty about the outcome of plea bargain negotiations should not prevent reversal where confidence in the outcome is undermined. *James*, 48 Wn. App. at 363.

Here, it is clear from the record that Estes’s lawyer did not understand the consequences for Estes if he was convicted of any felony with a deadly weapon enhancement. Furthermore, Estes’s situation is different from *Crawford*, in which our Supreme Court held that the defendant could not show prejudice from counsel’s deficient performance where there was no indication the State would offer a non-strike offense. 159 Wn.2d at 100. Here, the State specifically stated at the sentencing hearing that it offered to work with Estes to avoid a third strike but that Estes declined to negotiate. Because Estes’s lawyer did not fully understand the consequences of the

convictions in this case, he could not fully inform Estes of his options regarding mitigation as offered by the State.

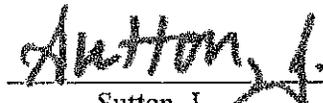
Plea bargaining is a part of defense strategy. Where the failure to plea bargain is based on ignorance of the law and, consequently, a failure to advise a client of the potential consequences of failing to negotiate, prejudice is demonstrated. *See Crawford*, 159 Wn.2d at 100. We cannot say that Estes's lawyer provided him adequate counsel, and thus, our confidence in the result is undermined. We conclude that Estes suffered prejudice because of defense counsel's lack of fluency with the law to the extent that there is a reasonable probability it impacted the outcome of the proceeding.

Because Estes received ineffective assistance of counsel, we reverse the convictions and remand for a new trial.



Melnick, J.

I concur:



Sutton, J.

MAXA, J. (dissenting) — I would agree with the majority that Kevin Estes received ineffective assistance of counsel *if* the record showed that defense counsel was unaware that the deadly weapon enhancements made his third degree assault and felony harassment charges strike offenses. However, the record simply is inconclusive regarding what defense counsel knew or did not know. Accordingly, I dissent.

Defense counsel never stated that he did not know that convictions for third degree assault and felony harassment with deadly weapon enhancements constituted strikes under the persistent offender statute. The majority's conclusion that defense counsel did not know that Estes's convictions constituted a third strike primarily is based on a single statement from defense counsel. When the State said, "As the Court is aware, this is a third strike case," defense counsel responded, "[Estes] wasn't convicted of a strike offense." 4 Report of Proceedings at 504.

Defense counsel's statement certainly could give rise to an inference that he was unaware of the third strike implications of Estes's convictions. However, that is not the only explanation for defense counsel's statement. Defense counsel may have been momentarily confused or simply may have misspoken. Nothing in the record discloses what defense counsel *actually* knew, what Estes knew, or what defense counsel told Estes about whether Estes's convictions would be third strikes.¹⁰

The majority also references Estes's refusal to engage in any negotiations with the State in order to avoid a third strike, and seems to suggest that this fact indicates that defense counsel

¹⁰ In his statement of additional grounds, Estes asserted that defense counsel did not advise him that the weapon enhancement would result in his convictions becoming strike offenses. However, this assertion is not part of the appellate record and cannot be considered in evaluating Estes's ineffective assistance of counsel claim.

did not know that Estes was facing a third strike if convicted. However, there certainly are many other reasons why a defendant might decline to negotiate.

The absence of any meaningful evidence regarding what defense counsel actually knew is fatal to Estes's ineffective assistance of counsel claim. The starting point in any ineffective assistance of counsel analysis is the strong presumption that defense counsel's performance was effective. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). This presumption cannot be overcome by speculation or even an inference about what defense counsel knew or did not know about the third strike implications of Estes's convictions.

If defense counsel *in fact* did not know that Estes's convictions were third strikes under the persistent offender statute, Estes is not without a remedy. He can file a personal restraint petition in which he presents sworn testimony to support his ineffective assistance of counsel claim. If that testimony or findings following a reference hearing demonstrate defense counsel's lack of knowledge, Estes may be entitled to a reversal of his convictions. However, based on the record on *this* appeal, Estes cannot establish ineffective assistance of counsel. As a result, I would affirm Estes's convictions.



MAXA, A.C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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