NO. 22 - 7426

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE DONALD HATT, JR.

PETITIONER

v.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

George Hatt, Jr. 400554
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

QUESTION PRESENTED

Does effective assistance of counsel in a plea bargain context requires that counsel actually and substantially assist a client in deciding whether to plead guilty, enter negotiations, or go to trial. Further, does counsel's representation include knowledge of mandatory minimums for the crime charged, offender score, communication of actual offers, discussing tentative plea negotiations, and the strength and weaknesses of a case so that the defendant knows what to expect and can make an informed decision whether or not to plead guilty, enter negotiations, or go to trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

WASHINGTON CASES:

Page

RULES, STATUTES AND OTHERS

PETITION FOR A WRIT OF CERTIORARI

Petitioner George Donald Hatt Jr., respectfully requests the issuance of a writ of certiorari to review the judgment of the Washington State Court of Appeals, Division One.

DECISION BELOW

The decision of the Washington State Court of Appeals Division One is unpublished, and is reproduced at Pet. App. A.

JURISDICTION

The Washington State Supreme Court denied the Petitioner's Petition for Review on January 26, 2023. See Pet App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VI; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

WASH. CONST. art. I, Sec. 22; In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a person, or by counsel, to demand the nature and cause of the accusation against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases; Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage, or in which the trip or voyage may begin to terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This case is cited as standard of review.

STATEMENT OF THE CASE

On November 3, 2015, Andrew Spencer was heading to the home of Andrew Fincher and George Hatt. On the way to the home of George Hatt, Andrew Spencer asked Ms. Lowenburg how she dealt with confrontation. (RP 5/3/2017 at 827-29, 841-43 (opening statements)); (RP 5/16/2017 at 95-97, 123-25 (closing arguments)); see (RP 5/5/2017 at 1079-80, 1109).

When Mr. Spencer and Ms. Lowenburg arrived at the residence of Mr. Fincher and Mr. Hatt, Mr. Spencer exited his vehicle, and without provocation began to assault Andrew Fincher. Mr. Spencer walked up behind Mr. Fincher as he was working on a car and began to relentlessly attack him. Mr. Spencer took Mr. Fincher to the ground and continued to pummel Mr. Fincher as he lay helplessly in the mud. (RP 05/3/2017 at 873-74, 876- 79; RP 5/4/2017 at 906-08, 914-15, 972).

George Hatt was upstairs and saw Mr. Fincher being beaten by someone wearing dark clothes. Mr. Hatt saw Mr. Fincher crawling in the mud trying to get away from the attacker. It looked to Mr. Hatt that the attacker was pistol-whipping Mr. Fincher as Mr. Fincher was crying out for the attacker to stop. Mr. Hatt grabbed a rifle and rushed

down the outside stairs of the house. In the rain and darkness, Mr. Hatt saw the attacker continuing to beat Mr. Fincher. Mr. Hatt thought that it looked like the attacker had a gun in his hand. (RP 5/4/2017 at 972; RP 5/15/2017 at 2055-59). Mr. Hatt stomped on the stairs and yelled and fired a gunshot above the attacker to try to stop what he was doing, but then the attacker wheeled toward him, and Mr. Hatt, from several feet away, and still believing the attacker had a gun fired at the attacker to defend himself. (RP 5/15/2017 at 2060-68).

According to the State's allegations, George Hatt saw and recognized the attacker as Andrew Spencer, and in the few weeks leading up to November 3, 2015, believed that Andrew Spencer had burglarized the residence where Ms. Espy and Mr. Hatt resided. It was also the State's allegation that Mr. Hatt had been saying that he would kill Mr. Spencer because of this. The State's theory of the case was that Mr. Hatt recognized Mr. Spencer as he arrived and saw him assaulting Mr. Fincher, and that Mr. Hatt used the attack on Mr. Fincher as an opportunity to shoot Mr. Spencer. (CP 1114); (CP 1097); (RP 5/3/2017 at 865-67); (RP 5/4/2017 at 911).

Mr. Hatt testified, however, that he was forced to defend himself when Spencer turned toward him. Once he realized what had

happened, Mr. Hatt tried to see if Spencer had a pulse, but he had died, and it turned out he had not been holding a gun, but had been wearing one black glove, solely on the left hand that Spencer had raised to him. (RP 5/15/2017 at 2052-53; 2058-60).

After Spencer's assault, because Hatt had a criminal record, and knew he should not even own a firearm, he acted out of fear, and a belief that the authorities would not believe anything he told them about what had occurred. Mr. Hatt directed some friends who lived on the property to drive Spencer's car down a road and leave it there, and he buried Mr. Spencer's body on the property. (RP 5/15/2017 at 2075-81).

Based on the information that the Snohomish County Sheriff's Office had learned during interviews with Mr. Fincher, including Mr. Fincher helping bury Mr. Spencer's body in a fire pit on the property, a search warrant was granted to the Snohomish County Sheriff's Office. (CP 588 *et seq.* (search warrant)); (CP 590 *et seq.* (warrant affidavit)).

The police dug into the ground at a fire pit on the property and located Mr. Spencer's body. (CP 581 (3.6 factual affidavit)); (RP 5/5/2017 at 1174-82).

Trial in his matter began on May 1, 2017, and concluded with the Jury Verdict on May 18, 2017. The jury found Mr. Hatt guilty of first-degree murder with a firearm enhancement, (CP 361, 362), unlawful possession of a firearm, (CP 357), possession of an unlawful firearm, (CP 356), and tampering with physical evidence (CP 354; RP 5/18/2017 at 175-79).

At the sentencing hearing on July 6, 2017, it was clear that Mr. Hatt's Counsel did not know that the Murder 1st Degree conviction carried with it a twenty-year mandatory sentence. The evidence for this is the fact that the State pointed out that Mr. Hatt's counsel asked for a ten-year sentence in his sentencing memorandum. The State at the sentencing on July 6, 2017, stated that "[b]ut that is what the law says. It says it shall be the 20 years for Murder 1 and 60 months for the firearm enhancement. And, I would note in counsel's brief, his last paragraph, in fact, his ten-year recommendation takes into account the 60 months is mandatory. What he didn't address was the fact that Murder 1 also has a mandatory requirement under 9.94A.450." (RP 7/6/2017 at 4). It is clear from Mr. Hatt's counsel's brief that he did not know what the mandatory minimum sentence would be for Mr. Hatt's conviction of Murder in the 1st Degree with

the Weapon Enhancement. The fact that Mr. Hatt's Counsel did not know about this is evidence that he did not discuss with Mr. Hatt the fact the charges subjected him to a 240-month mandatory minimum sentence on the Murder 1st Degree charge and a consecutive 60 month mandatory minimum sentence on the weapon enhancement.

At the conclusion of the sentencing on July 6, 2017, the court found that Mr. Hatt's offender score on the murder conviction was a "4" based on two prior offenses, and the two other current felony firearm convictions. (CP 83-109; RP 07/6/0217 at 25-6, 31). The court imposed 434 months on the murder count, 16 months each on the unlawful possession of a firearm and the possession of an unlawful firearm counts, and 364 days on the misdemeanor count of tampering with evidence, the counts to be served concurrently, followed by 36 months community custody. (CP 27-32, 33-47).

Mr. Hatt appealed. Division I of the Court of Appeals affirmed the convictions and denied relief on all claims except for one. That being the claim that the Possession of an Unlawful Firearm and the Unlawful Possession of Firearm 2nd Degree were the same criminal conduct.

As a result of the Court of Appeals decision, State v Hatt, 11

Wn.2d 113, 121, 452 P.3d 577 (2019), Mr. Hatt was remanded for sentencing. On September 11, 2020, Mr. Hatt was resentenced with a recalculated offender score of "3", (three), and was sentenced to 421 months on the Murder count, 12 months each on the Unlawful Possession of a Firearm and the Possession of an Unlawful Firearm counts, and 364 days on the Misdemeanor count of Tampering with Evidence, the counts to be served concurrently, followed by 36 months community custody.

Mr. Hatt sought review by the Washington State Supreme Court of the Court of Appeals decision to affirm his 2019 convictions. The Washington Supreme Court denied review on April 1, 2020.

Mr. Hatt then filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on October 5, 2020.

Mr. Hatt, through counsel, timely filed a Personal Restraint Petition pursuant to RCW 10.73.090(3)(c) with Division One of the Washington State Court of Appeals on October 5, 2021, which was amended and filed on November 1, 2021. In Mr. Hatt's Personal Restraint Petition, he alleged the following:

A. Counsel for Mr. Hatt did not provide effective assistance of counsel during negotiations by failing to inform Mr. Hatt of the mandatory minimums for Murder 1st Degree and the

Weapon Enhancement, therefore, Mr. Hatt was unable to make an informed decision as to whether to plead guilty or proceed to trial.

B. Counsel for Mr. Hatt did not provide effective assistance of counsel during negotiations by failing to accurately calculate Mr. Hatt's Offender Score therefore, Mr. Hatt was unable to make an informed decision as to whether to plead guilty or to proceed to trial.

C. Mr. Hatt received ineffective assistance of counsel where counsel asked a photograph be viewed during Mr. Hatt's testimony which had no probative value and was highly prejudicial.

D. Counsel for Mr. Hatt was ineffective in his representation of Mr. Hatt by failing to object to testimony about "altered" evidence and failing to ask that the testimony be stricken or for a curative instruction.

E. Mr. Hatt's counsel was ineffective and deficient in preparing for the testimony of the State's ballistic expert, and as a result was ineffective in the trial examination of the ballistic expert.

The Court of Appeals of the State of Washington, Division One denied the personal restraint petition on the finding that Mr. Hatt had failed to demonstrate by a preponderance of the evidence that the performance of Mr. Hatt's counsel at trial had "actual and substantial prejudice based on constitutional error, or "a fundamental error of law that results in a complete miscarriage of justice." In re Swenson, 158 Wn. App. 812, 817, 244 P.3d 959 (2010) (citing In re Pers. Restraint

of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)).

Division One of the Court of Appeals for the State of Washington correctly noted that state and federal constitutions entitle defendants to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, Sec. 22; Strickland v Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Further, the Court of Appeals stated that for Mr. Hatt to succeed on an ineffective assistance claim, Mr. Hatt would need to meet the two-prong Strickland test: (1) show that his counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (applying Strickland, 466 U.S. 668 at 687 (emphasis added)).

As to the former, Division One of the Court of Appeals stated that counsel's performance would be deficient only where it falls below an "objective standard of reasonableness based on consideration of all the circumstances." Estes, 188 Wn.2d at 458. Further the Court of Appeals stated that there is a strong presumption that counsel provided a defendant with effective representation. Matter of Hopper, 4 Wn. App. 2d 838, 844, 424 P.3d 228 (2018). As to the first prong, Division One of the Court of Appeals stated that

Mr. Hatt must rebut this presumption by establishing the "absence of any legitimate trial tactic that would explain counsel's performance." Matter of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017).

As to the latter prong, Division One of the Court of Appeals stated that counsel's performance would be prejudicial to a defendant only where there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). The Court of Appeals went on to state that "[r]easonable probability" is not merely a "conceivable effect on the outcome" but rather, a "probability sufficient to undermine confidence in the outcome." Estes, 188 Wn.2d at 458 (internal citations omitted).

In re regard to Mr. Hatt's allegation that Mr. Hatt's "Counsel did not provide effective assistance of counsel during negotiations by failing to inform Mr. Hatt of the mandatory minimums for Murder 1st Degree and the Weapon Enhancement," Division One of the Court of Appeals found that "[t]he record, thus, clearly indicates there was no plea deal offered to Hatt. Though there was an invitation to discuss potential plea offers—offers which, if explored, might have included a

reduced murder charge—there is no record of such an offer. In turn, without a plea offer from the State, Hatt fails to demonstrate that he was actually prejudiced during negotiations by any shortcomings in defense counsel's representations about the mandatory minimums." (Pet. App. A, page 7).

The Court of Appeals, Division One for the State of Washington disagreed with Mr. Hatt's second allegation in his Personal Restraint Petition that he was not able to make an informed decision as whether to plead guilty or to proceed to trial because his counsel failed to accurately calculate Mr. Hatt's Offender Score. The Court of Appeals went to on to find that "[e]ven where Hatt's defense attorney failed to properly calculate his offender score, as there was no plea offer from the State, Hatt fails to demonstrate that he was prejudiced." (Pet. App. A, page 8).

In regard to Mr. Hatt's allegation that he received ineffective assistance of counsel when his defense attorney displayed an admitted photograph of the deceased victim during his direct examination, Division One of the Court of Appeals found that Mr. Hatt "had failed to demonstrate that counsel acted without a legitimate strategy during direct examination." (Pet. App. A, page 11). In its analysis, the Court

of Appeals found that counsel had made a strategic decision "in which he explained he had just wanted to "establish that fact," presumably referring to the "fact" that Hatt had not seen the body in the condition in which it was found." (Pet. App. A, page 10). The Court of Appeals made a point not to "comment on the effectiveness of counsel's choice," (Pet. App. A, page 10), and noted that The Court of Appeals would grant "exceptional deference" to counsel's strategic decisions citing, State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing Strickland, 466 U.S. at 689).

Further, Division One of the Court of Appeals disagreed with Mr. Hatt's claim that he received ineffective assistance because his defense attorney did not object or respond to the expert witness testimony of the forensic anthropologist. The Court of Appeals found that Mr. Hatt did not "identify what testimonial "error" occurred, but instead merely alleges that the scrubbed defect constituted "altered evidence" requiring a spoliation instruction." The Court of Appeals went on to say that to demonstrate "ineffective assistance of counsel on the basis that counsel failed to request a jury instruction, Hatt would need to show that he was actually entitled to the spoliation instruction, that counsel's performance was deficient for failing to

request such an instruction, and he was subsequently prejudiced," citing State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). (Pet. App. A, page 13).

Finally, Division One of the Court of Appeals disagreed with Mr. Hatt's argument that his counsel had failed to prepare adequately for cross-examining the State's ballistic expert. The Court of Appeals stated that they would "not find ineffective assistance of counsel for an attorney's cross-examination if counsel's performance "fell within the range of reasonable representation." Johnston, 143 Wn. App. at 20. (Pet. App. A, page 14). As support for the Court of Appeals disagreeing with Mr. Hatt in regard to this allegation, the Court of Appeals pointed out that counsel had interviewed the ballistic expert, had asked questions about the impact of heat application to bullets, and about the effect of modifications to a gun. (Pet. App. A, page 14).

On December 7, 2022, Mr. Hatt sought review of Division One of the Court of Appeal's denial of his personal restraint Petition by the Supreme Court for the State of Washington.

On January 26, 2023, the Supreme Court for the State of Washington denied Mr. Hatt's motion for discretionary review.

The Washington Supreme Court affirmed Division One of the

Court of Appeals and found that Estes was distinguishable because there was evidence in the Estes case that the prosecutor was willing to allow a plea to a lesser offense. State v. Estes, 188 Wn.2d 450, 465, 395 P.3d 1045 (2017). Further, the Washington Supreme Court found that the evidence in the proceedings leading up to Mr. Hatt's trial, indicate that "the prosecutor and defense counsel engaged in rudimentary preliminary discussions, but there was no expression of willingness on the part of either side to accept a plea to a lesser homicide charge. Ultimately, Hatt does not demonstrate, as he must, that there is a reasonable probability that had he been fully informed, he would have negotiated a different outcome. Id. at 466. The Court of Appeals therefore sustainably found no showing of reversible ineffective assistance in relation to plea negotiations." (Pet. App. B, pg. 2).

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari Because the Right to Effective Assistance of Counsel Applies in the Plea-Bargaining/Negotiation Context.

1. Counsel for Mr. Hatt did not provide effective assistance of counsel during negotiations because Counsel failed to inform Mr. Hatt of the Mandatory Minimums for Murder 1st Degree and the Weapon Enhancement therefore, Mr. Hatt was unable to make an informed decision as to whether to enter negotiations to plead guilty or to proceed to trial.

The U.S. Supreme Court has held that the right to effective assistance of counsel applies in the plea-bargaining context. Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed.2d 398 (2012). Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed.2d 379 (2012).

The right to effective assistance extends to "all critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80-81, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004), Summerlin v. Schriro, 427 F. 3d 623 CA 9, (2005).

The Washington Supreme Court has also recognized a right to effective assistance in plea bargaining, stating that effective assistance includes "assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial". State v. A.N.J., 168

Wn.2d 91, 111, 225 P.3d 956 (2010).

A defendant can overcome the presumption of effective representation by demonstrating that counsel failed to conduct appropriate investigations. Counsel must, at a minimum, "reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." State v. A.N.J., 168 Wn.2d 91,111-112, 225 P.3d 956 (2010). State v. Edwards, 171 Wn. App. 379, 394, 294, P.3d 708 (2012).

"Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. 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." In re per Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015) citing Hinton v. Alabama, 571 U.S. 263, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014). A defense lawyer must thoroughly research a case so as to be able to properly advise his or her client. Estes, 193 Wn.App. 490 at 22., see also State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288

(2006),

In this case, Mr. Hatt was never told that a Murder 1st Degree conviction carried with it a minimum sentence of 240 months flat time which meant that Mr. Hatt was ineligible for any good time credits. Nor was Mr. Hatt informed that the accompanying Weapons Enhancement carried an additional 60 months that was ineligible for any good time and would be served consecutive to all other charges. In short, Mr. Hatt was not informed that a conviction would result in serving at a minimum 300 months that were ineligible for any good time credits.

Ineffective assistance of counsel requires both deficient performance on the part of Mr. Hatt's counsel, and resulting prejudice. State of Klinger, 96 Wn. App. 619, 622, 980 P.2d 282 (1999). Mr. Hatt asserts his lawyer was deficient in not advising him that he would receive an absolute minimum sentence of 25 years, if convicted. He also claims he would have accepted the State's offer of second-degree murder plus a 60-month mandatory firearm enhancement, if he had known about that twenty-year minimum for a murder 1st degree conviction.

With respect to the performance prong, as applied to Mr. Hatt's

petition, his counsel was under an ethical obligation to discuss plea negotiations with him. See State v James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). And, Mr. Hatt's counsel had to provide Mr. Hatt with sufficient information to make an informed decision on whether or not to enter into negotiations to plead guilty. State v Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998), review denied, 137 Wn.2d 1011, 978 P.2d 1098 (1999). Counsel for Mr. Hatt did not inform him of the minimum sentence of 300 months that could be imposed for the offenses charged by the State because Counsel did not know and Counsel failed even to conduct a cursory investigation into the relevant state statutes is by itself inadequate assistance of counsel, Hinton v. Alabama, 571 U.S. 263, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014). Because of the inadequate assistance of counsel, Mr. Hatt was not able to make an informed decision regarding plea negotiations and any plea offer. See People v. Bommaert, 237 Ill.App.3d 811, 817-18, 604 N.E.2d 1054, 178 Ill.Dec. 531 (1992).

This failure to advise Mr. Hatt of the available options and possible consequences constitutes ineffective assistance of counsel. See Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir.1981). Stated differently, Mr. Hatt's rejection of a plea offer or even further

negotiation was not voluntary because he did not understand the terms of the proffered plea bargain and the consequences of rejecting it.

It is more than a reasonable likelihood that if Mr. Hatt had known that if he was convicted that he would have to serve every day of a 300 month sentence at a minimum as a consequence of being convicted at trial, Mr. Hatt would have taken a plea bargain. Mr. Hatt, just like Estes, was prejudiced by defense counsel's deficient performance. Estes, 188 Wn.2d at 466.

2. Counsel for Mr. Hatt did not provide effective assistance of counsel during negotiations because Counsel failed accurately calculate Mr. Hatt's Offender Score therefor, Mr. Hatt was unable to make to inform Mr. Hatt of the Mandatory Minimums for Murder 1st Degree and the Weapon Enhancement therefore, Mr. Hatt was unable to make an informed decision as to whether to enter negotiations to plead guilty or to proceed to trial.

As stated previously, the U.S. Supreme Court has held that the right to effective assistance of counsel applies in the plea-bargaining context. Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed.2d 398 (2012). Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed.2d 379 (2012).

Additionally, the right to effective assistance extends to "all critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80-81, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004), Summerlin v. Schriro,

427 F. 3d 623 CA 9, (2005).

Further, the Washington Supreme Court has also recognized a right to effective assistance in plea bargaining, stating that effective assistance includes "assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial". State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010).

In the matter before the Court, Mr. Hatt's attorney failed to calculate an accurate offender score for Mr. Hatt until sentencing in this matter though Mr. Hatt had requested him repeatedly to do so. Failure of Mr. Hatt's counsel to calculate a correct offender score prevented Mr. Hatt from making a meaningful and informed decision as to what the consequences would be if he plead guilty or went to trial.

Prior to the Omnibus hearing on 06/30/2016, Mr. Hatt had been informed by his attorney that the State had offered him a sentence of twenty-five (25) years if Mr. Hatt plead guilty to Murder in the 2nd Degree. Mr. Hatt was told this was the mid-range sentence for an offender score of 8 points. Mr. Hatt insisted that he did not have 8 points. Mr. Hatt's attorney replied by stating that the prosecutor was collecting [Mr. Hatt's] out of state record, "so, let's see what he

comes up with."

At the Omnibus Hearing on 06/30/2016, Mr. Hupp, the assigned deputy prosecutor, informed the court. "There have been negotiations ongoing. Part of that included a very lengthy history for Mr. Hatt that was all out of county, out of state. So, we've been collecting those materials, and we're trying to come to an agreement, even of what his score is." (RP 6/30/16 at 2). Based on this representation from Mr. Hupp, the Court granted a continuance of the Omnibus Hearing for the purpose of continued negotiations.

At the Omnibus hearing on 11/13/2016, the assigned deputy prosecutor, Mr. Hupp, was not present. On the record Mr. Hatt's Counsel commented on the state of negotiations between the State and Mr. Hatt by stating that "[e]ventually, we got the information, we attempted to negotiate this case, and that failed." (RP 11/3/16 at 3). Before the hearing ended, Mr. Hatt addressed the Court directly and expressed his concern in regard to his attorney's statement regarding plea negotiations by stating that "[t]here's no negotiation off the table." (RP 11/3/16 at 5).

Before the Omnibus Hearing on 03/10/2017, Mr. Hatt was informed by his attorney that the State was considering offering a plea

of Murder 2nd Degree with a Weapon Enhancement with an offender score of six (6) points. Mr. Hatt told his counsel that his out of state criminal history would "wash"[1] and his counsel laughed and said, "We have to go by what the prosecutor thinks the score is."

The contemplation of the State offering Mr. Hatt a plea to an amended count of Murder 2nd Degree with a Weapon Enhancement was made a part of the record at the Omnibus Hearing on 03/10/2017 when Mr. Hupp stated "[j]ust to make a bit of a record. A week ago we were on for the same purpose. Mr. Schwarz wanted to do some research on – to answer a question for his client on his client's right to plead guilty at an amended information to new counts being added. I believe he answered those questions, and my understanding, in my preparation for today, is that he will be pleading not guilty to these counts." (RP 3/10/2017 at 85).

Mr. Hupp continued by stating, "[t]here was at least – I don't know if I want to use the word discussion, but the subject of possible plea to a murder in the second degree with a firearm enhancement was at least broached. It wasn't discussed at any length, but it was at least broached, and there didn't seem to be an interest on the part of the

[1] Pursuant to RCW 9.94A.525(1).

defendant to plea to that. What I would indicate to the court is, with a score of 6 – and that's the six charged in the paperwork we have provided now proving his criminal history out of California. With a score of 6, if we were – and I'm not saying that I'm offering that – if he were to plead guilty to a murder in the second degree with a firearm enhancement, he would be looking at a range of 21.25 years to 29.5 years in prison. So, basically 21 to 30 years in prison." (RP 3/10/2017 at 86-87).

The record is clear that it wasn't until Mr. Hatt was sentenced on 07/06/202017 that a correct offender score for Mr. Hatt was calculated. The events that led to the calculation of a correct offender score was that Mr. Hatt was found guilty by a jury 5/18/2017. On 7/5/2017, Mr. Hatt's counsel requested a continuance of the sentencing date because Mr. Hatt's counsel had not gone over the State's sentencing memorandum with Mr. Hatt. The State's sentencing memorandum dated 06/29/2017 (CP 114 – 152) calculated Mr. Hatt's offender score to be 10 points and the State was recommending a 50.67 year sentence. The Court granted Mr. Hatt's counsel's request to continue the sentencing for one day to 07/06/2017. (RP 7/5/2017 at 1-16)

the case, the provision for a wash does apply." (RP 7/6/2017 at 66).

Counsel for Mr. Hatt added that "I've seen this in other cases where the state is attempting to prove an offense does not wash, and I've gotten a certified copy from the prison where the defendant was held to show his release date. That could have happened here. It did not. The Bureau of Prisons of California routinely does it. I've done it in other cases, to get that information. And it has not been done here." (RP 7/6/2017 at 27-28).

In Williams v. Jones, 571 F.3d 1986 (CA 10, 2004), it was established that counsel's deficient performance created prejudice because the advice concerning the plea bargain was deficient. Had Williams been adequately counseled, there was a reasonable probability he would have accepted the plea offer and limited his exposure to ten years. The fact that Williams received a fair trial with a much greater sentence does not vitiate the prejudice from the constitutional violation.

A reasonable competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty. Moore v. Bryant, 348 F.3d 241 (CA 7, 2003).

"A plea bargain agreement cannot exceed the statutory authority given to the courts. "In re personal restraint of Gardner, 94 Wn. 2d 507, 617 P.2d 1001 (1980). And since a sentence based upon an incorrect offender score is fundamentally defective, In re per Godwin, 146 Wn. 2d 876 (2002), it would stand to reason that if a determination is not made by defense counsel during pre-trial negotiations regarding the correct offender score, then defense counsel has failed to provide assistance in making a meaningful and informed decision.

In Strickland, the court clarified that a defendant need not even make a showing on a more-likely-than-not basis. Strickland, 466 U.S. at 693. Uncertainty about the outcome of plea bargain negotiations should not prevent reversal where confidence in the outcome is undermined. Strickland, 466 U.S. at 694 State v. James, 48 Wn.App. 353, 363, 739 P.2d 1161 (1987).

In this case, there is a very reasonable probability that if Mr. Hatt had been fully informed, he would have negotiated a different outcome.

3. The Washington State Court of Appeals, Division One, and the Washington State Supreme Court improperly create a distinction between plea negotiations and a plea offer.

Mr. Hatt contends that the Court of Appeals has created a new distinction between a "formal plea offer" and "plea discussions/negotiations" by questioning the existence of whether the state in this matter actually made a "formal plea offer." Further, the Court of Appeals states that "any semblance of negotiations between the parties started in March of 2017..." (Pet. App. A, page 5).

This finding by the Court of Appeals is not supported by the transcripts from this case. For example, on February 3, 2016, the state requested a continuance because he, the state, was gathering materials in order to "resolve this case short of trial." (RP 02/03/2016).

Another example is in June of 2016, the state informs the court, "There have been negotiations ongoing," and then states that "we're hoping to either resolve this sometime before December." (RP 06/30/2016). On the document that was signed for this continuance it was noted that the purpose of the continuance was for "documents/negotiations."

Another example of plea discussions and negotiations occurred

on November 3, 2016, when Mr. Hatt's attorney informs the court that he and the state were gathering materials "that we thought were going to be dispositive towards resolving the case. (RP 11/03/2016).

Further example is from April 13, 2017, when counsel for the defendant filed a motion for vindictive prosecution because the state amended the charges as a result of Mr. Hatt declining to accept the State's offer to plead guilty to Murder 2nd Degree.

When one reviews the Washington Supreme Court's opinion in State v Estes, 188 Wn.2d 450, at 466, 395 P.3d 1045, at 1053 (2017), it can be said that just as in Estes, the "focus on the prosecutor's actions," such as a formal plea offer, rather than Mr. Hatt's "is misplaced here." As in Estes, Mr. Hatt "did not attempt to negotiate," and thus the Court of Appeals "cannot speculate about the specific of what the state may or may not have offered him." "What we do know is that lacking knowledge about a key matter in his case," Mr. Hatt "declined to negotiate from the outset." State v Estes, 188 Wn.2d at 466, 395 P.3d at 1053 (2017).

"That being said...the record does not show with complete certainty that had Estes," (or Mr. Hatt), "known about the impact of the deadly weapon enhancements," (or in addition to the weapon

enhancement and the mandatory twenty year minimum for a Murder First Degree Conviction), "he would have been able to negotiate a different outcome. But we need not be 100 percent sure that the outcome would have been different to find prejudice here: the Strickland Court clarified that a defendant need not even make his showing on a more-likely-than-not basis. 466 U.S. at 693, 104 S.Ct. 2052. Here, it is reasonably probable that had Estes," or (Mr. Hatt), "known that there was a much higher chance that he would be spending life in prison, the result of the proceeding would have differed." State v Estes, 188 Wn.2d at 466, 395 P.3d at 1053 (2017).

In Estes, "Defense counsel did not research the implications of the deadly weapon enhancements, and thus he was unable to communicate crucial information to his client. There is a reasonable probability that had Estes been fully informed, he would have negotiated a different outcome. Estes was denied the ability to "mak[e] an informed decision" about whether to plead guilty, and we find that defense counsel's conduct prejudiced Estes. State v A.N.J., 168 Wn.2d at 111, 225 P.3d 956." State v Estes, 188 Wn.2d at 466, 395 P.3d at 1053 (2017).

It is clear that Division One of the Washington State Court of

Appeals and the Washington Supreme Court focused on what the state offered or did not offer in the way of a "plea offer," and then secondarily focused on whether Mr. Hatt was willing to negotiate rather than whether Mr. Hatt was lacking knowledge about a key matter in his case. If there is a question as to what defense counsel knew or did not know, then it might be appropriate for a reference hearing to develop what defense counsel knew or did not know. See State v Estes, 188 Wn.2d at 467, 395 P.3d at 1054 (2017). However, the record is very clear that Mr. Hatt's counsel not only did not know about the twenty (20) year minimum for the Murder First Degree Conviction, but also did not have knowledge of the effect that the Weapon Enhancement would have on Mr. Hatt's sentence, and finally never accurately calculated Mr. Hatt's Offender Score prior to the day of sentencing. The denial of Mr. Hatt's Personal Restraint Petition is clearly not supported by State v Estes, 188 Wn.2d 450, at 466, 395 P.3d 1045, at 1053 (2017).

Estes clearly holds that effective assistance of counsel in a plea bargain context requires that counsel actually and substantially assist a client in deciding whether to plead guilty. Counsel's representation must include communication of actual offers, discussing tentative plea

negotiations, and the strength and weaknesses of a case so that the defendant knows what to expect and can make an informed decision whether or not to plead guilty. This did not occur in Mr. Hatt's matter. Uncertainty about the outcome of plea bargain negotiations should not prevent reversal where confidence in the outcome is undermined. Strickland, 466 U.S. at 694, State v. James, 48 Wn.App. 353, 363, 739 P.2d 1161 (1987), therefore, this Court's review is warranted.

CONCLUSION

Mr. Hatt respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted this 21st day of April, 2023

/s/George Donald Hatt, Jr.